

**THE POSITION OF THE REFUGEE IN INTERNATIONAL LAW  
AND THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER  
FOR REFUGEES**

by

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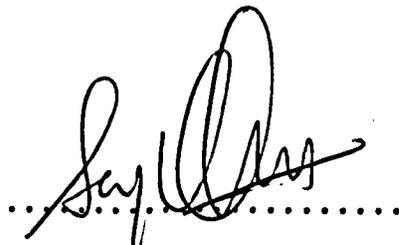
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**DECLARATION**

"I, [Sajid Qureshi], do hereby declare that, while registered as a candidate for the degree of Doctor of Philosophy, I have not been registered for another award of the Council of National Academic Award or of a university during the programme of study and I do hereby further declare that the material contained in this dissertation has not been used in any other submission for an academic award.

  
.....  
SAJID QURESHI

27/6/89  
.....  
Dated

**SELECTED ABBREVIATIONS**

<b><u>AJIL</u></b>	:	American Journal of International Law
<b><u>AAAPS</u></b>	:	Annals of American Association for Political Science
<b><u>AYIL</u></b>	:	Australian Yearbook of International Law
<b><u>BJIL</u></b>	:	Brooklyn Journal of International Law
<b><u>BYIL</u></b>	:	British Yearbook of International Law
<b><u>CHRLR</u></b>	:	Columbia Human Rights Law Review
<b><u>HILJ</u></b>	:	Harvard International Law Journal
<b><u>ICJ</u></b>	:	International Court of Justice
<b><u>ICLO</u></b>	:	International Comparative Law Quarterly
<b><u>IJIL</u></b>	:	Indian Journal of International Law
<b><u>IIM</u></b>	:	International Legal Material
<b><u>ILR</u></b>	:	Irish Law Review
<b><u>PCIJ</u></b>	:	Permanent Court of International Justice
<b><u>PLJ</u></b>	:	Philippine Law Journal
<b><u>MRG</u></b>	:	Minority Rights Group Reports
<b><u>MLR</u></b>	:	Modern Law Review
<b><u>PASIL</u></b>	:	Proceedings American Society of International Law
<b><u>RIA</u></b>	:	Review of International Affairs
<b><u>SJIL</u></b>	:	Stanford Journal of International Law
<b><u>VJIL</u></b>	:	Virginia Journal of International Law
<b><u>WLR</u></b>	:	Weekly Law Report
<b><u>YBILC</u></b>	:	Yearbook of International Law Commission.

**ABSTRACT**

**"The Position of the Refugee in International Law and the Work of the United Nations High Commissioner for Refugees"**

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The general scope of the study was to examine, analyse and expound the International Law on refugees and its implementation through the United Nations High Commissioner for Refugees (UNHCR). The primary focus was on international treatise and customary law concerned with refugees. A critique of the law has been offered, based upon the analysis which may be expected to uncover normative lacunae and deficiencies in implementation. A critique has been developed further in the light of comparative and historical perspectives on the present law and constructive suggestions for reform have been formed. The basic methodological stance offered was a legal/conceptual interpretation relying on published sources, in line with contemporary juristic standards.

An introductory chapter has been developed with reference to a note on the sources of international law and an examination, a classification and reflections upon the occasions of refugee flow. Information has been gained from the UNHCR and relevant embassies and high commissions.

The second chapter commences with a review of the legal situation in the era before the United Nations. The study has investigated treaties and municipal laws on aliens and the manner in which refugee influx influenced their formulation and implementations. Primary sources were studied, such as the League of Nations Treaty Series and early State Practice.

Chapter Three has examined the main refugee instrument, the 1951 Convention relating to the Status of Refugees. A systematic interpretation and analysis of each article has been undertaken.

The issues of refugees and human rights has been examined in Chapter Four. Primary documentation was obtained from the United Nations and the Council of Europe as well as non-governmental organisations in the field of Human Rights.

Chapter Five has examined the 1967 Protocol relating to the Status of Refugees and a special reference has been made to the Organisation of African Unity (OAU) relating to refugees, including the divergence between Policy and Practice in Africa.

An examination has been made on the question of procedures on the determination of refugee status and asylum in Chapter Six. A special reference has been made to the United Kingdom practice in view of personal experience. The principle of non-refoulement has been examined in Chapter Seven in light of the treatise and customary standards, including applications of this principle.

Chapter Eight has examined and investigated the concept of asylum. There has appeared a need for standardisation for eligibility for asylum. This section includes the published article "Opening the Floodgates?: Eligibility for Asylum in the USA and the UK" in Number 2, Volume 17 of the Anglo-American Law Review, 1988.

The work of the United Nations High Commissioner for Refugees has been examined and investigated in Chapters Nine and Ten. The organisation has been understood primarily through its founding documents and its historical and current practice. The historical development, the statute and the working of the organisation has also been examined. Substantial changes occurred within the organisation in 1986. Information has been gained from UNHCR archives and current reports which have been made accessible.

Finally, general conclusions and recommendations have been drawn.

**FOR MY  
PARENTS**

**SHAHNAZ AKHTAR SHAKIR**  
**AND**  
**ABDUL GAFFAR SHAKIR**

**"Beneath Their Feet Paradise Lies"**

# **CHAPTER ONE**

## **Introduction**

## 1.1 A NOTE ON THE USE OF SOURCES OF INTERNATIONAL LAW

### 1.1.1 TREATIES

#### 1.1.1.1 Introduction

Treaties,<sup>1</sup> in general, are agreements between states which are binding obligations in international law. Basically, there are two types of treaties: firstly, bilateral (that is, agreements between the contracting parties), and, secondly, multilateral (that is, agreements concluded by more than two contracting states).<sup>2</sup> In the absence of any overriding international authority or rules of jus cogens,<sup>3</sup> international customary law does not limit in any way the contents of any particular treaty. The parties are free to adopt whatever rule they wish to govern their own conduct.

The Vienna Convention on Law of Treaties (Vienna Convention),<sup>4</sup> was aptly described by the Representative of Byelorussia Soviet Socialist Republic (Kudryavtsev) as a "treaty on treaties".<sup>5</sup>

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1 McNair, Law of Treaties, Clarendon Press, Oxford, 1961; Elias, The Modern Law of Treaties, Sijthoff & Leider, New York, 1974; and, Sinclair, The Vienna Convention on Law of Treaties, Manchester University Press, 1973.

2 Terms such as 'trilateral' and 'quadrilateral' have used to describe treaties to which there are 3 or 4 contracting parties.

3 See section on the concept of jus cogens.

4 Misc.19 (1971), Cmnd 4818; 63 AJIL 875 (1969).

5 UN Doc A/Conf.39/11, Add 1, 22nd meeting, para 44.

For the purposes of this study, a "treaty" in an international agreement is set out in article 2(1) of the Vienna Convention as an:

"... international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ..."

The provisions of the Vienna Convention (now in force),<sup>6</sup> apply only to treaties made after its inception.<sup>7</sup> But treaties are bases for most works in international law and often resemble contracts in municipal law and the legal system. The important issue is that most of the provisions in the Vienna Convention attempt to codify customary law relating to treaties.

One writer has insisted that if a state makes treaties undertaking certain obligations towards each other, then these treaties can be cited as an authority for the existence of these obligations in customary law;<sup>8</sup> however, some cases have not supported his view.<sup>9</sup> State practice, in order to give rise to customary law, must be accompanied by opinio juris

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6 From 27th January 1980.

7 Article 4.

8 Professor D'amato, The Concept of International Law, Ch.5, 1971.

9 See The Lotus Case, PCIJ, Series A, No.10, p.27; The State (Duggan) v Tapley, ILR 18 (1951), pp.336,338-9.

(statements by representatives of states).<sup>10</sup>

1.1.1.2 Statements in a treaty or in the travaux préparatoires about customary law

Evidence of opinio-juris may be taken if statements about customary law in the text of a treaty or in the travaux préparatoires or preparatory documents.<sup>11</sup> Such statements in travaux préparatoires indicate that some or all of the provision of the treaty codify existing customary law, but when a treaty applies a rule to the facts of a particular case, there may be statements in the treaty or in travaux préparatoires that the rule in question is customary law. Treaties codifying customary law have frequently been cited as authority for customary law in judgements and state practice.<sup>12</sup> So when a treaty or its travaux préparatoires contain statements that part or all of the treaty declaratory of customary law, it is not enough to show that the state making these statements knew them to be untrue. However, if other states do not challenge these statements, they can create a new rule of customary law. It may be permissible to point to statements in a treaty or in its travaux préparatoires that part or all of the treaty is not declaratory of customary law.

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10 For a more precise definition of opinio juris, see later section on customary international law.

11 May consist of state practice and evidence of opinio juris, even if the treaty never came into force.

12 See Barcelona Traction case, ICJ Report, 1970, pp.3,303-304.

The preparatory work or the travaux préparatoires is deliberately not defined in the Vienna Convention and the ILC felt that this might lead to the possible exclusion of relevant evidence.<sup>13</sup> In the opinion on Admission of a State to the UN, the Court said that:

"... it considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the PCIJ, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself." <sup>14</sup>

But the ICJ has referred to the travaux préparatoires on a number of occasions for the purpose of confirming its "ordinary" meaning of the text. In interpretation of the Convention of 1919 concerning the employment of women during the night, the Court stated:

"The preparatory work thus confirms the conclusion reached on a study of the text of the convention .."<sup>15</sup>

The ILC decided that interpretation of including preparatory work is acceptable and permissible for the purpose of confirming the meaning results, if the meaning, when interpreted:

13 YBILC, 1966, II, p.223.

14 ICJ Report, 1948, p.63.

15 PCIJ, 1932, Series A/B, No.50, p.380.

- "1. leaves the meaning ambiguous or obscure;
2. leads to a result which is manifestly absurd or unreasonable." <sup>16</sup>

One of the major opponents to the travaux préparatoires or the preparatory documents was the Representative of the UK (Sinclair) who stated quite forcibly:

"... that the recourse to preparatory work of a treaty as a guide to interpretation should always be undertaken with caution ... preparatory work was almost invariably **confusing, unequal and partial**: **confusing** because it commonly consisted of the summary records of statements made during the process of registration, and early statements on the position of delegations might express the intention of the delegation at that stage, but bears no relation to the ultimate text of the treaty; **unequal** because not all delegates spoke on any particular issue; and **partial** because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation. If preparatory work was to be placed on an equal footing with the text of the treaty itself, there would be no end to debate at international conferences." <sup>17</sup> (my emphasis)

#### 1.1.1.3 Statements subsequent to the treaty

Statements made by States indicating that the rules of customary law are the same as the rules laid down in a treaty, can be made in the text of the treaty or in its travaux

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<sup>16</sup> YBILC, 1966, II, para 18, p.223. See also Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969.

<sup>17</sup> UN Doc A/Conf. 39/11, 33rd meeting, para 8.

préparatoires.<sup>18</sup> They can be made even after concluding a treaty.<sup>19</sup> But in general terms, a treaty and customary law is essential. Article 38 of the Vienna Convention states:

"Nothing in Articles 34 or 37 precludes a rule set forth in a treaty from the beginning binding upon a third state as a customary rule of international law, recognised as such."

This rule is known by the maxim "pacta tertiis nec nocent nec prosunt", which reflects customary international law. The words "recognised as such" indicate that the consent of states was required for the creation of international customary law. The words added were in order to emphasise that rules laid down in treaties could not transmute themselves automatically into customary law.

#### 1.1.1.4 Some kinds of Treaty rules likely to be accepted as customary rules

1. Treaty rules which add precision to customary law, for instance, treaty provisions fixing river boundaries. The difference between this treaty and other treaties is only of degree and emphasis or viewpoint.
2. Treaty rules are accepted as custom rule if there is uncertainty as to the content of pre-existing customary

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<sup>18</sup> See Akehurst, "Custom as a Source of International Law", BYIL, XLVII, 1974-5, p.49.

<sup>19</sup> View supporting this is the North Sea Continental Shelf case, ICJ Reports, 1969, pp.3,41-2.

law. Many judicial officers and judges have little experience in handling sources of international law. They do not have the patience or time to sift through a mass of evidence, sometimes conflicting, of customary law, and because of these issues, they usually apply documents which are easily accessible and succinct.<sup>20</sup> The rules contained in these documents may not be customary law at the outset but they become a part of customary law by subsequent application.<sup>21</sup> However, subsequent application, which is absolute for these rules to become customary law, may not occur.<sup>22</sup>

3. Treaty rules will be accepted as rules of customary law if many States are dissatisfied with the pre-existing customary law. If States are dissatisfied on a particular issue, they may then publicise a statement which could trigger of a reaction formulating a new practice, thus developing a new customary rule. But that statement is only a statement of lex ferenda, and it cannot, per se, create a new customary rule. It is the practice inspired by the opinio juris which creates the rule.<sup>23</sup>

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20 Such as the Multilateral Treaty, General Assembly Resolutions, Resolutions of Unofficial Bodies, for instance the Institut de Droit Internationale.

21 If it is accompanied by opinio juris.

22 See Akehurst, *op.cit.*, p.50, for an example of such an instance.

23 See Law of the Sea Convention (UNCLOS III).

#### 1.1.1.5 Treaty Interpretation

Treaty interpretation is contained in Articles 31, 32 and 33, respectively, of the Vienna Convention. There are three rules which must be mentioned regarding the interpretation of treaties:

1. The text of the treaty as to the authentic expression of the intention of the parties.
2. The intention of the parties as a subjective element distinct from the text; and,
3. The declared or apparent object and purpose of the treaty.

These rules were agreed upon, in general, by the majority of states at the Vienna Conference on the Law of Treaties in 1968.

The Representative of Finland (Totterman) stated that:

"... weight to be given to the text, to the intention of the parties as distinct from the text and to the object and purposes of the treaty ..." <sup>24</sup>

##### (a) Intention & Text

Some representatives at the Vienna Conference believed that the intention of the parties was the foundation for interpretation of treaties and that the best way of asserting intention was primarily to examine the Text in which they had determined to express and record their agreement.<sup>25</sup> The Italian

<sup>24</sup> UN Doc A/Conf. 39/11, 33rd meeting, para 46.

<sup>25</sup> Ibid., 32nd meeting, para 47.

Representative (Maserca) believed that to grasp the meaning of a treaty and measure its scope was to grasp the intention of the parties and accordingly to measure their scope. It was the text of the treaty which disclosed the intention of the parties. He stated:

"... it is the meaning and not the letter which should be taken into consideration ..." <sup>26</sup>

The Italian Representative also stated that the preparatory work and the circumstances in which the treaty had been concluded should not be regarded as a subsidiary means of interpretation.<sup>27</sup> The Representative of France (de Bresson) expressed that the intention of the parties was the foundation for the interpretation of the treaties and he stated that the best way of asserting intention was:

"... primarily to examine the Text in which they had determined to express and record their agreement ..." <sup>28</sup>

In agreement with the French and Italian Representatives, the Polish Delegate (Nahlik) stated that the intention of the parties was to be gathered from the text of the treaty and:

"That seemed to be a question of common-sense. There was no proof more direct and more authentic of the

26 Ibid., 32nd meeting, para 58.

27 Ibid.

28 Ibid.

intentions of parties than the text they drew up together to embody intentions." 29

However, the representative of Turkey (Miras) believed that the rules of interpretation must be based on the principle of good faith (nearly all the representatives agreed on this point) and that:

"... the text of the treaty had to be regarded as the final expression of the intention of the parties, the text being read in the ordinary meaning of the word ..." 30

However, if the text of the treaty was ambiguous or obscure, then resort must be made to the preparatory work.<sup>31</sup>

The Representative of Liberia (Broderick) stated that:

"... the text was the most authentic expression of that intention and should be given priority ... only when the text failed to indicate the intention should resort be had to extrinsic matter." 32

The interpretation of a treaty is essentially a mental process of attempting to establish the intention of the parties to the treaty as expression in words. There was no absolute

29 Ibid. para 20.

30 Ibid., 33rd meeting, para 51.

31 Waldock, Special Adviser, stated that "... preparatory work played little part so long as there was no problem, but ... if difficulties arise then recourse had to be made to preparatory work". Ibid., 33rd meeting, para 33.

32 Ibid., 33rd meeting, para 33.

interpretation and there might even be conflicting interpretation. Consequently, interpretation could not obey set rules. If a treaty contained one or more rules as to its interpretation, these rules themselves would need to be interpreted, but at that point no rules of interpretation would be available. Even if a treaty provided rules for the interpretation of clauses regarding interpretation, these provisions would require to be interpreted by means not contained in a treaty - a Catch 22 situation.

(b) The heading "General Rule of Interpretation"

Articles 31 and 32 of the Vienna Convention are under the heading of "General Rule of Interpretation". This is entitled as a singular "General Rule" and not a plural "General Rules" because the process of interpretation is a Unity and because the provisions of the article form a single, closely integrated rule.

Finally, some guidelines are given below on the principles and maxims <sup>33</sup> [which justify their inclusion in a codification of the law of treaties]:

1. Particular arrangement of words and sentences.
2. Their relation to each other and to other parts of the document.
3. General nature and subject matter of the document.

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<sup>33</sup> McNair, op.cit., pp.364-66.

#### 4. The circumstances in which it was drawn up.

When the occasion for their application (guidelines) may appear to exist, their application will not be automatic but will depend upon the interpreter. In other words, recourse to many of these principles is discretionary rather than obligatory.

#### 1.1.2 CUSTOMARY INTERNATIONAL LAW

Article 38 of the statute of the International Court of Justice (ICJ) in paragraph 1 (b) states:

"international custom, as evidence of a general practice accepted as law."

As in the application of treaties, the ICJ will apply the provisions in the above paragraph to any dispute submitted before it. There have been criticisms about the above paragraph but such criticisms and discussions are not in the scope of this thesis. However, a distinct point should be made at this stage. There seems to be dismay concerning the drafting of this paragraph and Professor Greig claims that this paragraph has been misdrafted.<sup>34</sup> It is the practice which is evidence of international custom accepted by law, but it is still the custom which has to be applied and a custom which is evidenced by, as much as evidence of, the practice of States.

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<sup>34</sup> Professor D W Greig, "The Protection of Refugees and Customary International Law", AYIL, 8, 1983, pp.108-141 at p.110.

For States to recognise and accept a rule of customary law, the ruling in the case of North Sea Continental Shelf <sup>35</sup> in the ICJ, should be observed and used as guidelines.

In the first instance, a consistency of state of practice or settled practice, the ICJ stated:

"Not only must the acts amount to a settled practice ..."<sup>36</sup>

Also mentioned was the other crucial instance of "opinio juris sive necessitatis". The ICJ stated:

"... but they (acts) must also be such, or be carried out in such a way, as to be evidence of a rule of law requiring it. The need for such belief, that is, the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are confirming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not in itself enough. There are many international acts, for example in the field of ceremonial and protocol, which are performed almost invariably but which are motivated only by considerations of courtesy, convenience or tradition and not by any sense of legal duty."<sup>37</sup>

In effect, the ICJ briefly stipulated two basic conditions for fulfilment in order to form a rule of customary international law. These conditions are settled practice and opinio juris

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35 Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands, ICJ Reports, 1969. See also Nelson, MLR, 52, 1972.

36 North Sea Continental Shelf case, *op.cit.*, p.44.

37 *Ibid.*

(the psychological element of acceptance of the practice as law).

In order to fulfil these two conditions, one must ask whether a particular item <sup>38</sup> has been used as a consistent or settled practice by the States and whether a belief by those observing the practice is mandatory. As indeed, the ICJ stated, the frequency or even habitual character of the act of observing and respecting a particular rule is not itself enough.<sup>39</sup> The States in question must feel that they are conforming with a rule as a legal obligation and not merely traditions, courtesy or image.

The formulation of customary law is not an easy matter to decide involving legal obligations, complex psychological and sociological processes. The first factor of customary law, which is termed as its CORPUS, constitutes a usage or a continuous repetition of the same kind of act in customary international law; state practice is required, representing a quantitative factor of customary law. In other words, the number of States which implement and observe the rule, per se.

The second factor, termed its ANIMUS, constitutes opinio juris sive necessitatis by which a simple usage can be transformed into a custom with binding power. It represents a qualitative factor of international law. As stated earlier, to decide

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38 For instance, the principle of non-refoulement.

39 North Sea Continental Shelf Case, op.cit., p.44.

whether these two factors (in the formative process of a customary law) exists or not, remains a complex question and an issue. The repetition, the number of examples of state practice, the duration of time, required for the generation of customary law cannot be mathematically or uniformly decided. Each fact requires to be evaluated (relatively) according to the different circumstances and occasions. This situation is unlike other branches of law. It cannot be denied that the question of repetition is a matter of quantity.

What is important is not the number of ratifications or accessions to a particular convention or state practice,<sup>40</sup> but the meaning which they would imply in a particular circumstance. One cannot evaluate the ratification of the 1951 Convention by a "refugee" influenced State or the State practice represented by its concluding an agreement on the basis of a particular rule or principle as having some importance as similar acts and legal obligations in a country where there never has been a refugee problem.<sup>41</sup>

As far as the qualitative factor is concerned, that is opinio juris, it is extremely difficult to gain evidence of its existence in concrete cases. This factor relating to internal 'motivation' and of a 'psychological' nature cannot be ascertained very easily, especially when legislative-making

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40 Examples of subsequent State practice can indicate whether a particular rule is observed.

41 For instance, Kuwait, where numbers of refugees have never been noted, acknowledged or highlighted.

bodies and the executive organs of the government participate. In the internal processes of decision-making in respect of ratification or other State acts. On numerous occasions there have been divergences between the two internal organs. There does not seem to be a way other than to ascertain the existence of opinio juris from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motive for each example of State practice, which is difficult to achieve.

The attitude which one takes vis-a-vis customary international law has been influenced by one's view on international law or legal epistemology. There are two schools of thought: firstly, those who belong to the school of positivism and voluntarism who seek an explanation in the binding power of international law in the sovereign will of the states and consequently their attitude in recognising the evidence of customary law is conservative and formalistic. And secondly, those who advocate the objective existence of law, apart from the will of the States, and are inclined to take a more liberal and elastic attitude in recognising the formation of a customary law attributing more importance to the evaluation of the content of law than to the process of its formation.

#### 1.1.2.1 State Practice

The International ICJ Court of Justice in the North Sea

Continental Shelf Case stated that by the term "usage", the Court interpreted this to mean a usage found in practice of States.<sup>42</sup> On this point, the International Law Commission included a non-exhaustive list of the constituents of state practice<sup>43</sup> and it was hoped by the ILC that this would be used in future as guidelines on any subject.

One of the guidelines contains a reference to national legislation or municipal laws of the Member States. These laws or regulations have to be treated with caution. A State which merely states legislation does not necessarily imply that its intention will be to assist the person in question. It could simply be complying with the provision of the treaty to which it is a member. The municipal laws are sometimes left in a vague and ambiguous condition to which there are many loopholes which governments favour.

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42 North Sea Continental Shelf Case, op.cit., p.44.

43 Yearbook International Law Commission II, 1950, pp.368-372. The list contains: A: Texts of International Instruments; B: Decisions of International Courts; C: Decisions of National Courts; D: National Legislation; E: Diplomatic Correspondences; F: Opinion of National Legal Advisers; G: Practice of International Organisations.

Cf. Brownlie, Principles of Public International Law, 2nd Ed., Clarendon Press, Oxford, 1973, p.5. He states that the list should contain: policy statements; press releases; official manuals on legal questions; executive decisions and practices; orders to naval forces; comments by governments on drafts produced by the International Law Commission, state legislation, international judicial decisions, recitals in treaties and other international instruments; a resolution relating to legal questions in the UNGA, practice of international organs and pattern of treaties in the same form.

### 1.1.3 CONCEPT OF 'JUS COGENS'

The concept of jus cogens <sup>44</sup> is situated in Articles 53 and 64 of the Vienna Convention on Law of Treaties 1969 <sup>45</sup> (now in force). Article 53 states:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Article 64 states:

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

The concept of jus cogens is not new, although it has only recently been incorporated and developed in international law

<sup>44</sup> See Christor L. Rozakis, The Concept of Jus Cogens in the Law of Treaties, North-Holland, New York, 1976; Jerzy Cztucki, Jus Cogens and the Vienna Convention on the Law of Treaties, Springer-Verlag-Wien, New York, 1974. And for an alternative view, see Anthony Carty, The Decay of International Law, Manchester University Press, Manchester, 1986, pp.1,59-60,96-97,109-110.

<sup>45</sup> Misc 19 1971, Cmd 4818; 63 AJIL 875, 1969. The Convention was adopted by a vote of 79:1 (France) with 19 abstentions. France objected to the provisions of jus cogens. Abstention, in general, were made by the Soviet Bloc, purely because they felt that all states should have been given the opportunity to participate in the Conference (Vienna). China, East Germany, North Korea and North Vietnam were not invited to the Vienna Conference.

and practice. The concept of jus cogens originated in the Roman era where it was used incognito.<sup>46</sup> Traces of the concept of jus cogens can be found during Elizabethan times<sup>47</sup> in the English legal system. The concept of jus cogens was eventually formalised in 1953.<sup>48</sup> However, the concept of jus cogens features very little in relation to the refugee in international law.

1.1.3.1 The 3rd Source of International Law: "General Principles of Law Recognised by Civilised Nations"

Dr Akehurst stalwartly states that jus cogens can be derived from custom and possible treaty but not "probability" from other sources.<sup>49</sup> The third source was aptly forwarded by the US delegate and Representative at the Vienna Conference<sup>50</sup> that

46 Jus cogens can be found in Jus Privatum and Jus Publicum, especially relating to laws of public order and good morals which affected the relationships of Roman subjects. Papinian stated that to allow the shameless dishonesty and gross immorality, without justice, would harm the State. He further stated: "jus publicum privatorum arbitrio mutari non potest" (Dig II, 14,38) which is repeated several times in Digests (D.II,14,7,7; D.38,I,42; D.XI,7,20; D.XXVII,8,1,9; D.h.17,14,1). Gaius claimed that this rule had been borrowed from the laws of Solon: "Sed haec lex videtur ex lege solonis tralata esse ..." (D.47,22,4). In Roman times there were some agreements which the State refused to enforce because they conflicted with the principles of good morals and public order, for example, unfair marriage contracts.

47 Decisions were recorded which established the nullity of contracts injurious or detrimental to the "public good": Collins v Blantern (1767) 2 Wils 341; or "contra bonas mores": Girardy v Richardson (1793) 1 Esp 13, per Lord Kenyon.

48 Hersch Lauterpacht became the first international jurist, as a Special Rapporteur in Yearbook ILC, II, 1953, pp.90-163 at p.154.

49 Akehurst, A Modern Introduction to International Law, George Allen & Unwin, 1984, p.41.

50 Conference, op.cit., para 39 (Sweeney).

the identification of the norms of jus cogens must be recognised in common by national and regional systems of the world. The rule was based on the "rule of international law" and it was only jus cogens if it was "universal" in character and was subsequently endorsed by the international community as a whole. The term "community" was not intended to contrast with "international society". The term "community" per se was employed to be equivalent to the subjects of international law. The US proposal was heavily defeated,<sup>51</sup> purely because States criticised that the formula appeared to eliminate the national over the international legal systems.<sup>52</sup>

The Representative of Cuba (Alvares Tabio) stated that the US proposal would allow a State (by invoking its domestic legislation) to thwart any peremptory rules of international law,<sup>53</sup> he further stated:

"The essential difference between jus cogens rules and other rules of international law lay not in their sources but in their contents and effects." <sup>54</sup>

Likewise, the Representative of Trinidad and Tobago (Baden-Semper) stated:

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- 51 See UN Doc A/Conf.39/C.1/L.302 and Corr.1, 57th meeting. Voting - 57:24 with 7 abstentions.
- 52 Ibid., para 39. See also Akehurst, *op.cit.*, p.34.
- 53 Conference, *op.cit.*, para 52.
- 54 UN Doc A/Conf.39/11, 52nd meeting, para 36.

"As to general principles of law recognised in common by the national and regional legal systems, his delegation considered not only that was a most unlikely source of rules of jus cogens but that it would be dangerous to rely on analogies with municipal law in a matter of such importance." 55

The Soviet Union simply did not accept this principle as a source of law,<sup>56</sup> so therefore the use is practically very limited. In effect, the concept of jus cogens cannot be derived from this third source.

#### 1.1.3.2 Final Remarks

The UN Charter certainly stipulates the protection of human rights in creating legal rights and duties. McKean states that:

"... protection of human rights can be considered to possess a jus cogens character ..." 57

Protection of human rights, namely to prevent violation of human rights, such as torture, slavery, discrimination, genocide, are to be considered to belong to the concept of jus cogens. Denial of the basic human rights can be referred to as

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55 UN Doc A/Conf.39/11/Add.1, 56th meeting, para 64.

56 Ibid, para 32. See Osakwe, Contemporary Soviet Doctrine on the Sources of General International Law, Proceedings ASIL, 1979, p.310. Also, Tunkin's Theory of International Law.

57 Warwick McKean, Equality and Discrimination Under International Law, Clarendon Press, Oxford, 1984, p.281. Judge Tanaka in the South West Africa Case (ICJ Rep 1966) stated that "protection of human rights may be considered to belong to the jus cogens", p.298.

violation of jus cogens, which include principles of equality and non-discrimination.<sup>58</sup> The evidence of jus cogens must be assessed and calculated while the concept, per se, is acquiring international prominence.<sup>59</sup>

#### 1.1.4 UN RESOLUTIONS

The United Nations Charter is a prominent legal document which makes clear at its outset the international community's basic commitment to equality. Its preamble stipulates a reaffirmation of faith in:

"... fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ..."

Among the purposes of the United Nations are the maintenance of "international peace and security",<sup>60</sup> to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to strengthen universal peace,<sup>61</sup> and "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".<sup>62</sup>

58 In other words, "fundamental human right".

59 Dr Akehurst states that jus cogens have been recognised and accepted by rules which have been accepted and recognised by the international community as a whole. At present, he states that "very few rules pass this test" and that only "aggression" satisfies the test. See op.cit., p.41.

60 United Nations Charter, Article 1(1).

61 Ibid., Article 1(2).

62 Ibid., Article 1(3).

Article 8 of the UN Charter states that the UN "shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs".

Among the powers of the General Assembly are to initiate studies and make recommendations for the purpose of "promoting international co-operation in the political field and encouraging development in international law and its codification",<sup>63</sup> and "assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".<sup>64</sup>

Article 55 is the key article because it stipulates that the United Nations shall promote "higher standards of living, full employment, and conditions of economic and social progress and development,"<sup>65</sup> with "universal respect for, and observance of human rights and freedoms for all without distinction as to race, sex, language or religion".<sup>66</sup> As treaty provisions applicable to the Organisation and its Members, these prescriptions are of paramount importance and respect. Although Article 55 is perhaps 'oblique', especially in use of the term that the UN "shall promote", Article 56 is very strong, stipulating:

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63 Ibid., Article 13(1)(a).

64 Ibid., Article 13(1)(b).

65 Ibid., Article 55(1)(a).

66 Ibid., Article 55(1)(c).

"All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

The Economic and Social Council (ECOSOC) may initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters, and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations and to the specialised agencies concerned.<sup>67</sup> ECOSOC may also make recommendations for the purposes of promoting respect for, and observance of, human rights and fundamental freedoms for all.<sup>68</sup> Furthermore, the basic objectives of the international trusteeship system including assuring "equal treatment for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice".<sup>69</sup> In connection with refugees and asylum-seekers, this provision,<sup>70</sup> and the feelings underlying it, have been the basis of a great deal of international expression and activity.

After World War II, in San Francisco, the founders of the United Nations rejected all attempts to grant the General

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67 Ibid., Article 62(1).

68 Ibid., Article 62(2).

69 Ibid., Article 76(d).

70 Ibid.

Assembly<sup>71</sup> the power to create international law per se through its powers<sup>72</sup> and functions. States are rather sceptical about recognising UN resolutions and recommendations as sources of international law under Article 38 of the statute of ICJ, especially where application of Article 38, paragraph I(b) is concerned. From a general study of many hundreds of resolutions adopted by the General Assembly, one can observe that they have never been granted a status of binding principle of international legal provisions. However, although some resolutions do have legal effects, they are held to be merely recommendatory. Non-recommendatory and legal resolution can be stereotyped into five basic sections, in addition to those which deal with the infrastructure of the General Assembly and the United Nations:

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71 The General Assembly is conceived as an organ which consists of all members of the UN; each member has one vote. Decisions on important questions are taken by a  $\frac{2}{3}$ rd vote; on other matters a majority is sufficient. It has a wide range of functions which may be conveniently grouped under the following 6 headings: Discussions and Recommendation, Supervision, Control of Finances, Election, Admission of New Members, and Invitation of Proposals for the Charter Reviewed and Amended.

72 The power of the General Assembly is very broad. In fact, by the terms of Art.10 of the Charter, it extends to "any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter". The Charter imposes two important limitations, however, on this power. Firstly, the Assembly must refer to the Security Council any question on which action is necessarily understood to mean enforcement action; in any case, before making a recommendation. And, secondly, the General Assembly must refrain from making any recommendation on any dispute or situation to which the Security Council is engaged in exercising its functions under the Charter. See S R Gibbons, The League of Nations and UNO, Longman, London, 1970. See also Stephen M Schwebel, 'The Effects of Resolution of UN General Assembly on Customary International Law', PASIL, 1979, pp.301-309.

- (a) Certain resolutions on international peace and security have a binding effect<sup>73</sup> but from a legal point, jurists have considered this as contrary to the Charter. However, it led to a modification of the law because of political necessity and constituted the General Assembly interpretation of its legal capacity to act in the future.
- (b) Certain resolutions express and register agreement among members of the General Assembly. These resolutions have been called "multilateral execution agreements".<sup>74</sup>
- (c) Some resolutions, although they do not create international law per se, can either express general principles of law or confirm the existence of customary international law. The former constitutes a source of international law under Article 38 of the statute of the ICJ.<sup>75</sup>
- (d) Certain resolutions derive their binding force

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73 For instance, Res.377(V), the Uniting for Peace Resolution.

74 For instance, Res.1962 (XVIII), the Declaration of Legal Principles Governing the Activities of States in the Explanation of Use of Outer Space (binding non-recommendatory resolution).

75 For instance in Res.95(I), the General Assembly confirmed, without reservation, the Nuremberg Principles on War Crimes.

from instruments other than the Charter.<sup>76</sup>

- (e) Some resolutions establish the existence of facts and concrete legal situations.<sup>77</sup>

It is debateable, especially among the Western Jurists, whether adoption of certain resolutions merely reveal the emergence of rules of customary international law, provided of course that the major States or groups of States do not reserve or reject the proposed resolution. The General Assembly does exercise in this way certain quasi- or pseudo-legislative function. Supporters of this view have maintained that the world political system does not have any legislative machinery of either an "ad hoc" or "permanent" character or magnitude suitable for legislating in world politics, in the same way that domestic legislation in internal politics allows a majority to adopt measures that would be binding on an outvoted or/and dissenting minority.<sup>78</sup>

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- 76 For instance, Res.289 (iv) on the question of Italian Colonies (Libya, Somalia and Eritrea) which derived its binding character from the Italian Peace Treaty (1947) under which the "powers concerned" agreed to accept the General Assembly's recommendations in case of non-agreement among themselves about the future of those colonies.
- 77 For instance in Res.1542 (xv), the General Assembly established that the Portuguese territories in Africa were non-self governing territories within the meaning of Chapter XI of the Charter and not part of the Portuguese Metropolitan territories. It followed that Portugal had a legal obligation to transmit information on those territories to the UN under that particular Chapter of the Charter.
- 78 See: M J Peterson, The General Assembly in World Politics, Allen and Unwin, London, 1986, pp.183-209; Evan Luard, The UN, Macmillan Press, London, 1979, pp.33-54; and James Barros, The United Nations, Macmillan Co., USA, 1972, pp.89-93.

Can, for instance, the principle of non-refoulement be taken to satisfy category (c) above, whereby confirming the already existing principle as evidence of customary law. But the important question remains whether the UN resolutions have a legal nature or obligation and whether they are binding on consenting and dissenting States within the General Assembly? Judge Klaestad stated that the UN General Assembly resolutions:

"... are, in my mind, not of a legal nature in the usual sense, but rather of a moral or political character. This does not, however, mean that such a recommendation is without real significance and importance ...".<sup>79</sup>

Judge Klaestad goes on to state the effectiveness of a resolution on a particular state:

" ... and that the Union of South Africa can simply disregard it (resolution). As a member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of a matter referred to in the recommendation. But a duty to such a nature, however real and serious it may be, can hardly be considered as involving a true legal obligation, and it does not in any case involve a binding legal obligation to comply with the recommendation."<sup>80</sup>

Two points clearly emerge from Judge Klaestad's judgement. Firstly, that States are bound to consider in bona fide the

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<sup>79</sup> ICJ Reports, 1955, p.88 (Union of South Africa case).

<sup>80</sup> Ibid.

recommendation adopted by the General Assembly and, secondly, these recommendations are not legally obligated and have no legal binding obligation.

The writer agrees with Judge Klaestad's opinion. One can apply the synopsis to any principle (for instance, non-refoulement), although States are duty bound to consider in bona fide the principle of non-refoulement, but still have no legal binding obligations.

In the area of refoulement, States can effectively refoule asylum-seekers and still face no penalty from the General Assembly or the international community at large, although international moral and political pressures can affect an offending State (see later).

Judge Lauterpacht agrees with Judge Klaestad's opinion but goes on to state full legal effects were to be undeniable if in matters:

"... such as election of members of the ECOSOC, Trustee Council, the adoption of rules of procedure ..." 81

Judge Lauterpacht stipulated that the resolutions adopted by the General Assembly are in the nature of recommendations (although on occasions they provide a "legal authorisation" for members to act singly or in a group) and do not create a legal

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81 ICJ Reports, 1955, p.115.

obligation.<sup>82</sup>

Brierly is of the same opinion, that resolutions have no binding effect:

"Apart from its control over the budget, all that the General Assembly can do is to discuss and recommend, and initiate studies and consider reports from other bodies."<sup>83</sup>

The General Assembly, of course, does not possess international legislative authority. It can study, it can debate, it can recommend, but it cannot legislate or form international law. In general, apart from the approval of the budget, it cannot make decisions that are binding on the members of the United Nations.

However, Kelsen holds the opinion that the recommendation of the General Assembly is binding, but does not constitute a legal obligation. Kelsen encourages binding decisions, similar to the Security Council which considers non-compliance with a recommendation made by the Assembly as a threat to international peace.<sup>84</sup>

Resolutions, especially concerned with the internal working of the United Nations Organisation, have full legal effects

82 Ibid.

83 Brierly, The Law of Nations, 5th Ed., 1955, p.107.

84 Kelsen, The Law of the UN, 1951, pp.195-6.

especially on members and organs of the organisations.

However, when recommendations are adopted to deal with matters outside internal works, resolutions have no legal binding effects and do not have moral or political obligations on members of the General Assembly. It is agreed that the General Assembly can only make recommendations. In this respect, its powers are much less than those of the Security Council, which explains why the veto exists in the Security Council but not in the General Assembly (see above).

Political obligations or effects may have the same effect on States, because the General Assembly as an international political body has always some "political effect". Members may lose political friendships and the understanding of those who voted differently on a resolution. A resolution also has a "political effect" if it succeeds in affecting the bond between the government of a State and its own nationals and subjects.

Moral obligations or effects have no valid meaning in international law; it is sometimes used when it is intended to convey the meaning of "political effect".<sup>85</sup> Although resolutions passed by the General Assembly of the United Nations on issues varying from human rights to non-refoulement

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85 For further discussion, see D H N Johnson, "The Effect of Resolutions on the General Assembly of the United Nations", BYIL, 32, 34, 1955-6, pp.97-121. Also see Bin Cheng, "UN Resolutions on Outer Space: Instant Customary Law", IJCL, V, No.1, January 1965. Although Professor Cheng's views are rather controversial, especially on the formulation of customary law, he remains in a small minority of jurists.

may have some "moral" effects on States.

In general terms, most members of the United Nations observe and respect issues in accordance with the resolutions passed.

In the contemporary situation, refugees flow predominantly from man-made or natural disasters and very few actually comply with the refugee instruments. However, it is advantageous to explain the dimensions of the refugee problem and their causes.

## 1.2 DIMENSIONS OF THE REFUGEE PROBLEM

### 1.2.1 INTRODUCTION

There is no universal or a comprehensive definition of a "refugee". The United Nations, through the 1951 Refugee Convention, as seen in Chapter Three, defined the refugee as a person who:

"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, unwilling to avail himself of the protection of that country."

The definition of a refugee was extended beyond the persecuted individual to groups of people fleeing from dangerous circumstances by the OAU Convention. The 1969 OAU Convention on Refugees incorporated the above definition but further added to it "every person who, owing to external aggression,

occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality". Obvious further elaboration is made in Chapter Five.

In factual terms, only 5% of the world refugees belong to the definition incorporated in the United Nations, in other words, the Convention refugees, while the other 95% belong to a category which consists of natural disasters and man-made disasters.<sup>86</sup> Natural disasters include drought and famine, floods, tropical cyclones and earthquakes; and man-made disasters include internal conflict, foreign intervention and war, border clashes and apartheid. It is proposed that each affected region be examined, highlighting the facts and figures concerning refugees throughout the world, their causal factors and flow.

#### 1.2.1.1 Natural Disasters

The definition of drought is not simple, but the general view is that drought means no rainfall or a small quantity of rain which adversely affects the land and its people.<sup>87</sup> More than 160 million Africans were and still are affected by drought.

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<sup>86</sup> See General Assembly, Official Records, 41st session, Supp. No.12(A/41/12), pp.1,3.

<sup>87</sup> See Kenneth Hare, Climate, Drought and Destification, Nature and Resources, UNESCO, 1984.

Drought can cause livestock to die due to dehydration and farmers cannot generate food. They are then forced to move to other areas where there may be more grazing for their animals, but this often results in tension between the already settled farmers and the new farmers.<sup>88</sup> The non-generation off food often results in famine for the people. Many are then forced to leave their homelands and seek food elsewhere, thus becoming refugees.

Floods, tropical cyclones and earthquakes have caused the destruction of dwellings, crops livestock and people. People are forced to flee from the devastated areas to try and seek a safe haven in other areas. If these people cross borders they are known as refugees in the non-conventional status.

#### 1.2.1.2 Man-Made Disasters

Foreign intervention, civil war and border clashes often result in the flow of refugees. The Soviet invasion of Afghanistan has resulted in a mass exodus of over 5 million refugees. Civil war in Africa, fuelled by the super-powers, has resulted in many thousands of refugees fleeing to neighbouring countries to seek refuge. Border clashes involving fighting between two sets of soldiers also causes loss of life to innocent civilians, men, women and children, prompting survivors to escape to neighbouring States.

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<sup>88</sup> See Essam El-Hinnawi, Environmental Refugees, UNEP, 1984, p.12.

The study of natural and man-made disasters is beyond the scope of this thesis but it is useful to mention the main causes of refugee problems.

The following countries are the major countries in each continent in accordance with the numbers recorded by the UNHCR which exceed 500 refugees.

## 1.2.2 STATISTICAL DIMENSIONS OF THE REFUGEE PROBLEM

### 1.2.2.1 Africa

Ethnic conflict, government repression and political instability have all created refugees within the Central and Eastern Africa. Burundi<sup>89</sup> contains 267,500 refugees, many from the Tutsis from Rwanda, victims of a longstanding conflict with the ruling minority, the Hutus. The Central Africa Republic<sup>90</sup> hosts around 13,000 refugees, most of them the result of the civil war in Chad. Kenya<sup>91</sup> hosts about 8,000 refugees, a large proportion of them from Uganda, and it is predicted that this may figure may increase due to more political violence within Uganda. Rwanda<sup>92</sup> has a refugee population of about 19,400. The majority of the refugees are

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89 UNHCR Magazine, Geneva [hereinafter referred to as 'Magazine'], July 1987, No.43, p.33.

90 Telephone interview with Mr Kpénou, Head of Africa Bureau, UNHCR, Geneva, January 1988.

91 Kenya High Commission, London, 1988.

92 Magazine, op.cit., p.34.

Hutus from Burundi. The remainder are people of Rwandan origin who were forced out of their dwellings in south-western Uganda by supporters of the ruling party at the end of 1982. Tanzania<sup>93</sup> shelters around 220,300 refugees, the majority being the result of ethnic conflict in Burundi and the rest escapees from rebellion and unrest in Zaire. Uganda,<sup>94</sup> through elimination of suspected opponents, have produced major refugee movements. Military operations against guerrillas have forced many thousands to cross to Zaire and flee to Sudan, and the return of such refugees seems unlikely until such conditions have been eradicated. Although Uganda, per se, hosts around 144,000 refugees most of which come from Tanzania and Burundi. Finally, Zaire,<sup>95</sup> because of its size, location and volatile political history, is a major refugee-producing country. Approximately 301,000 refugees live in Zaire: 218,000 Angolans, 60,000 Ugandans, 11,000 Burundi and 12,000 Rwandans. Around 60,000 refugees have fled from political unrest in Zaire to neighbouring states, which include Tanzania, Angola and Zambia.

North and West Africa has experienced few refugee problems in comparison with other areas of Africa. Algeria<sup>96</sup> has received the largest refugee population, numbering around 167,000,

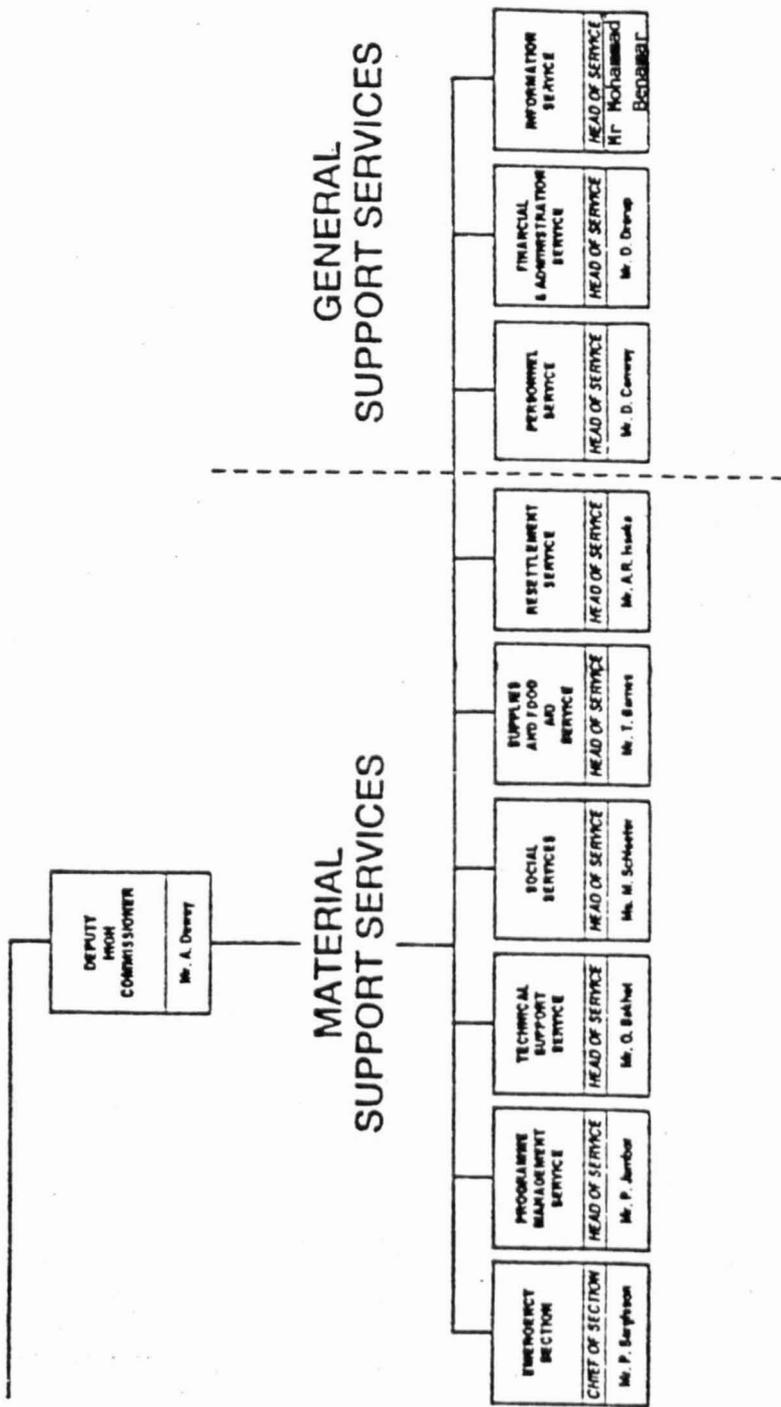
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93 Tanzanian High Commission, London, 1988.

94 Uganda High Commission, London, 1988.

95 UNHCR Factsheet [hereinafter referred to a Factsheet], October 1987, No.12.

96 Ambassade de Algerie, London, 1988.



DEPUTY HIGH COMMISSIONER  
Mr. A. Denny

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GENERAL SUPPORT SERVICES

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CHIEF OF SECTION  
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PROGRAMME MANAGEMENT SERVICE  
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HEAD OF SERVICE  
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RESETTLEMENT SERVICE  
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Mr. A.R. Isdale

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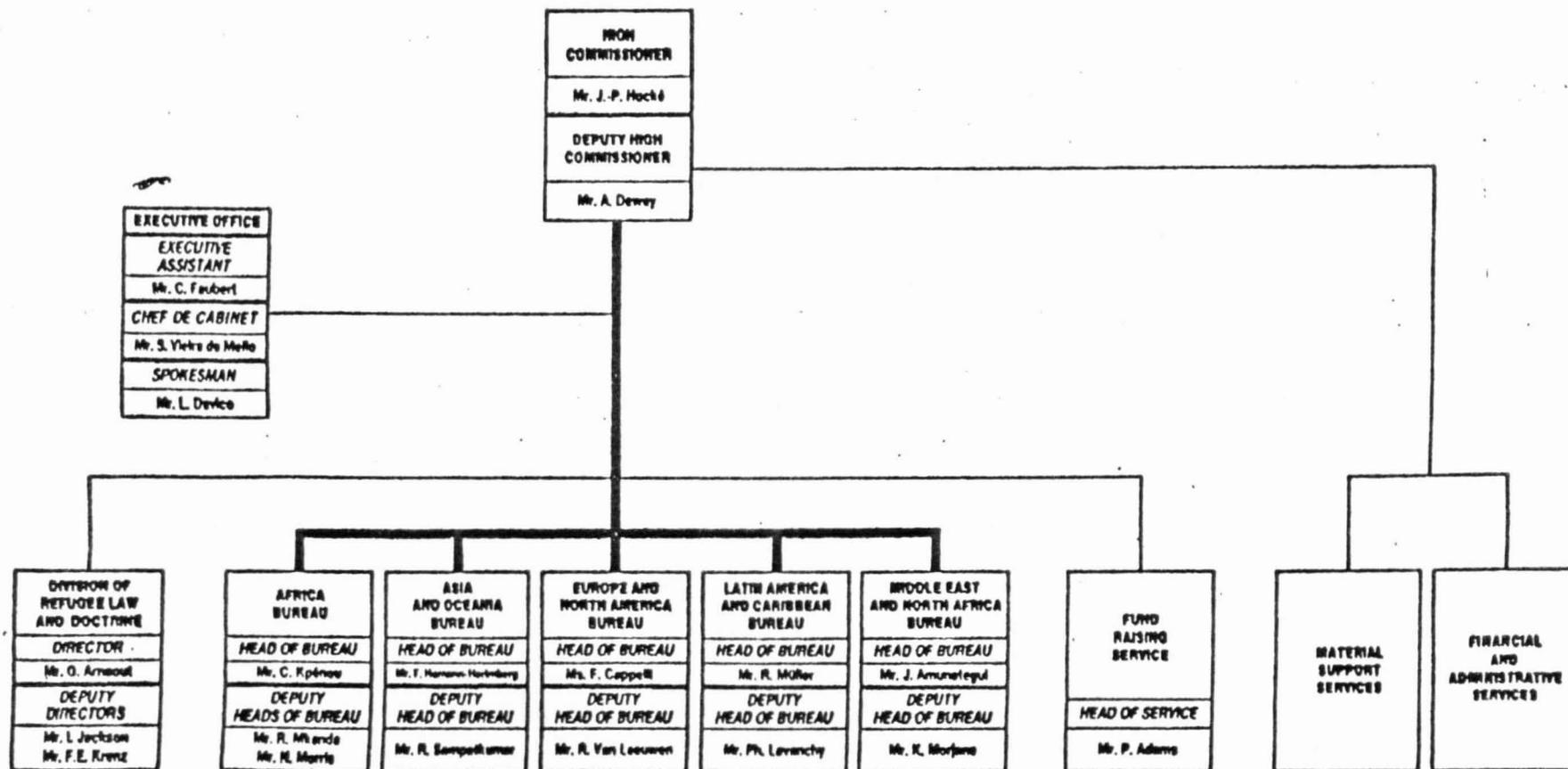
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HEAD OF SERVICE  
Mr. D. Dwyer

INFORMATION SERVICE  
HEAD OF SERVICE  
Mr. Mohammad Beddabi

mainly victims of the long conflict between Morocco and the political movement, Polisario, over control of the former Spanish Sahara.<sup>97</sup> In Cameroon<sup>98</sup> around 53,600 refugees have been recorded, the majority from the civil war in Chad. However, many are returning under the UNHCR repatriation programme. Egypt<sup>99</sup> caters for about 1,100 refugees but there are an unknown number of Palestinians, Libyans, Iraqis and Lebanese living within Egyptian territory. Finally, many Chadian refugees have been repatriated from Nigeria, but in Chad<sup>100</sup> there are approximately 4,700 refugees, although many of these have returned to Ghana.

In 1974 the Government of Haile Selassie in Ethiopia was overthrown by a group of army officers. The new government proceeded to centralist power, crushing opponents and soon becoming involved in a struggle with Eritrean, Tigrean, Somalian and Oromo independence movements. Somalia, being American-backed, became hostile to the Soviet-backed Ethiopia. War broke out and tension between the two countries remains high. Meanwhile, Sudan was being devastated by war. A civil war broke out between the north and the south and a form of regional autonomy was granted to the south. Political and military conflicts have unsettled masses of people. However,

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- 97 See Manaa, "Self Determination and Rights of Peoples", M.Phil Thesis (unpublished), Hull University, 1985.
- 98 Final report on the situation in Africa, UN Office for Emergency Operations in Africa, New York, 1987, p.13.
- 99 Embassy of Arab Republic of Egypt, London, 1987.
- 100 Factsheet, op.cit., No.7, October 1987.



# U.N.H.C.R.:

## ORGANISATION STRUCTURE

July 1986

then the captain is under a legal obligation to render assistance to everybody, even to his enemies. Also, if the flag State is a signatory body to UNCLOS III, then, by Article 98, the captain will be legally bound to render assistance. While the 1951 Convention does not contain a provision on the granting of asylum (except in the Preamble), the 1951 Convention can only be applied to Governments of Contracting States and not to merchant ships flying their flags, since a merchant ship is not really an extension of the State. The legal duty is emphasised in various conventions and instruments, whilst if the flag State is a non-signatory body, then humanitarianism will play a vital role. Thankfully, most captains rescue boat-people irrespective of any legal jargon or views and they simply apply moral and humanitarian ideals. In fact, the captain of a rescuing merchant vessel or passenger ship can persuade the port authorities to accept asylum-seekers and grant them asylum.<sup>79</sup>

Finally, the position of the boat-people or asylum-seekers at sea is tragic. They have too often been refouled back onto the High Seas, to face terrible conditions from both the elements and pirates. Thankfully, the authorities of various countries are clamping down on piracy through international solidarity and co-operation. Merchant vessels do rescue these people but this problem would be much better solved if such people did not

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<sup>79</sup> The SS Aroza rescued 27 asylum-seekers in South-East Asian waters and after two days of sailing managed to persuade the Government of Thailand to accept these people. News, BBC TV, 27 March 1987.

in the last five years, it has been drought and famine that has provoked the flow of very large numbers of refugees. In Djibouti,<sup>101</sup> about 16,700 refugees have gathered, most of them Ethiopians from Ogaden, fled from the war with Somalia. A small number are political refugees, opponents of Ethiopia's military government. However, because of the Djibouti's poor economy, the situation of refugees there remains desperate. Ethiopia<sup>102</sup> is known as the "Refugee Producing Country" with approximately 132,400 refugees. There has been criticism of the Ethiopian Government for not distributing food and aid to the refugees. Drought and famine, governmental repression, civil war and conflict with Somalia over the disputed Ogaden region have displaced a great number of people within Ethiopia. In Somalia,<sup>103</sup> there are some 700,000 refugees of which the majority come from the Ogaden region of eastern Ethiopia, victims of both war and drought. Nearly 75% of the refugees within Somalia are women and children. Sudan<sup>104</sup> is bordered by 8 countries, all of which are undergoing political, social and ecological crises. There are over 975,000 refugees in Sudan, the majority from Ethiopia. Military conflict between government and various independence movements has combined with severe drought and famine to drive many thousands of Eritreans and Tigreans to eastern Sudan. The political relationship with Ethiopia is still delicate, because of the Sudan's cautious

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101 Telephone interview, Kpénou, op.cit.

102 Factsheet, op.cit., No.9, October 1987.

103 Factsheet, op.cit., No.14, October 1987.

104 Factsheet, op.cit., No.16, October 1987.

support for the Eritrean and Tigrean independence movements. Meanwhile, it has been reported that in southern Sudan, Ugandan troops have trespassed into Sudanese territory.

South Africa<sup>105</sup> is the cause of most refugee movement in southern Africa. President Kaunda<sup>106</sup> of Zambia stated:

"... the cause of the serious refugee situation is, of course, apartheid in South Africa ..." <sup>107</sup>

While the cause of mass refugee movements can certainly be blamed in large part on the South African Government and its Apartheid policies, the war in Namibia between South African forces and the South West Africa Peoples Organisation (SWAPO), the war in Angola between the Government and rebel forces of South-African backed UNITA, and the destabilizing of the Government of Mozambique by the Mozambique Resistance Movement, again South-African backed, has also contributed to the flow of refugees. These problems are all certainly created by South Africa's foreign policy. Even when the mostly black refugees have fled to Angola, Mozambique, Botswana, Lesotho and Swaziland, they have been physically attacked by South African troops.

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105 Factsheet, op.cit., No.8, October 1987.

106 Interview with Arja Saijormaa, UNHCR Goodwill Ambassador and Søren Peterson, UNHCR Regional Representative for the Nordic Countries. Magazine, op.cit., No.48, December 1987, p.21. President Kaunda is also the Chairman of the OAU and Frontline States.

107 Ibid.

Angola<sup>108</sup> has experienced military unrest and conflict within the country since its independence from Portugal in 1975. Angolans are regularly under attack from South African troops. In the southern and central areas, the opposition movement, UNITA, is active, supported by the South African Government by arms and equipment. Severe drought in the country has not helped the situation in which thousands of refugees have fled Angola. There are at present around 92,200 refugees but many of them are leaving for south-west Zaire and Zambia.

Botswana<sup>109</sup> has a refugee population of 4,600, with around 66% from Zimbabwe, the remainder from South Africa, Angola, Lesotho and Namibia.

Many refugees have been killed in Lesotho<sup>110</sup> from attacks launched by South African forces. There are around 11,500 refugees in Lesotho, but many have been evacuated to Tanzania because of these attacks on the borders where the refugees are sheltered.

About 95,000 Mozambiqians are settled in Malawi,<sup>111</sup> most of the refugees are there because of drought and famine. After repatriation, there are about 700 refugees in Mozambique.<sup>112</sup>

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108 Factsheet, op.cit., No.8, October 1987.

109 Factsheet, op.cit., No.8, October 1987.

110 Factsheet, op.cit., No.8, October 1987.

111 Ibid. See also Refugees, op.cit., No.42, June 1987, p.20.

112 Factsheet, op.cit., No.8, October 1987.

The South African Government has alleged that Mozambique is used as a base by nationalist guerrillas and in retaliation launches numerous airstrikes and bomb attacks on civilian targets, and indeed supports the Mozambique Resistance Movement (MNR) which has been responsible for widespread disturbances. The presence of the MNR, along with severe drought and famine, has led to the exodus of 700,000 people within Mozambique, while many more thousands have crossed the border into Zimbabwe.

UNHCR reports state that in Namibia,<sup>113</sup> many thousands of refugees have fled because of the South African military presence and their fight against SWAPO.

Since 1948, the South African Government has clearly and openly discriminated against the 82% of its non-white population. The clear and unfair policy of apartheid as led many to leave. Many thousands of refugees have fled to Lesotho, Angola, Swaziland, Zambia, Mozambique and Tanzania. Many refugees from the professions, as well as people from banned groups, have fled to North America, European and other African countries. As a result, the South African Government has exerted military, economic and diplomatic pressures on border States in order to either stop or at least restrict their involvement in political activities.

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<sup>113</sup> Magazine, op.cit., No.43, July 1987, p.31.

Swaziland<sup>114</sup> contains a population of 12,100 refugees, the majority being blacks escaping suppression by the South African Government. In Zambia,<sup>115</sup> there are around 138,300 refugees, many having fled from the conflict in Angola. Drought and famine have also caused the refugees to move on from Zambia. In 1979, Zimbabwe<sup>116</sup> gained independence and some ¼ million people fled as refugees, although many were repatriated later. Many thousands fled again to Botswana because of further unrest in the south-west region of Zimbabwe. This exodus has led to increased tension between the two States. Zimbabwe has about 65,200 refugees, many from Mozambique who have left a deteriorating economic and security situation to settle in Zimbabwe.

#### 1.2.2.2 The Americas

There are a substantial number of refugees in the Americas. In El-Salvador, the military have been pursuing a counter-insurgency campaign against opposition guerilla groups. In Guatemala, attacks have been made on rural communities alleged to be supporting an armed struggle against the Government, entailing massacres and genocide in entire villages. Nicaragua 'contra' groups based in Honduras have been actively destabilizing the Sandanista Government. Many thousands of

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114 Factsheet, op.cit., No.8, October 1987. Also, High Commission of Swaziland, London.

115 Ibid.

116 Ibid.

innocent women and children have been abused and killed. As a result, many flee across each other's international borders.

Belize<sup>117</sup> has a firm policy of integrating refugees. Many Salvadoran refugees have been granted asylum and at present there are about 9,000 refugees there.

Costa Rica<sup>118</sup> has a tradition of granting asylum to people fleeing violence or political persecution, and recently has received around 31,320 refugees from El-Salvador, Nicaragua, Cuba and Guatemala.

The civil war in El-Salvador<sup>119</sup> has caused many deaths resulting from conflicts between US-backed military and left-wing opposition forces. Actual figures of refugees are not available but it is estimated that between 250,000 and 500,000 refugees have fled to Mexico, Honduras, Costa Rica, Nicaragua, Guatemala, Belize and Panama. Many Salvadoreans have fled to the US but some have been repatriated back to El-Salvador.

Many Salvadoreans are seeking asylum in Guatemala,<sup>120</sup> and there are around 12,000 refugees within Guatemala itself. A vast majority of the population is made up of Indian groups and Government campaigns against alleged subversive activities have

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117 Factsheet, op.cit., No.17, October 1987.

118 Ibid.

119 Magazine, op.cit., No.44, August 1987, p.20.

120 Magazine, op.cit., No.44, August 1988, pp.30-32.

resulted in the destruction of many predominantly Indian communities and has indeed provoked a flight of such refugees, particularly to Mexico.

Honduras<sup>121</sup> provides settlement for about 68,000 refugees, predominantly women and children fleeing from the troubles in El-Salvador, Nicaragua and Guatemala. Some Nicaraguan refugees (believed to be dependents of the anti-Sandinista "contras") have arrived in Honduras and are currently residing near the Nicaraguan border.

Mexico<sup>122</sup> has always granted refugee status for political offenders but there has been a worrying large influx of Salvadoreans and Guatemalans. Mexico shelters about 175,000 refugees.

Nicaragua<sup>123</sup> has about 8,200 refugees comprising Salvadoreans, Guatemalans and others. Many Nicaraguans have been unsettled by the destabilizing campaign of the Contras based in Honduras. Quite recently, the Government forces clashed with disaffected Miskito Indians living on the east coast where Government security operations against the Contras had been launched. Many thousands of Indians have fled Nicaragua and now live in the Miskito region of eastern Honduras.

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121 Factsheet, op.cit., No.17, October 1987.

122 Ibid.

123 Factsheet, op.cit., No.17, October 1987.

Haiti<sup>124</sup> had exiled over 1 million Haitians abroad over the last 30 years. Since the fall of President Duvalier on 7th February 1986, some Haitians are thinking of returning to Haiti, either to settle or simply visit. Some Haitians have fled to North America, Canada, Dominican Republic, Lesser Antilles, French Guyana, Bahamas, France, Venezuela, Mexico and Africa.

Canada<sup>125</sup> hosts around 353,000 refugees. It is one of the leading settlement countries for refugees. Refugees within Canada include Tamils, Indo-Chinese, Eastern Europeans, Latin Americans, Near Easterns, Middle Easterns, and Africans. The refugees are allowed entry under two provisions implied by the Canadian authorities, along with the provisions of the 1951 Convention relating to the Status of Refugees. In the first provision, victims of social upheaval or war may be admitted through the "designated classes" system. These include categories of Indo-Chinese refugees, political prisoners, oppressed people, self-exiled persons, citizens of Argentina, Chile, El-Salvador, Uruguay and some Eastern countries. In the second provision are special humanitarian programmes used in response to particular crises. Recent groups requesting asylum in Canada have included Tamils, Lebanese, Poles and El-Salvadoreans.

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124 Refugee, op.cit., No.39, March 1987.

125 Canadian High Commission, London, 1987. And Refugees, op.cit., No.38, February 1987.

The USA<sup>126</sup> has settled over 1 million refugees, 50% coming from Indo-China. Basically the US has refugees from all parts of the globe.

In South America, Bolivia and Chile have established military dictatorships, resulting in thousands of people escaping from political persecution. The problem is exacerbated when Latin American countries are generally unwilling to grant asylum for refugees for fear of hostility and/or threats from other Latin American countries.

Argentina<sup>127</sup> hosts around 14,000 refugees, many of whom have vanished and many murdered due to a volatile political climate. Many Argentinians have fled the country but some have since returned following the recent overthrow of the military dictatorship. In Argentina, there are Indo-Chinese, Europeans and Latin Americans seeking refugee status, and a vast number of Chilean, Uruguayan and Paraguayan exiles who are there either illegally or on temporary visas and are not accounted for.

In Brazil,<sup>128</sup> there are about 5,300 refugees, mainly Uruguayans, Argentinians and Chileans. Also, the UNHCR has recently reported,<sup>129</sup> together with the Brazilian Embassy in

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126 US Embassy, London and Magazine, op.cit., No.44, August 1987, p.17.

127 Factsheet, op.cit., No.2, October 1987.

128 Ibid.

129 Ibid.

London,<sup>130</sup> that there are also many thousands of refugees living illegally within Brazil.

More than 1 million people have fled Chile and have ended up in Sweden, France, West Germany and the United Kingdom following political upheavals in Chile.<sup>131</sup> However, there are some Chileans who, due to increased democracy there, are returning to Chile each year.

In Paraguay and Uruguay,<sup>132</sup> the number of refugees is small but there was a massive exodus of people escaping economic hardships rather than persecution and other causal factors.

Venezuela<sup>133</sup> has admitted 1,800 refugees. There are, however, many thousands of illegal immigrants, not necessarily seeking refugee status,<sup>134</sup> from Columbia but there are no precise figures of how many people have fled Venezuela.

#### 1.2.2.3 Asia

Pakistan<sup>135</sup> contains the largest refugee population in the

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130 Brazilian Embassy, London, 1987.

131 Factsheet, op.cit., No 2, October 1987.

132 Ibid.

133 Ibid.

134 Embajada de Venezuela, London, 1987.

135 Pakistan Embassy, London, 1987. Also, Factsheet, op.cit., No.16, October 1987.

world. In late 1987, the Government, and subsequently the UNHCR, recorded around 2,882,000 refugees within the country. Included amongst these were around 200,000 Bangladeshi refugees escaping floods, famine and cyclones and 2,000 Iranians escaping the current fundamentalist political regime. However, the majority of the refugees are from Afghanistan, fleeing the Soviet intervention in that country in 1979 and its resulting political strife.<sup>136</sup> 75% of the refugees are women and children and 15% are males of young or old age. Many males have returned to Afghanistan to join the Mujahideens and their fight against the Soviets and Soviet-backed Government forces. Many of the male refugees are farmers and tribesmen with peasant backgrounds. The future of these Afghan refugees lies in the hands of the Soviet authorities. If the Soviet forces, as promised, are pulled out of Afghanistan,<sup>137</sup> then the great majority of the refugees will return to their homelands. Military and political changes are required in Afghanistan if these refugees are to return to their normal way of life.

Iran<sup>138</sup> currently accommodates around 2,600,000 refugees, the majority being Afghans. As in the case of Pakistan, these refugees will only return to their homelands if the Soviets leave Afghanistan.

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136 See A.G. Noorani, "Afghanistan and the Rule of Law: The Review", International Commission of Jurists, No.24, June 1980, pp.37-51.

137 As of April 1989, the Soviet forces have left Afghanistan.

138 Iranian Chargé D'Affaires, London, 1987.

On the Thailand/Kampuchea border, up to 220,000 Kampucheans are living a precarious existence in camps controlled by the military and are physically in the front line of the war. Thailand possesses a deterrence policy towards refugees and vast numbers of these refugees have been resettled elsewhere throughout the world.

China<sup>139</sup> has around 285,500 refugees, the majority fleeing from North Vietnam by boat and land as a result of war between the two countries. Many of these refugees are ethnic Chinese. Some refugees try to enter Hong Kong and Macaw but are often returned by the authorities. 2% of the ethnic Chinese were expelled from Mongolia and were absorbed by the Chinese authorities.

Hong Kong<sup>140</sup> has absorbed two types of refugee, firstly those who came from China by land and, secondly, those who came from Vietnam by boats. Currently there are about 8,000 refugees in Hong Kong and many thousands have been resettled elsewhere.

India<sup>141</sup> has around 136,400 refugees, mainly Tibetan followers of the Dalai Lama from China. There are some Afghans and Iranians in India and, very recently, some Tamils have infiltrated as a result of the Indian armed forces presence in Tamil areas of Sri Lanka. As a consequence, many Tamils now

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139 Factsheet, op.cit., No.16, October 1987.

140 Ibid.

141 High Commission of India, London, 1987.

live in Southern India, although a few more have formally made applications for refugee status.

Many refugees in Indonesia<sup>142</sup> have been resettled and at present there are around 4,000 refugees. Many refugees have left Indonesia to settle in the USA, Australia, Canada, West Germany and the United Kingdom. Many Indonesian refugees are from West Irian and are also members of the Melanesian separatist movement and they have been admitted to Papua New Guinea.

Japan<sup>143</sup> has only 900 refugees. Japan has a dense population and ethnic homogeneity and although Chinese refugees have been allowed to disembark, a great many have been resettled elsewhere. However, many Vietnamese boat people have been given temporary asylum.

In 1975, the Khmer Rouge took control of Kampuchea,<sup>144</sup> invoking a four-year period of harsh repression which led to massive internal population displacement and the deaths of at least a million people. Many refugees fled to Thailand and Vietnam. However, in 1979 Vietnamese forces forcibly removed the Khmer Rouge Government of Pol Pot. The war caused more than 500,000 starving people to seek asylum in Thailand and on the Thai/Kampuchea border. However, many Kampuchean have recently

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142 Factsheet, op.cit., No.16, October 1987.

143 Ibid.

144 Factsheet, op.cit., No.16, October 1987.

returned to Kampuchea.

Laos<sup>145</sup> has 3,200 refugees, 60% of which are Kampucheans who are settled in the Attopen Province. Several thousands of Laotians have fled to camps in Thailand since the breakdown of the country's coalition government in 1974, the abdication of the king in 1975, and the subsequent penetration of communist government backed by the Soviet Union and Vietnam. Many refugees left Laos in 1980 when the communist government's radical restructuring of Laos' economic and political systems. However, the situation in Laos has now stabilized and because Thailand has a policy of "human deterrence", the flow of refugees leaving Laos has halted, although many thousands have resettled in Third World countries and the USA.

Malaysia<sup>146</sup> has a refugee population of around 99,000. Many are Muslims from the Southern Philippines living in Sabah, Muslims from Kampuchea and Burma, and Vietnamese boat people.

The Philippines<sup>147</sup> has allowed around 13,700 refugees to settle within the country, especially in camps in Bataan. Many will seek resettlement in the USA. Around 150,000 Filipino Muslims have fled to Malaysia from the southern islands where civil strife and religious conflict has taken place. However, some refugees have left the Philippines purely for economic reasons.

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145 Ibid.

146 Ibid.

147 Ibid.

Thailand<sup>148</sup> had admitted around 119,900 refugees from Vietnam, China and Burma. Many refugees are soldiers of the Khmer Rouge and other groups who oppose the Kampuchean Government. The Thai Government has encouraged voluntary repatriation of Laotian refugees and the voluntary transfer of Kampucheans to the border camps. Many refugees arrive by sea and have faced piracy at its worst. However, recently, piracy has subsided and there is a decline in pirate attacks in the Gulf of Thailand.

Vietnam<sup>149</sup> has about 25,000 refugees, but it has been the source of the largest refugee flow for many years. The defeat of President Thieu of South Vietnam and his American allies by North Vietnamese forces in 1975 resulted in many thousands leaving Vietnam. The fall of Saigon prompted many thousands of Vietnamese associated with the Thieu Government and its American advisers to evacuate to America. Many Vietnamese refugees fled the war by boat, assailed by pirates and rough seas, to Thailand, and overland to the Thai border via Kampuchea. The causes of this exodus are varied. Persecution by the communist government, antipathy towards the country's new political and socio-economic aspects, military conflict and political tension with neighbouring States and a desire to join relations in a common environment abroad, have all played a

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148 Factsheet, op.cit., No.16, October 1987. And Royal Thai Embassy, London, 1987.

149 Factsheet, op.cit., No.16, October 1987.

part in the exodus of refugees. The Vietnamese Government was itself party to the departure of many of the ethnic Chinese, who were encouraged to pay their way out of the country.

#### 1.2.2.4 Australia and New Zealand

Many refugees have entered Australia,<sup>150</sup> especially so after the Second World War. In 1956 many Hungarians left for Australia following the abortive uprising in that country and in 1968 many Czechs followed after the crushing of the 'Prague Spring' by the Soviet forces. Many USSR defectors, Poles, Lebanese and Timonese have entered Australia, along with several thousand Indo-Chinese asylum-seekers seeking refugee status. The current refugee figure is around 85,900.

New Zealand<sup>151</sup> has around 4,400 refugees. Refugees include Indo-Chinese, Poles and East Europeans.

#### 1.2.2.5 The Middle East

There are around 2.2 million Palestinian refugees situated in the Gaza Strip, Jordan, Lebanon, Syrian Arab Republic and the West Bank.<sup>152</sup> The UNHCR figures do not include the above figure under the mandate of the United Nations Relief and Works

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150 Australian High Commission, London and Manchester, 1987.

151 New Zealand High Commission, London, 1987.

152 Magazine, op.cit., No.45, September 1987, pp.4,41.

Agency for Palestinian Refugees in the Near East (UNRWA) by virtue of the United Nations General Assembly Resolution 302(IV) of 8th December 1949. The Middle Eastern refugees are beyond the scope of this thesis.

#### 1.2.2.6 Europe

There are approximately 800,000 refugees in Europe and are from 4 basic groups:

1. Eastern European.
2. Indo-Chinese.
3. Latin American.
4. Middle East and Africa.

There are some refugees who flee due to economic hardship rather than from any specific threat of persecution.

Austria<sup>153</sup> hosts around 18,500 refugees, mostly from Poland. However, there are a smaller number from Uganda, Latin America and Indo-China.

Belgium<sup>154</sup> also has refugees from Indo-China and Latin America, but there are some from Poland. The number of refugees within the country is around 35,900.

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153 Austrian Embassy, London, 1987.

154 Belgium Embassy, London, 1987.

France<sup>155</sup> has a refugee population of around 180,300, many of whom have come from Cambodia, Vietnam and Laos. A few are from Poland, the Soviet Union (especially Armenia) and Central and South America.

The Democratic Republic of Germany<sup>156</sup> hosts around 140,300 refugees, the largest group being from Eastern Europe. The majority are Poles, East Germans, Rumanians and Russians. A minority are from Indo-China and Latin American States.

Greece<sup>157</sup> has a refugee population of 3,300 which comprise mainly East Europeans, Indo-Chinese, Iraqis and Iranians.

In Italy,<sup>158</sup> there are about 15,500 refugees consisting of Indo-Chinese, Chileans, Russians, Iranians, Iraqis and Ethiopians.

The Netherlands<sup>159</sup> has 16,000 refugees which include Orthodox and Christian Turks, Latin Americans and Indo-Chinese.

Norway<sup>160</sup> contains 13,200 refugees, many from Latin America, Uganda and East Europe.

155 French (Honorary) Consulate, Manchester, 1987.

156 Embassy of the German Democratic Republic, London, 1987.

157 Embassy of Greece, London, 1987.

158 Refugee, op.cit., No.44, August 1987, p.16.

159 Ambassade Van Het Koninrijk Der Nederlanden, London, 1987.

160 Refugee, op.cit., No.44, August 1987, p.13.

Spain<sup>161</sup> has a refugee population of about 10,200, the majority from Argentina, Uruguay, Chile and Cuba. In addition, Spain has admitted small quotas of Indo-Chinese, Poles and Iranians. However, many Latin American refugees do not want to stay in Spain on a long-term basis. As soon as this latter group of refugees arrive, they immediately want to apply for entry into the USA and Canada.

Since 1945, Sweden<sup>162</sup> has admitted just under 120,000 refugees, many from Eastern Europe, Greece, Syria and Latin America. Likewise, Switzerland<sup>163</sup> hosts around 30,100 refugees, most from Hungary, Czechoslovakia, Indo-China and Poland.

Yugoslavia<sup>164</sup> has a refugee population of 1,400, most of them being Albanian exiles living in the Kossova region.

The United Kingdom<sup>165</sup> and Ireland has a total refugee population of around 100,600 and has had a generous tradition of granting asylum for those who were victims of persecution, often beyond the 1951 Convention on Refugees.

161 Spanish Embassy, London, 1987.

162 Swedish Embassy, London, 1987.

163 Magazine, op.cit., No.44, August 1987, p.35.

164 Federal Republic of Yugoslavia, London, 1987.

165 Home Office, Immigration & Press Department, London, 1987. And Refugees, op.cit., No.43, July 1987.

#### 1.2.2.7 Some Comments

Only 5% of the total refugee population are comprehended by the definition in the 1951 Convention Relating to the Status of Refugees. The 1969 OAU Convention on Refugees has made a noble effort to increase the limits of the definition of a refugee. Natural disasters have caused the flow of many thousands of refugees, especially from poor Third World countries. These people escape to nearby places within the same country and become displaced persons or escape across borders thereby becoming refugees in a non-conventional sense. Man is to blame for the man-made disasters. Superpower involvement, explicitly or implicitly, directly or indirectly, in Third World areas is the crux of the matter, especially relating to the flow of refugees. In Africa, civil war, government oppression, political instability, all adversely influenced by the superpowers, produces refugees. These man-made disasters, along with natural disasters such as drought and/or famine, have made Africa the biggest refugee-producing continent in the world. South Africa and its apartheid policies is a major culprit. People are escaping the brutal, harsh and painful laws applied by the South African Government. Innocent black children, women and men are escaping to nearby countries. In the Americas, especially South and Central America, the superpowers are to blame yet again. Violence, war, government suppression and hostility, have all caused many thousands of people to become homeless and destitute. Pakistan is burdened with the largest number of refugees. Being a Third World

country, its economic resources can hardly be sufficient, especially with an influx of over 2.8 million Afghan refugees. The causal factor for these refugees is the Soviet intervention in Afghanistan. The basis for the restitution of these refugees to their homelands is Soviet withdrawal from Afghanistan. Ideologically based conflicts in the Far East and South East Asia have produced many thousands of refugees. Again, the involvement of the superpowers is only too noticeable and true. The Australian continent does not produce refugees (at least not on the scale of other continents). There is no civil war, government oppression (except perhaps towards the original Aborigines who are hardly able to leave their homeland and become refugees) and natural disasters. The Middle East has a great many problems. There are many thousands of Palestinian refugees, but the UNCHR cannot provide protection and aid for these refugees because they do not fall within the mandate. Only the UNRWA agency can deal with the Palestinians, but only in terms of aid and not protection. Europe has no civil wars, government oppression, superpower intervention and relatively few natural disasters. Europe does not produce refugees, except for a small and quite negligible number. World War II was the last major event producing refugees which were gladly absorbed by the Western nations, asylum being easy to obtain. However, today the situation is much different. Europe has restrictive immigration policies and is often quite prejudicial against the asylum-seekers from the Third World. The general consensus is that most people fleeing their homelands (from the Third World) are trying to

improve their economic conditions by escaping to Europe. Visa restrictions and carriers' liability have all helped to reduce and discourage genuine asylum-seekers seeking refuge in Europe.

Early warnings of natural disasters and man-made disasters can sometimes prepare governments and the UNHCR to assist refugees. Natural disasters occur with the will of God and man has little control. But man can control the man-made disasters which affect the innocent lives of refugees, men, women and children, but because of international politics, man chooses not to do so. The superpowers, along with some governments, are to blame but not the refugees themselves.

### 1.3 SUMMARY TO INTRODUCTION

After noting the sources of international law and the statistical dimensions of the refugee problem, the introduction chapter will outline the scope and work of this thesis.

Refugees have existed throughout history and there is no doubt that they will continue to exist until the day of judgment. The most interesting era concerning the refugees was when the Greek empire was at its most dominant and powerful. The Greeks when faced with an influx of refugees did not want to acknowledge their existence because a refugee or any other alien, foreigner or sojourner presented a threat to their closely woven society. The Romans were the first civilization that introduced protection for the refugee although there was

still uncertainty about the actual definition of a refugee. Until the 16th and 17th centuries, historically speaking, there existed a confusion between refugees, aliens, citizens, residents and sojourners. Refugees were not distinguished from other immigrants.

International law and the protection of the individual was not codified or formulated until the 16th and 17th centuries. Distinguished scholars and jurists such as Grotius (1583-1645), Pufendorf (1632-94) and Vattel (1714-67) were the first group of people to distinguish between protection for refugees in domestic law and protection under international law. They recognised the necessity for the refugee to be protected. Once this protection was established there followed rights and privileges available to refugees.

History has revealed some prominent historical refugees, inter alia the Waldensians, the Quiet People of Switzerland, the Huguenots, the Armenians, the Jews and the Russians. All of these refugees had one common feature, that they were driven from their homes due to persecution or threats of persecution because they possessed different political and/or religious beliefs.

The invasion of such refugees led many States to enact domestic legislation to cater for the religious and political similarities. Many States were cautious as there was some danger of friction occurring between the host population and

the new refugees. The US Declaration of Independence (1776) sparked off the concern and prominence of human rights. States had to realise that all men were created equal, that they were born free and had equal rights. The refugees were also entitled to some form of protection and safety under this human rights banner.

The two World Wars had left a nasty reminder of how dreadful wars were. The international community as a whole was convinced that any future conflicts on the scale of World Wars should never happen again. The League of Nations was set up after World War I, where peace and international solidarity was seen to be essential. The League of Nations intervened on behalf of Russian emigrants who fled communist Russia. The League of Nations wanted to provide protection for these and similar emigrants but the League was still uncertain of the definition of a refugee - what was a refugee?

In 1921, the definition of the refugee included people fleeing from oppression and persecution, rather than for reasons of personal convenience or economic hardship. Dr Nansen realised the problem of the refugee in international law and he became the first High Commissioner to draw up a definition of a refugee. This definition included the Armenian and Russian refugees. Dr Nansen immediately realised that refugees had to be distinguished from other immigrants such as aliens, foreigners, visitors and students. The reason for this was that refugees did not have the protection from his State. The

refugee had actually fled from his government and it was unlikely that this government would offer protection. The relationship between a State and its disaffected nationals was not a happy one. The High Commissioner had the power and the competence to issue refugees with travel documents, which enabled the refugee to obtain protection and recognition as a refugee by the international community. The issue of travel documents effectively recognised the refugee in international law. The international community as a whole wanted a more precise definition of what was a refugee and what rights he possessed. The eventual formulation of the 1933 Convention relating to the Status of Refugees granted basic rights such as access to courts, schools, work, etc. The drafters of the 1933 Convention thought that the refugee problem would only be a temporary one which could be sorted out by States accepting refugees. However, it was not until the conclusion of World War II that real protection was granted to the refugee. The various agreements, conventions and arrangements prior to 1951 were unsuccessful in codifying real protection for the refugee. It was the drafters of the 1951 Convention relating to the Status of Refugees which defined the refugee and listed rights relating to him. The Office of the United Nations High Commissioner for Refugees (UNHCR), along with its statute, was also set up for the protection of the refugee.

The main convention which needs to be examined, analysed and expounded is the 1951 Convention along with the attachment of the 1967 Protocol relating to the Status of Refugees. The

travaux préparatoires of the 1951 Convention must be looked at in order to understand the meaning of this convention. The 1951 Convention was certainly more favourable to refugees; it defined the refugee and listed many rights and duties for the refugees. An article by article analysis was needed. But what were the main reasons for these articles? What did the drafters have in mind? The 1951 Convention attempted to establish an international code of rights and privileges for refugees. It has lacunae - what are they in relation to other human rights instruments? The biggest flaw with the 1951 Convention is that it only lists the rights of refugees, simply because the 1951 Convention acknowledges the presence of refugees and some minimal rights. The 1951 Convention does not require States having refugees to integrate them completely. There is no definition of asylum in the 1951 Convention. There are gaps and deficiencies in the 1951 Convention which will be exposed during the course of this thesis. The Third World and the communist States have failed to ratify this Convention - Why? The drafters of the 1951 Convention implemented two limitations: firstly, the 1951 Convention only applied to refugees originating from Europe and, secondly, only to refugees before the dateline of 1st January 1951. The ineffectiveness of these limitations was highlighted by refugees fleeing in Africa. The international community as a whole was unhappy about these limitations. Eventually the 1967 Protocol relating to the Status of Refugees removed these limitations to everyone's relief. The 1951 Convention, along with the 1967 Protocol, contained a definition which was

adopted from the experiences of the World Wars. The definition was purely for the individual, as the drafters did not foresee the masses of refugees which emerged in the late-seventies and eighties. Was the definition too individualistic, and is it outdated by today's standards? Interpretation of the 1951 Convention and the 1967 Protocol needs to be examined and expounded. Each article will be examined. Why was the 1967 Protocol an attachment to the 1951 Convention? Could the drafters not draft a new convention incorporating the provisions of the 1951 Convention with the 1967 Protocol?

Human rights refugees have already been mentioned above, but there is a difference between this category and the refugee who comes under the umbrella of humanitarian law. Are there any similarities between the two? An overview is required of the human rights refugees and its relation to the 1951 Convention and other human rights instruments. The definitions of human rights and humanitarian refugees are examined in Chapter Four of this thesis.

In 1969 the OAU adopted a convention relating to the specific aspects of refugees in Africa. They adopted the definition of the refugees but was this definition any better drafted than that in the 1951 Convention? Was the definition expanded to cater for African refugees, or did it simply rely on the provisions for general refugees? The 1969 OAU refugee convention was adopted and formulated because of the effects of decolonialisation. The major powers had left Africa, leaving

it in a state of chaos. The 1969 OAU Convention had incorporated the concept of asylum and categorically stated that the granting of asylum was not to be regarded as an hostile or unfriendly act by other states. It is interesting to compare and contrast the 1969 OAU Convention with the 1951 Convention and 1967 Protocol. What are the deficiencies? Can the 1951 Convention and 1967 Protocol improve their provisions, taking the OAU as an example, and which is the better convention?

The 1969 OAU Convention could well be a better drafted convention, but what are its relations with Member States? There appears to be a dichotomy between practice and policy of the 1969 OAU Convention. The examples of some Africa States will be highlighted.

There must be a difference between the criteria for the determination of refugee status and the procedure for the determination of refugee status. The former and the latter will be examined below. There are no procedures for the determination of refugee status in any refugee instruments. States have a complete discretion to set their own procedures for the determination of refugee status and asylum. This is an important stage determining whether the asylum-seeker will be granted refugee status and asylum, or whether he/she will be returned or refouled to his State of origin. Are there any guidelines within the UNHCR Handbook which assists States in setting procedures for the determination of refugee status? If

there are, do States treat them as binding or as just guidelines? The procedures of the Federal Republic of Germany and the United Kingdom are analysed and examined. The Federal Republic of Germany used to have a lenient policy of granting refugee status and asylum; however, due to a mass influx, it has now adopted a restrictive policy in granting refugee status and asylum. The United Kingdom has also adopted a more restrictive policy towards refugees and asylum-seekers and its procedure system contains some obvious flaws. For instance, its immigration officers are inadequately trained; there appear to be lengthy delays in making decisions on the applications of asylum-seekers; and there is a need for improvement of the attitudes of the persons who are involved in the application of the 1951 Convention and 1967 Protocol towards Third World asylum-seekers. There is now no right of appeal by the asylum-seeker if the person is deemed to be an "illegal entrant", for in the UK such a person is classified as using deception to obtain entry to the UK.<sup>166</sup> The UK authorities disregard Article 31 of the 1951 Convention which advocates non-discrimination of illegal entrants. Also, the automatic right of appeal to the United Kingdom Immigrants' Advisory Service and Members of Parliament has been removed for the asylum-seeker while he remains within the UK.

The principle of non-return at borders forms an important link between the criteria for determining refugee status and asylum. The principle is known as non-refoulement and it was codified

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<sup>166</sup> By the immigration authorities and the adjudicators.

following World War I.<sup>167</sup> The principle of non-refoulement needs to be examined in Treaty or Convention and Customary Law. The 1951 Convention, along with the 1967 Protocol, contains this principle which is embedded in Article 33. The travaux préparatoires must be looked at in order to examine the meaning of Article 33, its scope and its limitations. Is the principle of non-refoulement or Article 33 to be read simply on its own or should it form part of other articles?<sup>168</sup> The principle of non-refoulement must be examined with the other articles, namely 31 and 32. Article 31 grants respectability to illegal entrants, while Article 32 prohibits expulsion, although under international law, every State is competent to expel any aliens. The application of non-refoulement needs to be examined at borders, seaports and airports. The importance of Article 33 was shown by the drafters of the 1951 Convention when they imposed no reservation on Article 33, inter alia, as stipulated in Article 42 of the same Convention. There are also a number of regional instruments which state the principle of non-refoulement - these also have to be examined. The principle of non-refoulement is also examined in light of customary international law, expounding texts of international instruments; UN General Assembly Resolutions; State practices; and international conferences. One question which needs to be examined is whether the principle of non-refoulement really forms a part of customary international law? It may form a

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167 Although there were signs of its recognition during the time of Grotius and Vattel.

168 Articles 31 and 32.

limited part.

The 1951 Convention does not forbid rejection at the border or frontier and, quite simply, States can reject asylum-seekers and still not be in violation of breach of the 1951 Convention. The 1951 Convention does not contain a provision dealing with admission. Are these deficiencies grave in nature? These will be examined. The United Nations has observed the refoulement of refugees but have not condemned the States that refoules the asylum-seekers.

Asylum is another important link in the chain for the protection of a refugee. Asylum means a sanctuary - a place where a person who is pursued can take refuge. Asylum can take the form of 'territorial' or 'diplomatic'. The latter will not be discussed in the course of this thesis. The concept of asylum appears in Article 14(2) of the Universal Declaration of Human Rights, but it is not legally binding on States. The wording of Article 14(2) is vague and ambiguous. Asylum is not defined in the 1951 Convention or the 1967 Protocol. Why was this so? States are given discretion on whether or not to grant asylum which will be investigated in this thesis. For the refugee law to be implemented and incorporated, international solidarity, friendship and responsibility are required. States must co-operate with each other and should not regard the granting of asylum as an unfriendly act. The recent influx of 'boat people', fleeing from violations of human rights, persecution and piracy, shows the need for

international co-operation. The position of asylum-seekers at sea is highlighted but the rescue of these people by the captain is to be regarded as a humanitarian act. Is the captain to the rescue vessel under any legal obligation to save these people? UNCLOS II and III<sup>169</sup> will be examined although there is nothing concrete in the travaux préparatoires of these conventions.

Asylum in customary law needs to be examined. Is there a trend for the States to imply deterrence and strictness? Is it true that many Western States do not want to grant asylum to refugees, especially if they originate from the Third World countries? State practice will include a glimpse into countries' domestic law systems to examine the provisions for asylum. Many systems may include vagueness and words such as "may" for use when granting asylum. The vagueness of domestic legislation and regulations, together with the deficiency of the term "asylum" in the 1951 Convention and 1967 Protocol, leads to the reluctance of the international community to grant asylum to refugees. The eligibility for asylum varies from country to country. There is a need for standardisation of eligibility for asylum. The asylum-seeker depends entirely on this eligibility process and it could mean the difference to being granted refugee status and asylum and return to his State of origin. An examination of the USA and the UK has been carried out with a view to acknowledging and proving the need for standardisation of eligibility for asylum. In the USA, the

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<sup>169</sup> Article 98 concerns the rescue of people on high seas.

Supreme Court acknowledged this need in the Cardoza-Fonseca case. This case was of some importance, not only because of the favourable decision for the refugee but also because the Supreme Court is the highest common law court in the land and its decisions are bound to affect other similar cases all around the world. The US ratified the 1967 Protocol in 1968 and this prompted the 1980 Refugee Act which incorporated the provisions of the 1967 Protocol and 1951 Convention, thus bringing the US domestic law firmly into conformity with the refugee convention. A great deal of discussion will take place over the term "well founded fear of prosecution", a condition which the asylum-seeker must satisfy if he is to be granted refugee status and asylum.

The UK ratified the 1951 Convention in 1954 and the 1967 Protocol in 1968 but have not yet reformed that part of the British domestic law. The UK entertained a case which was decided by the House of Lords on the eligibility for asylum for 6 Tamil refugees, who had escaped from Sri Lanka to the UK. The House of Lords, however, disagreed with the persuasive ruling in the Cardoza case and ordered that the Tamils be removed to Sri Lanka. They had interpreted "well founded fear of persecution" differently and held that in Sri Lanka there was only civil disorder and not persecution or fear of persecution. The term "well founded fear of persecution" can have many interpretations and in general this term depends on a case by case adjudication.

The work of the United Nations High Commissioner for Refugees (UNHCR) is of the utmost importance if the refugees are to remain under international protection. It is one such organisation where no objections have been made by States as to its functions, its aims and its objectives. It is a non-political organisation which helps to maintain its world-wide acceptance.

Historically speaking, why was such an organisation set up? The World Wars had produced many thousands of refugees who needed protection and assistance. How was the High Commissioner selected? The High Commissioner would ultimately control the organisation, so it was imperative that the High Commissioner be selected neutrally. Could he be selected through the General Assembly of the UN or the Economic and Social Council, or could he be selected by direct nomination of the Secretary-General of the UN? The former method was adopted as the latter would have certainly involved political implications.<sup>170</sup>

The UNHCR has a statute which follows the pattern of the 1951 Convention. An examination of the statute, article by article, will be needed, Its implications will be expounded. There are some similarities between the statute and the 1951 Convention which will be examined. Any dissimilarities will also be noted. In basic terms, the UNHCR's aims and objectives are to provide material assistance and protection to refugees. The

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<sup>170</sup> To the disgust of the US representative.

former is beyond the scope of this thesis while the latter will be examined in depth. The protection is carried out on three levels: universal, regional and national, since the UNHCR is a non-operational organisation and relies heavily on other organisations. The role of the UNHCR is varied, assisting governments in applying inter alia asylum, non-refoulement, non-detention, voluntary repatriation and refugee instruments.

The influence of the UNHCR is strong. States respect the organisation and its officers. In 1986, the office of the UNHCR undertook major organisational changes. Its infrastructure was changed, especially since the new Higher Commissioner was appointed. Is this change for better or for worse? The UNHCR now has a new bureau, the Division of Refugee Law and Doctrine, which replaces the old protection division.

The impression one gains from representatives of the Third World countries is that the UNHCR is predominantly a "Western" organisation with the staff recruited from the Western States. How far is this true? The Third World States need more representation in the UNHCR and there appears to be a lack of women within the organisation. An overview is needed of the workings of the UNHCR. Is it competent or is it a political beast implanted by the West?

Finally, a conclusion is needed at the end of the thesis which will answer all the questions already posed and many more. The conclusion will relate to the scope of the law to the refugee

problem as a whole. Refugees are an enduring feature of the human landscape and constitute one of the tragedies of our own and former times.<sup>171</sup> The study promises to make a significant contribution to understanding contemporary legal efforts to cope with refugees. Its coherence, comprehensiveness and range of perspectives combines to present an original viewpoint not achieved by any previous work in this field.

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<sup>171</sup> For further imaginative reflections and poetic views contact Dr Patrick Thornberry, Reader of International Law, School of Law, Liverpool Polytechnic.

## CHAPTER TWO

### Historical Context

## CHAPTER TWO

### HISTORICAL CONTEXT

Refugees have existed since the beginning of civilisation. Adam and Eve when they were forced to leave the Garden of Eden, became the first refugees. King David in the Old Testament granted refuge and asylum to the Philistine Ittai of Gath and King David himself became a refugee when he accepted asylum from King Achish of Gath when fleeing from Saul.

As we have seen in Chapter One, throughout history groups or individuals have been persecuted by stronger, more powerful groups or individuals, forcing and driving these unfortunate people to flee to another State or States. There was no real protection for fleeing refugees in municipal or international law, especially for their individual rights and privileges. Once within the territorial jurisdiction of the State granting refuge, the refugee was entirely at the mercy of the asylum State. Prior to the 16th Century, international communications were poor and news was unreliable, especially since it had to travel vast distances, and the law of nations was not cohesive. Some nations granted refuge or asylum on purely religious and

humanitarian grounds,<sup>1</sup> but were under no legal obligation.

During that period, the refugees were not classified as "refugees" in the present meaning of the word (see later) and it would not be until the 20th Century that our present definition would be internationally recognised. Throughout history, many instances can be cited to illustrate the presence of the "refugee".<sup>2</sup> The current meaning of "refugee" in the Oxford Dictionary is:

"One who, owing to religious persecution or political troubles, seeks refuge in a foreign country."<sup>3</sup>

The actual term "refugee" was not used prior to the 17th Century and substitute terms were used by States and jurists.

Pufendorf wrote:

"For he who engages in life's activities in his native land, or in the land where he has fixed the seal of his fortunes, enjoying full rights of that place is called a CITIZEN; he who enjoys partial rights is a RESIDENT; he who has established a less stable and a temporary seal of his fortunes in some place or other, is called a SOJOURNER. He who goes about on a foreign soil, intending to remain but a short time, is called an ALIEN, and his status

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<sup>1</sup> For instance, Abyssinia (Ethiopia) granted refuge to the prophet Mohammed and his followers in 615AD. At that time, virtually all refugees were religious fugitives, mainly belonging to the Protestant Church. Immigration restrictions were very rare and although public sympathy for victims of religious persecution was widespread, the distinction was rarely made between economic migrants and political or religious refugees.

<sup>2</sup> See later.

<sup>3</sup> The Shorter Oxford Dictionary, Clarendon Press, Oxford, 1984, p.1780.

## ALIENAGE." 4

The term "alien" <sup>5</sup> should be distinguished from the definition of a "refugee". The alien is a person who, being a national of State X finds himself in the territory of State Y, as a traveller, merchant or visitor. As a generally accepted norm, the entry and sojourn of the ordinary alien was and still is regularised on the strength of certain documents.<sup>6</sup> The crucial difference between an "alien" and a "refugee" is that the former can turn for assistance<sup>7</sup> and protection to his State, whereas the latter can expect to receive no assistance or protection, because he is escaping or fleeing from his State due to several reasons and factors, which will be dealt with in the following chapters.

2.1 THE GREEK ERA

There was no real protection from the Greek State towards refugees or aliens or non-citizens. Although the Greeks were well known for their hospitality, which was predominantly

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4 Pufendorf, *Elementorum Juris Prudentiae Universalis Libril Duo* (translation: Carnegie Endowment for International Peace), Vol.II, 1931, p.16.

5 See R.B. Lillich, The Human Rights of Aliens in Contemporary International Law, Manchester University Press, Manchester, 1984. See also Baroness Elles, International Provisions Protecting the Human Rights of Non-Citizens, UN Publication, New York, 1980.

6 Passport, a certificate of nationality or some travel document issued by State X.

7 Diplomatic, social, economic and cultural.

directed towards the citizens of the Greek State, and the "outsider" or the foreigner was not always accorded this hospitality. The Greek system was not merely a political "entity", it also possessed religious and tribal sympathies. The "outsider" who entered a Greek city automatically became a "trespasser", purely because he did not belong to the tightly woven Greek infrastructure. This was indeed a disadvantage for the refugee, alien or foreigner, especially where their basic rights were at stake.<sup>8</sup> Eventually, the Greek system became less hostile and States began to conclude treaties and agreements amongst themselves in order to safeguard each others' citizens. These were known as "isopolities". These "isopolities" gave privileges of various kinds to each member's citizens. But could these privileges apply to refugees? Protection for the alien was quite a different matter but a refugee was an individual who was being driven out of a State and that State was not prepared to offer any sympathy or protection to that refugee. Surely if one State, which was a member of the "isopolities", was to offer refuge or asylum to a refugee, could it be in breach of the agreement? It appears not. In the case of "Alcibiades",<sup>9</sup> a prominent Greek general (who was driven out on two occasions because of allegations of treason and mala fide political opinions) was granted asylum

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8 See C. Phillipson, The International Law and Custom of Ancient Greece and Rome, Vol.I, Macmillan & Co, London, 1911, pp.122,209,347-369.

9 See "Alcibiades" in UN Magazine, Refugees, No.32, August 1986, pp.38-9; Balogh, Political Refugees in Ancient Greece, Witwatersrand University Press, 1943, pp.5-6; and W. Adams, "Extent and Nature of the World Refugee Problem", AAPS, Vol.22, Philadelphia, 1939, p.15.

and refuge under the provisions of a "isopolities" treaty.

## 2.2

### THE ROMAN ERA

As in the Greek era, the Romans showed or indicated no protection for refugees. Despite the royal statutes assigned to the regal period, which ended with the expulsion of the last of the legendary seven kings of Rome in 510 BC, the Twelve Tables known as LEX DUO DECIM TABULARUM (law of the 12 tables) or simply DUO DECIM TABULAE (the 12 tables) formed the foundation of the whole fabric of Roman law.<sup>10</sup> The Romans were hostile towards aliens and refugees. The tone of hostility can be seen in Table 6 (paragraph 4):

"Against an alien a warranty of ownership or of prescriptive right shall be valid forever." <sup>11</sup>

Further evidence of hostility towards aliens or refugees can be discovered in the Rescript of Trajan on a Grant of Citizenship

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<sup>10</sup> The code was composed by a commission, first of 10 and then of 12 men, in 451-450 BC was ratified by the Centuriate Assembly. The Twelve Tables consisted of:- Table 1: Proceedings Preliminary to Trial; Table 2: Trial; Table 3: Execution of Judgement; Table 4: Paternal Power; Table 5: Inheritance and Guardianship; Table 6: Ownership and Possession; Table 7: Real Property; Table 8: Torts and Delicts; Table 9: Public Law; Table 10: Sacred Laws; Tables 11 & 12: Supplementary Laws.

<sup>11</sup> Twelve Tables of Rome, S. Riccobono et al, Fontes Juris Romani Antejustiniani, Vol.3, Firenze, 1940-43.

(113 AD).<sup>12</sup> The enemy and refugees were classified together and only Roman citizens possess rights and protection from the State, especially under the Twelve Tables of Rome. However, the emergence of "commercial interest" in Rome did slightly alter the position on refugees and aliens. By "commercial interest" is meant trade, importing and exporting goods which would be sold in Rome and abroad. "Friendly relations" were encouraged between Romans and foreigners on condition that these foreigners possessed "commercial suitability". But refugees could not fulfil this required "suitability", since they were fleeing and not traders. However, the Romans did subject refugees to "jus gentium", which also applied to native Romans but the "jus civile" was enforced exclusively for the citizens of Rome. "Jus gentium" was a system of law regulating the interrelationship of sovereign States and their rights and duties with regard to one another. The distinction between "jus civile" and "jus gentium" was made by Gaius in this Institutes:

"Every people that is governed by statutes and customs applies partly to its own peculiar law and partly law which is common to all mankind. For the law which each people establishes for itself is peculiar to it and is called "jus civile" as being the special law of that state (civitas); but the law which nature reason establishes among all mankind is observed

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12 Roman citizenship was not granted to a daughter of Accins (who had been an alien), because she had been born to a former wife who he had married whilst still an alien. The granting of Roman citizenship to foreigners who hadn't the right to civil marriage (ius conubii) did not include their previous offspring, unless exceptions had been specified. Only aliens were enrolled among the auxiliary troops in which were reckoned the equestrian cohorts. But often after 25 years service, deserving aliens were granted Roman citizenship.

equally be every people and is called "jus gentium" as being the law applied by all nations (gentes). And so the Roman people applies partly its own peculiar law and partly that which is common to all mankind." 13

Through "jus gentium", the Romans were the first people to appoint a "praetor peregrinus"<sup>14</sup> in 242 BC. The "praetor peregrinus" dealt with legal matters connecting Romans and foreigners (refugees), but the was to apply "jus gentium" and not "jus civile". From the development of the "jus gentium" and the "praetor peregrinus", one can see the emergence of protection for foreigners which would presumably include refugees.

### 2.3 THE MIDDLE AGES

Through the Middle Ages and with the emergence of Christianity,<sup>15</sup> the protection of refugees began developing and was noticeable, but there were no direct legal authorities on refugees themselves although there were some treaties which could be classified as 'quasi-protectionist'. There was a "Right to Reprisal" for the foreigner in a treaty of 836<sup>16</sup>

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- 13 F. De Zulueta, The Institutes of Gaius, Part I, Text with Critical Notes and Translation, Clarendon Press, Oxford, 1958, p.3.
- 14 He dealt with disputes where at least one party to the dispute was a foreigner (peregrinus).
- 15 Jesus Christ (BPUH) as a child had to seek refuge with Mary and Joseph in Egypt.
- 16 G. Cohn, Die Verbrechen in Offentlichen Dienst Nach Altdeutschem Recht, Vol.1, Karlsruhe, 1876, p.96.

between Sicard of Benevent and the Neopolitan king which contained a provision that there was a right to make reprisal but it was limited to denial of justice suffered by a subject of one party within the territory of another. This provision ensured that there was protection for the subject irrespective of why he was there. The provisions were extended further to the position of reprisals against judges who denied justice to aliens<sup>17</sup> in a Treaty between Emperor Lotar I (acting for Italian cities) and Doge Petrus Tradenicus of Venice in 1040.<sup>18</sup> During the Middle Ages, sovereign protection and legal jurisdiction had not yet developed and the sovereign or head of state was not placed at the centre of the municipal system, so the refugee automatically owed obedience and co-operation to the municipal law and the issue of protection per se did not arise. The refugee was in a dilemma. Firstly, he did not have the protection of his state of origin and, secondly, he had to obey his refuge State or be expelled or persecuted. If his State of refuge or asylum was not sympathetic to his reasons for fleeing, then one of the alternatives was to leave that State and seek another.

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17 The term "alien" should be carefully interpreted within the 836 and 840 Treaties (infra). The protection was in the form of a letter written by one monarch (wronged) to another (in whose territory the wrong was committed). It was a form of diplomatic pressure. But this would only apply to aliens or foreigners and rarely to refugees. Since the refugee has no protection from his monarch or head of state, it would be unlikely if the monarch or head of state would write to support subjects who were fleeing him and his territory.

18 Ibid.. Also see Mon. Germ. Hist., Cap. Reg France, Vol.III, p.133.

Grotius formulated an ideology which is accepted by most of today's jurists. This ideology proclaimed that the responsibility of foreigners, be they bona fide visitors, merchants, aliens or refugees, must belong to the municipal system. Grotius<sup>19</sup> indicated that the Head of State must be held responsible for protection of refugees, that temporary stay should be granted to transient people and a permanent stay for those who were in exile.<sup>20</sup> Grotius was the first jurist to draw a sharp distinction between the role of municipal law and international regulations relating to the protection of refugees and foreigners.

Pufendorf extended Grotius' views to include the notion of "personal injuries",<sup>21</sup> compensations for refugees or foreigners. This notion was that if the refugee or the foreigner was to receive some injury whilst within the territorial jurisdiction of the refuge State, then compensation would be paid to the injured person by the refuge State. Pufendorf, Grotius and Vattel held similar ideologies regarding the individual and his rights, but Vattel did make one aspect clear: that entry of refugees or foreigners can be denied if they appear to be a danger to the nation.<sup>22</sup> The Head

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19 De Jure Praedae (1604), Clarendon Press, Oxford, 1950, pp.218-219.

20 De jure Belli ac Pacis II (translated), 2, XV, XVS, 1646, Carnegie Institute, Washington, 1913, p.148.

21 Pufendorf, op.cit., p.18.

22 Chitty (Ed), Vattel - Law of Nations, Vol.II, Carnegie Institute, Washington, 1834.

of State was free to refuse entrance to foreigners in general or in some particular cases.<sup>23</sup> Vattel proclaimed that the sovereign was free to impose certain conditions upon the granting of permission to enter.<sup>24</sup> However, Vattel did state that these conditions and discretion should be exercised with regard to duties of humanity and that any misuse of these provisions by the sovereign should be dealt with by the community.<sup>25</sup> Vattel made the Head of State liable for the protection of refugees or foreigners in general. During the period of Vattel, religious beliefs were held to be of the utmost importance as long as they were in accordance with the beliefs of the State. But Vattel did state that possession of religious beliefs different to those of the refuge State should not lead to expulsions but there were exceptions.<sup>26</sup> Vattel's views provided the influence on the two most important cases of the 19th Century.

In Nishimura E. kin v US,<sup>27</sup> Nishimura E. kin (alien immigrant) was prevented from landing by an officer claiming he had the authority to do so under an Act of Congress. The statute allowed discretionary powers to an officer to be exercised by him; he was the sole executive judge. The right of foreigners

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23 Ibid., pp.7, 94.

24 Ibid., pp.8, 100.

25 Ibid.

26 Ibid., pp.10, 135. One such exception was engagement in controversial disputes with a view to disseminating the State's tenets.

27 142 US (1892), p.651.

to enter the US was on the decision of the executive or administrative officers confirmed by Congress under a due process of law. Mr Justice Gray, in delivering his judgement, stated:

"It is an accepted maxim of international law that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe [Vattel Lib, 2, ss.94,100]." <sup>28</sup>

In Musgrove v Chun Teeong Toy,<sup>29</sup> by section 3 of the Victorian Chinese Act 1881, a Chinese immigrant has no legal right to land in the colony until a sum of £10 has been paid for him. The master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants into the port of a colony than the Act allowed. The Court held that an alien does not possess a legal right to enter British territory. The counsels<sup>30</sup> concluded, applying Vattel's ideology, that:

On the broad constitutional ground, it was contended that Her Majesty by her prerogative had the power to prevent any alien from landing in any part of her dominions." <sup>31</sup>

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28 Ibid., p.1149.

29 (1891), AC 272.

30 Sir W. Phillimore QC and J.W. McCarthy (for the State) and Sir Horace Davy QC and Wrixon QC (for the Defendant).

31 Ibid., p.274.

and,

"... that every State may by international law exclude aliens ..."<sup>32</sup>

The counsel for the defence argued:

"With regard to alien friends, it was contended that they had as much right to land in, reside in, and leave the country, as an English subject had ..."<sup>33</sup>

Religion and State have never been easy bed-fellows, one of them has always tried to obtain, by effort, from the other, some part of its authority over the people, but their very struggle compelled them to accept the idea of power sharing and, when the time was favourable, the spirit of tolerance. But history has witness the fact that this spirit is at least as tenuous as human life.

#### 2.4 THE ISLAMIC BEGINNING

The Prophet Muhammad (BPUH) was born in 570 AD in an arrogant and tough merchant's town of Mecca. The Prophet was an orphan who spent his early years in poverty and without protection. The Prophet was not bitter at being poor, as he said himself: "poverty is my pride"; but from it he developed a determination to protect the weak and the poor, orphans and refugees. As

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<sup>32</sup> Ibid., p.276.

<sup>33</sup> Ibid.

soon as the revelation had occurred and the prophet began to spread his message, the wealthy Quraish began to show hostility towards the Prophet and his work. Those who wielded power recognised that the Prophet's work and message were subversive and threatened the established order of society. As resistance and hostility grew, the Prophet had to seek refuge firstly in Abyssinia (615 AD)<sup>34</sup> and secondly in 622 AD at Yathrib (Medina).<sup>35</sup> These 'refugees' abandoned their homes, possessions, friends and jobs to follow the Prophet in his exile which formed the nucleus of Moslems. The Prophet died in Medina and his tomb is visited by Moslems from all around the world; it is significant as the town which gave him and his followers asylum and refuge.

## 2.5 PROMINENT HISTORICAL REFUGEES

As stated earlier, there have been prominent historical refugees and it is perhaps advantageous at this stage to briefly mention some cases.

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34 Any Ethiopian refugee who turns to Saudi Arabia for refuge is automatically given asylum without any formalities because of the refuge those Abyssinians gave to the Prophet.

35 This Hijra was the beginning of the Moslem age and this emigration to Medina was the beginning of the Islamic calendar.

### 2.5.1 The Waldensians 36

This was a movement founded by Peter Waldo in 1170. They were based in northern Italy in the area between Aosta, Turin, Florence and Trieste and then spread to Germany, Southern Italy France and Spain. They believed in the Gospels and the Holy Trinity and because of their differing religious beliefs they were excommunicated by the Pope and classified as devil worshippers and witches. In 1532, some 10,000 families were massacred in France due to such classifications. The right of exile was granted, so large masses of refugees arrived in Switzerland. Early attempts to return failed but they did, however, eventually return after aid and assistance was granted them by William of Orange (William III).

### 2.5.2 The "Quiet People of Switzerland" 37

In Switzerland, the "Quiet People" (Die Stille in Lande) were subjected to executions and torture. They were industrious people who disassociated themselves from the State Church and allegiance to the State. Some 1,200 documented executions took place. They were forced to leave Switzerland and to search for places of refuge and asylum. They eventually found asylum in

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36 See Andre Chavaure, UN Magazine, "Refugees", No.31, July 1986, pp.35-36. Traces of the Waldensian movement can still be found in South America.

37 The leader was Conrad Grebel (1524). See Sandis Stromberg, UN Magazine "Refugees", No.23, November 1985, pp.30-33.

the United States, Holland, Canada, France and Switzerland.<sup>38</sup>

### 2.5.3 The Huguenots

One group of refugees, the Huguenots, are certainly worth a mention. The massacre of St Bartholomew, during the night of 24 August 1572, was the bloodiest incident of France's religious wars. Over 100,000 Huguenot men, women and children were persecuted and massacred for possessing Protestant religious beliefs. Due to its implications and effects upon the State, the "Edict of Nantes" in 1598 was promulgated by which the Protestant religion was recognised and, to some extent, accepted. However, Louis XIV repealed this legislation on 18 October 1685 which led to the flight of 250,000 Huguenot refugees into neighbouring States. They eventually settled in Europe, the United States, South Africa and Canada.<sup>39</sup>

### 2.5.4 Refugees of the French Revolution

Between 1789 and 1815, some 150,000 French people became political refugees as a result of the French Revolution and its adoption of State terrorism against the Ancien Regime and its supporters. However, most of these refugees eventually returned following the promise made by Napoleon that discrimination against them would cease. But even after such a

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<sup>38</sup> USA (160,000 refugees); Holland (53,000); Canada (41,000); France (3,000); and Switzerland (2,000).

<sup>39</sup> See, G.E. Reaman, The Trial of the Huguenots in Europe, the US, South Africa and Canada, Frederick Muller Ltd, London, 1986.

promise, many thousands of refugees still chose not to return to their country.

#### 2.5.5 The Armenian Refugees

The Christian Armenians were persecuted and massacred by the Turks of the Ottoman Empire. Such persecution was not based on individual discrimination by Moslems against Armenian Christians, but was the result of a deliberate decision made by the Government of the Turkish Empire. The Government wished to get rid of the non-moslem element in the Empire. The whole Armenian population was cleared out by house to house search. Some people were thrown into prison, tortured, raped and abused. This treatment led to a mass exodus of desperate refugees. Some 10,000 refugees were drowned in the Black Sea whilst escaping, others were driven into the mountains, and about 250,000 refugees fled to Russia and 5,000 to Egypt. The refugees totalled between 1.6 and 2 million.<sup>40</sup>

#### 2.6 HISTORICAL MUNICIPAL LEGISLATION

Large numbers of Huguenot refugees entered Germany and Frederick Wilhelm issued the "Edict of Potsdam", designed to

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40 See Viscount Bruce, The Treatment of Armenians in the Ottoman Empire, Hodder and Stoughton, London, 1915, p.664. Lord Bruce, Armenian Atrocities: A Murder of a Nation, Hodder and Stoughton, London, 1915, p.16. A.P. Hacobian, Armenia and War, Hodder and Stoughton, London, 1915; and Idem., Germany, Turkey and Armenia - A selection of documentary evidence relating to the Armenian Atrocities from German and other Sources, J.J. Keliher & Co Ltd, London, 1915.

assist and authorise the Protestant Huguenots to settle in Prussia and Brandenburg. Religion was the key issue of the period and in Europe many States authorised safe haven or refuge for those possessing similar religious beliefs.

Similar legislation was enacted by the British Parliament. The British Act of 1708 was passed and made into British law. This Act was titled, "The Act for Naturalising Foreign Protestants" and in Chapter 5 contained the following paragraph:

"Whereas the increase of people is a means of advancing the wealth and strength of a nation; and whereas many strangers of the Protestant or reformed religions out of a dire consideration of the happy constitution of the Government of this Realm, would be induced to transport themselves and their estates into this kingdom, if they might be made partakers of the Advantages and Privileges which the natural-born subjects thereof do enjoy." <sup>41</sup>

This Act was clearly designed for the Protestant Huguenots which would enable them to become naturalised and subject to the same benefits and privileges as the "natural born subjects".<sup>42</sup> This Act was one of the earliest examples of municipal legislation containing privileges for refugees.<sup>43</sup> However, the life of this Act was very short and in 1711 it was

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41 (7 Anne C.5) - Statute at large, Vol.4, p.339.

42 See (4 Geo 2 C.211), (1731), p.62, for an explanation of the term "natural-born subjects" and see also [1 Geo I 5.4], (1714), p.7, for the explanation of the term "naturalisation".

43 Even though this Act was limited to Protestant refugees.

repealed by the British Act of 1711.<sup>44</sup>

In France, the national assembly debated the refugee question and the law and eventually, in 1832, the adopted: "Loi relative aux l'etranger refugies' qui resideront en France".<sup>45</sup> The term "refugee" appears as an adjective rather than as a noun and refers to persons who did not have the protection or assistance of any State.

In the United States, it was a different story. In 1790 the United States Congress, through the Federal Constitution, authorised a rule of "naturalisation for foreigners".<sup>46</sup> Professor Grahl-Madsen considered this Act as:

"... the signal to legislation on nationality in the modern sense; a fateful development which has put its indelible mark on the law of refugees ..."<sup>47</sup>

However, the situation changed and hostility towards aliens became intense. Originally, the four measures known as the Alien and Sedition Acts, which were passed by Congress in 1798, had their background in the strife between the Federalists and Republicans who, in turn, were in conflict with vociferous sympathisers of France and Great Britain. The Amendment to the

44 (Anno decimo Anne Reginae, C.5) - Statute at large, Vol.4, p.512.

45 1832 Duvergier 210.

46 Act of 26 March 1790 (First Congress, Session II, Ch.3).

47 A. Grahl-Madsen, The Status of Refugees in International Law, Vol.I, Sijthoff, Leyden, 1966, p.11.

Naturalisation Act,<sup>48</sup> (which provided a period of 5 years for naturalisation of refugees and aliens), was changed to a period 14 years for naturalisation. Great debates ensued between the Federalists and Republicans.<sup>49</sup> However, the 5 year provision was restored in 1802.<sup>50</sup>

The refugees were certainly facing a dilemma, especially when on passing the "Act Concerning Aliens",<sup>51</sup> which authorised the President to order the departure of aliens if he was satisfied that they were a threat to the peace and safety of the US, the President presumed that there was a threat and the refugees were left to rebut such presumptions.

The position of refugees grew worse. In the "Act Respecting Alien Enemies",<sup>52</sup> it provided that when the President issued a proclamation of the existence of war with any foreign nation,

"All natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of 14 years and upwards, who shall be within the

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48 (1 Stat.566).

49 Robert Goodloe Harper stated that: "... nothing but birth should entitle a man to citizenship in this country", Annals of Congress, 5th Cong., 2nd Session, pp.1567-8. Harrison Gray Otis (of Massachusetts) offered a resolution that: "... no person who was born an alien ... should be capable of holding any office of trust, profit or honor under the US". The Otis resolution failed to be adopted because of the opposition to its provisions or in the belief that it was unconstitutional. See Annals of Congress, pp.1570-1.

50 2 Stat.153.

51 1 Stat.570. (This Act provided control of immigration).

52 1 Stat.577.

United States, and not actually naturalised, shall be liable to be apprehended, restrained, secured and removed, as alien enemies."

This Act implied that if the US was at war with the refugees' state of origin, then the male refugees were at the complete mercy of the US. Even though the refugee may well be an enemy of the state of his origin. This legislation was not repealed and constituted the basis of regulations concerning alien enemies which were issued during the First World War, more than a century after its enactment.

Likewise in the United Kingdom, in 1826<sup>53</sup> onerous restrictions were repealed and replaced by a system of alien registration. This was amended by the Alien Restriction Act 1836<sup>54</sup> (this provision remained in force until its repeal in 1905). During 1848 Europe was unstable, resulting in an exodus of political refugees who eventually arrived in England. But their presence led to substantial disturbances.<sup>55</sup> The British Parliament passed the Aliens Removal Act,<sup>56</sup> which was similar to the US legislation.<sup>57</sup> This Act granted discretionary powers to the Home Secretary and the Lord of Ireland to remove any aliens against whom written allegations had been made; but in section 3, there was a provision for the alien or refugee to appeal to

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53 (7 Geo.IV, C.54).

54 (64, 7 Will., IV, C.11).

55 Differing religious beliefs between Catholics and Protestants.

56 (11 and 12 Vict., C.20).

57 1 Stat.570.

the Privy Council if he or she had good reasons. This Act was certainly slightly more lenient than the US legislation as at least appeal opportunities were available.

In Canada too the authorities took measures to control the influx of refugees, some of whom were thought to be revolutionaries. From 1794, the Canadian authorities considered it necessary to maintain a permanent administrative machinery to scrutinize aliens entering Canadian territory.<sup>58</sup>

One difference between Canadian legislation and the UK Acts was that the former legislation was a preventative measure, whilst the latter incurred certain restrictions after the refugees or aliens had penetrated or entered British Territory.

2.6.1 What was the position of the refugees who were in transit.<sup>59</sup>  
Was there any form of protection in the 19th Century?

In 1866, the Colombian Congress undertook by statute to define the rights and duties of aliens. It was declared that the alien domiciled, not merely transient, should:

"... enjoy the same civil rights and guarantees and be subject to the same obligations as to property as Colombians ..."<sup>60</sup>

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58 Nova Scotian Act (38 Geo.III, C.1).

59 The term "transit" will be discussed below. For an historical interpretation, the term "transit" implies to "pass through".

60 Moore's Digest of International Law, Vol.3, p.819.

The interpretation of this statute can mean that as long as the alien is domiciled and "not passing through", the alien can enjoy some basic rights. There were provisions in an earlier treaty of 1846 (Article XIII) which, though it did not provide for any exemptions from municipal law, stipulated that the contracting parties should extend a "special protection whether the aliens or refugees were transient or dwelling therein".<sup>61</sup>

There was no clear cut legislation relating to the protection of refugees implemented in the municipal laws (historically speaking). One of the reasons for such denial was that refugees until very recently have not really been recognised, although there were legislation for aliens which in some cases could include refugees. Refugees were not recognised, as the term suggests,<sup>62</sup> but were classified as aliens. An "alien" was a more important term than other terms such as "foreigner", "visitor", and "traveller". With the European influx, several restrictive pieces of legislation were formulated and aggression towards aliens was witnessed in emergences of "expelling" legislation. However, today, States have a completely opposing view concerning the problem of refugees.<sup>63</sup>

## 2.7

### HUMAN RIGHTS PRE-LEAGUE OF NATIONS

Human rights were not codified until 1776 by the US Declaration

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61 Ibid.

62 See above for the term "refugee".

63 See below.

of Independence (adopted on 4 July 1776). The text read:

"... that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness."

A similar declaration was adopted in 1789 in France, the Declaration of the Rights of Man and the Citizen 1789 of the French Revolution stated:

"(1) All men are born and remain free, and have equal rights ..."

These texts have certainly influenced the foundation of human rights and certainly triggered off the awareness of the preservation of basic human rights. The ideas stemming from these declarations certainly spilled over into the eventual formation of the League of Nations.

2.8

THE LEAGUE OF NATIONS

The League of Nations was the first organisation created to maintain international peace and for the development of international peaceful co-operation. The League of Nations was established following World War I on the initiative of US President T Woodrow Wilson (1856-1924) in accordance with the recommendation of Havana, prepared by the American Institute of International Law in 1917, in Havana. It was an era of peace

treaties,<sup>64</sup> especially after the First World War. States genuinely wanted peace and one such treaty was entitled the Versailles Peace Treaty, signed on 28 June 1919,<sup>65</sup> and contained the League of Nation's Covenant which was accepted as an "integral part of the General Peace Treaty". The Covenant itself came into force on 10 January 1920.

The League of Nations became the guardian of the order created by suchlike treaties. Any state, dominion or even self-governing colony could effectively become a member of the League, under the condition that it gave a warranty accepting League of Nations' commitments and the  $\frac{2}{3}$  of the League's Assembly voting in favour of admission. The 32 victorious States which signed the Versailles Treaty and the 13 neutral States were classified as the original members. The League of Nation's Assembly and the Council were the supreme organs of the League. Both had equal powers and could only pass resolutions unanimously which often presented problems. All decisions required unanimity among those League members who voted, except for decisions strictly specified by the Covenant (procedure and election of Council), which could pass ordinary or qualified resolutions on a majority vote. In 1921, the Council created the Commission of Enquiry of the League of

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64 Treaty of St Germain with Austria, signed on 10 September 1919, was modelled on the Treaty of Versailles. The Covenant of the League of Nations was integrally included in the peace treaties. The war responsibility and reparation clauses were similar to those of the German treaty. Parties included Austria, Italy, Czechoslovakia and Rumania. Source: British and Foreign State Papers, London, 112:317.

65 British and Foreign State Papers, London, 112:1.

Nations, which investigated international disputes and conflicts. The Council, like the Assembly, could consider any matter relating to the maintenance of peace. The Council could also intervene in matters relating to the defence of national minorities.<sup>66</sup>

The League of Nations' Covenant 1919, Part I, Article 2, stated:

"The action of the League under this Covenant shall be affected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat."

The Council of the League was set up by Article 2 of the Covenant as a separate body to the Assembly. Article 3 of the Covenant stated that the Assembly was to consist of Representatives of the Principal Allied and Associated Powers, together with the Representatives of four other members of the League (Article 4 of the Covenant).

## 2.9

### THE LEAGUE OF NATIONS AND REFUGEES

In the area of refugees, the League of Nations was first required to intervene on behalf of the million "emigrés" or refugees from Russia who fled from the Soviet Revolution.<sup>67</sup> By

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<sup>66</sup> See A.F. Zimmern, The League of Nations and the Rule of Law-1918-1935, 2 Vols., London, 1939.

<sup>67</sup> These refugees were encouraged to settle in Eastern Europe and Constantinople by the persuasion of the International Red Cross Society.

1921, the International Red Cross Society was unable to deal with the refugee problem and they then addressed the Council of the League requesting assistance and help to deal with the refugees. The Council nominated a High Commissioner for Refugees (Dr Nansen) because he had just finished the task of repatriating over half a million prisoners of war. On appointing Dr Nansen, the League envisaged a quick solution and the original office was set up on a temporary basis and scale, because everybody at that time thought that it would be possible to repatriate the refugees quickly and efficiently. Unfortunately, this was not possible. By 1924, it was clear that the Soviet Government would not be prepared to accept or take back former Russian subjects except under "unacceptable" terms and conditions.

At that time, the newly-formed High Commissioner for Refugees and the Council itself, were unsure of what a refugee was. In other words, what was the definition of a refugee?

#### 2.9.1 The initial definition of a refugee

The Council or the High Commissioner could find no formal definition of a refugee. At the same time, one of the earliest agreements was signed at Moscow on 3 August 1921. This was an "Agreement regarding the repatriation of Latvian refugees who were at present in the territory of the Ukrainian Socialist Soviet Republic".<sup>68</sup> The agreement was for the

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68 Vol.XVII, LNTS, No.441, p.295.

repatriation of the Latvian refugees who expressly desired to be repatriated to Latvia.<sup>69</sup> The importance of this agreement is twofold. Firstly, voluntary repatriation had been highlighted in the international community and, secondly and perhaps more importantly, the foundations of the definition of a refugee had been laid. The refugee was defined as the one who:

"... ran away due to fear of oppression by military or civil authorities ..."<sup>70</sup>

This definition was important because it narrowed the definition to those who feared oppression and persecution, rather than anyone who was escaping famine or personal convenience. These Russian refugees consisted of individuals and families who had fled because of the violations of human rights brought about by the Russian Revolution. There were some who left because of poverty and famine, but the majority genuinely escaped persecution and oppression from the Bolsheviks. The great bulk of the Russian refugees had no valid travel documents and the prospects for repatriation looked remote. In 1921, the All Russian Central Executive Committee and the Council of Peoples Commission<sup>71</sup> rendered the Russians stateless as they had left Russia after the 7th November 1917; this created a mass of stateless persons. On

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69 Ibid., Article 1.

70 Ibid., Article 2.

71 See Williams, "Denationalisation", BYIL, 45, 1927.

noting the scale and intensity of the Russian refugee crisis, the international community had to proffer some kind of protection towards these refugees. The League of Nations' attitude towards the refugee problem was not so much a humanitarian duty to protect and assist refugees, but was rather an obligation of international justice.<sup>72</sup>

The League of Nations was faced with a dilemma, namely on how to separate refugees from ordinary immigrants and how to regulate legal status and assistance through various documents in order to assist the refugees to find accommodation and employment. The problem was made easier by the issuing of identity certificates for refugees. The exodus of Russian refugees prompted the League of Nations to officially arrange for these refugees to possess identity certificates. Dr Nansen formulated a report to the Council of the League of Nations on 17 March 1922 which recommended that the identification papers be issued to the Russian refugees. The Council examined the report and adopted it for its members and then encouraged non-members to adopt the Arrangement which the Council had formulated. The "Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, signed at Geneva on 5 July 1922".<sup>73</sup> This arrangement was adopted by eight

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<sup>72</sup> (1921), 2(2), League of Nations, CM 53-54. See also (1921) 13 League of Nations CM 53-54 on the decision of the IRCC to address the refugee problem as a juridical one rather than a humanitarian one, prompted the Council to respond positively.

<sup>73</sup> Vol.15, LNTS, No.344, p.237.

States,<sup>74</sup> and adhered to by sixteen.<sup>75</sup> This arrangement was based on the acknowledgement of the status of Russian refugees rather than on the actual definition of the term "Russian refugee". The arrangement contained administrative procedures which enabled the contracting States to possess a discretion for issuing such certificates. In fact, some non-League members also adhered (supported) this arrangement; they were: Chile,<sup>76</sup> China,<sup>77</sup> Japan,<sup>78</sup> Sweden,<sup>79</sup> and Uruguay.<sup>80</sup> Thus emphasising the intense overall problem that this represented for the international community as a whole.

#### 2.9.2 The Armenian and Russian refugees

The Armenian refugees were assimilated into the category of Russian refugees by the League of Nations and this was due to two aspects: firstly, there were large numbers of Armenian refugees who were fleeing from the Ottoman Empire because of harsh treatment by the Turks and violation of human rights, especially in the execution of the provisions of the Treaty of

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74 Taken up by Germany, Lithuania, Denmark, United States of Mexico, Poland, Portugal, Japan, and Hungary.

75 It was given support by Estonia, Finland, France, Great Britain, Latvia, Bolivia, Rumania, Union of South Africa, Switzerland, Norway, Italy, Bulgaria, Netherlands, Guatemala, Austria and Greece.

76 Vol.24, LNTS, No.355, p.178.

77 Vol.19, LNTS, No.355, p.285.

78 op.cit., vol.24.

79 Ibid.

80 Vol.27, LNTS, NO.355, p.421.

Lausanne.

### 2.9.2.1 Treaty of Lausanne

This was a peace treaty between the Allied Powers (British Empire, France, Italy, Japan, Greece, Rumania and the Serb-Croat-Slovene States) and Turkey, signed on 24 July 1923 at Lausanne.<sup>81</sup> Primarily, this Treaty was to recognise the annexation of Cyprus proclaimed by the British Government on 5 November 1914.<sup>82</sup> This peace treaty described the frontiers,<sup>83</sup> the peace to be re-established,<sup>84</sup> and contained the important provision that:

"Turkish nationals belonging to non-Moslem minorities will enjoy the same political rights as Moslems."<sup>85</sup>

The second aspect was that the International Community had considered the results of the system of identity certificates for the Russian refugees. In September 1923, the Council of League of Nations was called up to issue identity certificates to Armenian refugees.<sup>86</sup> The Armenians were actually settled in north-east Turkey and adjoining areas of Asia Minor. As

81 Contained four parts. Part I: Political Clause (Articles 1-45); Part II: Financial Clause (Articles 46-63); Part III: Economic Clause (Articles 64-100); and Part IV: Communications and Sanitary Question (Articles 101-118).

82 Article 20, Lausanne Peace Treaty, 1923.

83 Ibid., Article 4.

84 Ibid., Article 1.

85 Ibid., Article 39.

86 (1924), 5(7), League of Nations O.J. 967.

mentioned earlier, these Armenian Christians were persecuted and massacred by the Turkish Government as a result of different religions. The Turkish Government commenced a series of major deportations and killings. The presence of Allied occupation forces afforded some degree of protection to the Armenians but it was merely temporary. Grave violations of human rights continued but of a more intensive nature, especially on the withdrawal of the French troops. In June 1924, Dr Nansen compiled a report stating that some 320,000 Armenians were in need of identity certificates.<sup>87</sup> The Council of the League of Nations responded to Dr Nansen's report by adopting a resolution which called for the Armenian refugees to obtain emergency certificates.<sup>88</sup> The Armenians were provided similar privileges to the Russian refugees. These arrangements were generally well-received by the Governments but difficulties were encountered in administering the programme,<sup>89</sup> purely because there were no clear definitions of refugees and no clear outlines for those who were to receive the identity documentation. Dr Nansen realised that the refugees should possess a definition which all States could follow. He then suggested a prototype definition of the Armenian and Russian refugees, which was adopted by the intergovernmental conference in May 1926.<sup>90</sup> Dr

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87 Ibid., p.968.

88 Ibid., p.969.

89 Report by the High Commissioner, League of Nations, Doc.1926 XIII, 2, 1926, p.5.

90 (1925), 6(10), League of Nations O.J. 1535.

Nansen had realised the need for a common definition that would enable each Member State to administer the programme. Dr Nansen received full support from the Council of the League of Nations which voted to recommend the definition for favourable consideration by Member States. There was overall agreement and consent. The international community considered it necessary to regularise the system. This regulation was done by adopting the,

"Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees ... signed at Geneva on 12th May, 1926." <sup>91</sup>

This was the first agreement whereby the term of "Russian and Armenian refugees" was defined. The Russian "refugee" was:

"Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republic and who had not acquired another nationality." <sup>92</sup>

And the Armenian "refugee" was:

"Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality." <sup>93</sup>

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91 Vol.84, INTS, No.2004, p.48.

92 Ibid., para 2.

93 Ibid.

The Conference explicitly referred to the "refugee" as the one who does not enjoy the protection of their Government. This was of the utmost importance. Refugees had to be distinguished from aliens, foreigners, visitors and students. The alien possesses protection from his own Government but the refugee does not, he is usually fleeing from persecution and oppression. The right of protection abroad depends in large measure to the intimacy of the relationship existing between the State and its subject. The refugee does not possess a happy relationship with his State.

The Arrangement does not explicitly require the refugees to be outside the country of origin but it did cater implicitly for this by issuing travel documents which would enable the refugee to travel.<sup>94</sup>

Several States<sup>95</sup> found it necessary to define more clearly the legal status of Russian and Armenian refugees. These States adopted resolutions such as:

1. That the High Commissioner of Refugees would appoint representatives from the adopting States and these services should not be within the "exclusive competence" of the national authorities.

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94 Op.cit., p.49.

95 Germany, Belgium, Bulgaria, Estonia, Rumania, Kingdom of the Serbs, Croats and Slovenes, and Switzerland.

2. That the personal status of Russian and Armenian refugees should be determined in countries where the law would not be recognised, thus suggesting a complete impartiality of the State granting asylum or the certificates.<sup>96</sup>
  
3. That protection against expulsion be implemented,<sup>97</sup> especially if the refugee entered a State of refuge in a "non-regular" or "illegal manner. However, if the refugee intentionally breached national or domestic laws of the State of asylum and refuge, then the refugee could be expelled to a neighbouring State irrespective of the status which the refugee held.

There seemed to be a great deal of power devolved upon the High Commissioner himself.<sup>98</sup> The selection of the High Commissioner was certainly political and Greece did actually make a reservation on this issue,<sup>99</sup> and also on the powers granted to the High Commissioner for the selection of his staff.

#### 2.9.2.2 Nansen's Passport

The Eastern Christians, the Chaldeans and the Assyrians, were made homeless by the Turkish Government. These refugees were

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<sup>96</sup> Vol.84, INTS, No.2005, para 2, pp.55-61.

<sup>97</sup> Ibid., para 7.

<sup>98</sup> Such as issue of travel certificates, organisation, co-ordination and distribution of programmes relating to refugees.

<sup>99</sup> Vol.84, INTS, No.2005, op.cit., p.61.

included in the scope of Nansen's office and were referred to as "assimilated refugees".<sup>100</sup> The emigrés were deprived of their Russian and Turkish nationalities and of their passports or similar travel documents. In legal terms, these refugees had to be provided with documents of identity and travel and to establish some agreement as to the law which should govern their civil status and secure them some form of protection in the countries in which they were living. Nansen formulated the passport,<sup>101</sup> which enabled these and other refugees some form of movement and protection.

### 2.9.3 Expansion of Refugee Categories

In December 1926, the Council of the League of Nations resolved to extend protection to "other categories of refugees who, as a consequence of war, are living under analogous conditions (to those of the Russian and Armenian refugees)".<sup>102</sup> The High Commissioner's report suggested that the League of Nation's protection should be expanded and extended to further categories of refugees. Some 155,000 refugees came under the following seven categories:

(a) Some 150 Assyrians who had to leave their homeland in

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100 This term was used because Nansen's office wanted to classify the Chaldeans, Assyrians and the Eastern Christians (who had no real legal definition) as one specific category under the umbrella term of "assimilated refugees".

101 As we know it today.

102 (1927), 8(2), League of Nations, O.J. 155.

1922. They moved to Novovsik, Constantinople, Smyrna and Marseilles. The Assyrians possessed no passports or travel documents.

- (b) 19,000 Assyro-Chaldaeans had fled to Caucasus and Greece. They also needed travel documents.
- (c) Some 150 Turks (friends of the Allies) who were residing in Greece and the Near East, and had been barred from returning to their homeland by the Protocol of the 1923 Declaration of Amnesty,<sup>103</sup> signed at Lausanne.
- (d) Uncertain numbers of Montenegrins living in France who could not return to the Kingdom of the Serbs, Croats and Slovenes.
- (e) 9,000 Ruthenians who fled to Galicia.
- (f) 110,000 refugees dispersed throughout Central Europe, especially former Hungarians, many of whom wanted to emigrate but could not do so due to non-possession of passports.
- (g) Some 16,000 Jews who were unable to obtain Rumanian citizenship.

The High Commissioner's recommendations were met with disapproval by the Council of the League of Nations in September 1927.<sup>104</sup> The opposition stated that the mere fact that there were certain persons without the protection of any national Government did not automatically imply refugee status or definition.<sup>105</sup> The Rapporteur, Mr Commère, stated that the

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<sup>103</sup> Declaration of Amnesty, 24 July 1923, 913 LNTS 147.

<sup>104</sup> (1927), 8(10), League of Nations O.J. 1137.

<sup>105</sup> Ibid., p.1137.

exodus of refugees must result from consequences of war or events directly connected with war.<sup>106</sup> This view was upheld by other Council members. In June 1928, the Intergovernmental Conference was convened and the question of extending the League of Nations' protection to additional categories was placed on the agenda. But the Conference adopted a somewhat comprehensive definition of the Assyrians and Assyro-Chaldaeans who were to be assisted, but the delegates narrowed the reference to Turkish refugees to precisely the 1,150 individuals contemplated by the High Commissioner. Nine States<sup>107</sup> adopted the resolution<sup>108</sup> which suggested that the measures, which were taken on behalf of the Russian and Armenian refugees, should be extended to Turkish, Assyrian and Assyro-Chaldaeans and assimilated refugees. The Conference actually defined these refugees and managed to adopt the following definitions:

"Assyrians, Assyro-Chaldaeans and assimilated refugees":

"Any person of Assyrian or Assyro-Chaldaeans origin, and also by assimilation any person of Syrian or Kurdish origin who does not enjoy or who no longer enjoys the protection to which he previously belonged and who has not acquired or does not possess another nationality." <sup>109</sup>

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106 Ibid., p.1138.

107 Germany, Belgium, Bulgaria, Estonia, Latvia, Rumania, Kingdom of Serbs, Croats and Slovenes, and Switzerland.

108 Vol.84, LNTS, No.2006, pp.64-67.

109 Ibid., p.65.

"Turkish refugee:

Any person of Turkish origin, previously a subject of the Ottoman Empire, who under the terms of the Protocol of Lausanne of 24 July 1923,<sup>110</sup> does not enjoy or no longer enjoys the protection of the Turkish Republic and who has not acquired another nationality."<sup>111</sup>

The Governments, in general, were frightened of receiving a large number of alien inhabitants on a permanent basis and in the end adopted an inferior version of the status of the refugee. The human victims (refugees) were being passed from one State to another, serving periods of imprisonment for trespass of frontiers. The aim of the 'voeu' of the Assembly was that the refugee should not be turned into an outlaw.<sup>112</sup> In 1930, Dr Nansen died and the Office of the High Commissioner was not maintained and in its place the Nansen International Office for Refugees was set up by the decision of the Eleventh Assembly.<sup>113</sup> The political and legal protection of refugees was entrusted to the organ of the League, a special refugee office (see Chapters Nine & Ten later) which would take over the humanitarian duties hereto discharged by the High Commissioner. Before the dissolution of the Office, a

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110 Vol.36, INTS, No.913, p.145.

111 op.cit., pp.66-67.

112 France and Britain were concerned about this and it formed the subject of an international agreement between the two States. Nevertheless, its validity was questionable and the matter was discussed at the Court of Cassation in France but was not upheld. It was realised that the legal status of refugees and their protection required something more than benevolent recommendations.

113 (1931) League of Nations, O.J. Spec.92, p.38.

Convention was adopted to define the international status of refugees. This Convention was very important in the sense that it was the foundation of the more important 1951 Convention Relating to the Status of Refugees.

2.9.4 The Convention Relating to the International Status of Refugees, Signed at Geneva, 28 October 1933 (1933 Convention)<sup>114</sup>

The 12th Assembly of the League of Nations acknowledged that a more permanent system was required and that former arrangements were only recommendations to Governments and hence were not obligatory. But the proposed new convention would impose a series of obligations on all ratifying States. The International Office for Refugees<sup>115</sup> suggested that former refugee definitions<sup>116</sup> should be implemented in the Convention, but there was opposition, especially from the delegates of Czechoslovakia and Poland who stated that the original definitions in the 1926 and 1928 Arrangements were vague, imprecise and therefore should not be included in the final text of the Convention.<sup>117</sup> The Chairman disagreed with the Czechoslovakian and Polish delegates and concluded that the definitions should be implemented and incorporated within the Convention. The Chairman's view was very important and

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114 Vol.159, LNTS, No.3663, pp.199-217.

115 Report of the Governing Body of the Nansen International Office for Refugees, League of Nations Doc., 1933, XIII (1933), p.3.

116 1926 and 1928 Arrangements, respectively.

117 (1933), 12(3), League of Nations O.J. 1535.

extremely persuasive, and eventually all the definitions were indeed incorporated with a special reference to human rights.<sup>118</sup>

On 28 October 1933, the Convention relating to the International Status of Refugees was adopted and certain human rights standards were upheld and implemented. In the preamble, it stated:

"Members of the League will endeavour to secure and maintain fair and humane conditions of labour for men, women and children ..."<sup>119</sup>

In general terms, the founders of this Convention were anxious to establish conditions for the refugees to enjoy civil rights; free and ready access to domestic courts; security and stability as regards establishment and work; facilities in the exercise of professions in industry and commerce; and, in regard to the movement of persons, admission to schools and universities. A general awareness of refugees' problems was introduced at this Convention by the ratifying parties. It would be appropriate at this stage to mention some Articles of the Convention.

Article 1:

Stated (to the disapproval of the Czechoslovakian and Polish delegates) that: "The present Convention is applicable to

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<sup>118</sup> However, only 8 States accepted this Convention.

<sup>119</sup> Vol.159, op.cit., p.201.

Russian, Armenian and assimilated refugees ..."<sup>120</sup> Article 1 was certainly very basic in the sense that only three groups of refugees were actually defined. At the time of drafting the Convention, the League of Nations did not envisage further refugee flows and certainly no further large groups of refugees. But the drafters were to have a surprise when other groups of refugees soon sprang up requiring protection (see later).

Article 2:

Stated that the Nansen certificates were to be valid for not less than one year. This was an improvement on the original arrangement.<sup>121</sup>

Article 3:

Was one of the most important articles within this Convention. It stated:

"Each of the contracting States undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, ... unless ... by reasons of national security or public order."

"It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin."

"It reserves the right to apply such internal

<sup>120</sup> Ibid., p.203.

<sup>121</sup> In regard to the period of validity as well as to the right of return to the refugee's country.

measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country."

The principle of Non-Refoulement had been born in international conventions. Refugees could not be returned at the borders or territories, unless the refugee was a risk to national security or public order. Effectively, all ratifying States were compelled to accept refugees and not to return them. Article 3 of the Convention was installed later in the 1951 Convention Relating to the Status of Refugees, in Article 33, which according to some jurists became a principle of international law.<sup>122</sup>

Paragraph 2 above indicates that ratifying States were under a "legal" obligation to grant asylum or refuge to the fleeing refugees. Paragraph 3 shows a slightly negative view on refugees who were expelled, the term "such internal measures" was very vague and uncertain. Could this term imply prison sentences, detentions and other violations of human rights if the refugee was to be found guilty of the offence of infringements against "national security or public order"? The discretion for interpretation of this term was left to the ratifying State.

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<sup>122</sup> See Non-Refoulement in Chapter Seven.

#### Article 4

Can be compared with Article 6 of the 1938 Convention (see later). The terms "domicile" and "residence" were deliberately emphasised and separate. This would ensure complete safety for refugees to have their status recognised or selected. There is no mention on "determining the status of refugees".

#### Article 6

Was another important item, especially since this Article was reiterated by Article 8 of the 1938 Convention. Article 6 stated:

"Refugees shall have, in the territories of the Contracting Parties, free and ready access to courts of law.

In the countries in which they have their domicile or regular residence, they shall enjoy, in this respect, the same rights and privileges as nationals; they shall, on the same conditions as the latter, enjoy the benefits of legal assistance and shall be exempt from 'cautio judicatum solvi'."

This article places the refugee in a similar position to the national especially in matters of access to courts of law. They also enjoyed the same "rights" and "privileges" but once again the terms were vague and deliberately kept ambiguous. The refugees enjoyed the benefits of legal assistance on similar grounds as the nationals. National labour markets were open to usage by the refugees; the laws and regulations (which applied restrictions on behalf of the labour conditions) could not be applied if the refugees were:

- "(a) ... resident for not less than three years in the country;
- (b) ... married to persons possessing the nationality of the country of residence;
- (c) ... one or more children possessing the nationality of the country of residence;
- (d) ... ex-combatant of the Great War."

### Article 8

Refugees who suffered industrial accidents were given "most favourable treatment" on similar grounds the nationals of a foreign country.

### Articles 9, 10 and 11

Respectively, contained provisions of humanitarian and general human rights such as "Unemployed persons suffering ... shall have medical and hospital treatment". Article 10 contains social insurance laws for the refugees and the refugees were to be given education at schools and universities similar to national students.<sup>123</sup>

### Article 13

Stated that no charges or taxes were to be imposed on the refugees other than those levied on their nationals in similar situations.

From the Articles mentioned above, one can see the formulation

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<sup>123</sup> Article 12.

of human rights for refugees. The human rights doctrine and the refugee doctrine were combined to provide a satisfying Convention for the protection of refugees. However, there were some States who made some reservations to some of the Articles.

The 1933 Convention expressly defined and provided for Armenian and assimilated refugees. It was also to cover the Assyrians who were forced to emigrate from Iraq, as well as those who were earlier driven from Turkey and Syria. But the 1933 Convention did not cover the large number of refugees from other countries who also needed urgent assistance and protection.

When a bond between the State and the individual is broken, no international entity may be held responsible for the individual's actions. The result is that States have been reluctant to accept individuals who were not legally responsible to the State. The basic definition in the Arrangements of 1926, 1928,<sup>124</sup> and the 1933 Convention were designed and promoted to break down this problem, that is, to provide truly international refuge for people who had no existing link or bond between them and their countries. The definitions all contained a criterion of ethnic or territorial origin.

It is interesting to point out that the Council of the League

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<sup>124</sup> The 1928 Arrangement (but not agreements), of limited scope and only acceded by Belgium and France, had been a form of recommendation.

of Nations had decided to accord refugee status to only three of the seven categories which the High Commissioners recommended. The few excluding categories were:

1. The Montenegrins, because they were believed to be eligible to receive legal passports;
2. The Ruthenians.
3. Refugees from Bassarabia and Transylvania, and the Jews of Bukowina;
4. Central European refugees.

The latter three categories were rejected because of a decision to bar certain groups from the assistance of the League of Nations.

#### 2.9.4.1 Lack of individualism

There was a lack of individual determination of the status of refugees by the League of Nations. This was because individualistic determinations would be very difficult in terms of practicability. When one State is faced with thousands of refugees arriving all at once at the borders or territories, then individual determination becomes extremely difficult. Refugee status was always based on group definition, although there was a late attempt to incorporate this by the Government of Switzerland in 1926. This was,

"Any non-Bolshevist person of Russian origin who has not acquired the nationality of the USSR nor any

other nationality." 125

This proposal was not considered at the Intergovernmental Conference and the individualistic approach was not adopted.<sup>126</sup>

#### 2.9.5 The Status of Refugees Coming from Germany

In 1933 the emergence of the National-Socialist Government in Germany forced some 60,000 people to leave the country, either because they were of Jewish origin and were subjected to deprivation of basic human rights, or because they were political "undesirables" on account of their socialist, pacifist and Jewish sympathies. The Jewish people or people of Jewish origin had to choose between exile, persecution and violation of human rights. The relationship of the State (Germany) and its subjects (in particular Jews) was extremely grave and delicate. The German State or the Government of Germany would offer no protection (internationally or nationally) and the unfortunate Jews were forced to flee Germany. Germany was not covered by the League of Nations minority rights system, hence the Jews were without protection from the League of Nations. This was because Germany was not a League of Nations member, hence the League could not afford protection to citizens of a non-member State.

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125 Report by the High Commissioner, League of Nations, Doc. 1926, XIII, 2 (1926), p.13.

126 Although later instruments, namely the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, were very individualised. A major fault in these two instruments. See below.

Another factor which made the adsorption of the Jews highly difficult was the economic Depression that the Western world was experiencing. There were many intellectuals and highly-motivated refugees who normally would have been welcome in Europe if it had not been for the industrial slump. International collaboration was needed.

The League of Nations, however, decided to define the German refugee in order to formulate an Arrangement for the protection of the refugees fleeing from Germany in particular. Prior to the 1936 Conference, the High Commissioner had prepared a draft convention<sup>127</sup> in which he defined a German refugee 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."

The High Commissioner also stated three additional conditions:

1. Only persons who had immigrated from Germany could apply for refugee status.
2. The person must not enjoy the protection of the Reich Government.
3. Persons who did not have German nationality were excluded.

The "Provisional Arrangement concerning the Status of Refugees

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<sup>127</sup> Draft Provisional Agreement regarding the Status of Refugees, League of Nations, Doc., Conf./SRA/1, 1936.

coming from Germany, signed in Geneva on 4th July 1936",<sup>128</sup> was adopted.

The definition of the term "Refugee coming from Germany" was stated in Article 1 as:

"For the purpose of the present Arrangement, the term "refugee coming from Germany" shall be deemed to apply to any person who was settled in that country, who does not possess any nationality other than German nationality, and in respect of whom it is established that in law or in fact he or she does not enjoy the protection of the Government of the Reich."

The emphasis was on the contracting States to grant documents for travelling. The term "shall" was used to indicate that it was mandatory for the contracting States to issue and review certificates of identity.

Article 4 was of some importance, stating:

"Without prejudice to the measures which may be taken within the country, refugees who had been authorised to reside in a country may not be subjected by the authorities of that country to measures of expulsion or be sent back across the frontier unless such measures are dictated by reasons of national security or public order."

The United Kingdom made a reservation on this Article. Article 4 was framed on similar grounds as Article 3 (1933 Convention) on non-refoulement of refugees. The UK claimed that refugees were entitled to protection from returning, but on extradition

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128 Vol.171, INTS, No.3952, p.77.

proceedings it was a different matter. On ratifying and not making a reservation on Article 4, the UK was not obliged to prevent the refugee from refoulement (sent back), if extradition proceedings had commenced in the UK. The term "authorised to reside" was vague. Could this apply to persons or travellers on a temporary visit or purpose or was this to apply to persons whose refugee status had been granted and were given "indefinite leave to stay" as "refugees"?

The definition adopted by the Conference of 4th July 1936 was different than that which was recommended by the High Commissioner. The Arrangement required the refugee to be "settled" in Germany rather than the refugee to have "merely left" that country. There was also an indication to exclude from the scope of the Arrangement stateless persons who had never possessed German nationality. In March 1937, the League of Nations invited governments to participate in a conference to draft a more comprehensive plan for the protection of German refugees. The primary reason for German refugees was that at that time Hitler had become Chancellor of Germany. The Saar Territory was no sooner joined with Germany as a result of the plebiscite of January 1935, than refugees started pouring out from that territory. The events in Germany were followed by a provisional arrangement (1936, see earlier) and by a Convention of 10th February 1938 on the same subject. The 1938 Convention, along with the 1933 Convention, formed a limited basis to the 1951 Convention.

2.9.6 The Convention Concerning the Status of Refugees Coming from Germany with Annex, signed at Geneva on 10th February 1938 (1938 Convention) 129

This Convention was formulated and adopted for the observation and implementation of basic human rights for the subjects who fled from Germany. The term "refugees coming from Germany" was similar to the previous arrangement. However, in Article 1, the provision stated:

- "(a) 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 German Government;
- (b) Stateless 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 Germany Government."

In previous agreements and arrangements, only German nationals (who were without the protection of the German Government) were the "subjects", but in the 1938 Convention the protection was extended to "Stateless persons not covered by previous Conventions or Agreements". There was a growing practice in a totalitarian state to deprive the leaders and often ordinary members of opposing parties of their basic human rights and on many instances driving them out of Germany. This created groups of stateless refugees in nearly all the countries of Europe. They were mainly Italian, Hungarians and Austrians who

had no protection from the State and indeed faced great difficulty in travelling and obtaining employment. The above Provision was designed to cater for such refugees or stateless persons who were not covered by any previous arrangements or agreements. Was this an expansion to refugee law to cater for non-German refugees? Prima facie it appears so.

There was one important exception to the definition, the provision in Article 1 (paragraph 2) 1938 Convention:

"Persons who leave Germany for reasons of purely personal convenience are not included in this definition".

This provision was deliberately installed by the drafters of the Convention to take into account the grave economic situation in Europe at that particular time and States certainly did not want "economic refugees" or people who were hoping to better their lives and effectively become "economic burdens" on the States offering asylum and refuge.<sup>130</sup>

Article 2 stated that the refugee was entitled to move freely or reside in the territory of States; and Article 3 concerned the application of issue and renewal of documents. Article 4 stated:

"The travel document shall entitle the holder to leave the territory where it has been issued and to

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<sup>130</sup> It is interesting to compare attitudes then to attitudes of States now, some 40 years later.

return thereto ..."

Article 4 had made the return of the refugee or title holder mandatory for the ratifying States, but in previous agreements and arrangements a "request" had to be made to the country of which the refugee was to return.

Once again, "national interest" and "public order" were the grounds for expulsion, deportation and removal of refugees or stateless persons - Article 5. As mentioned previously, Article 6 of the 1938 Convention was similar to Article 4(1) of the 1933 Convention (domicile and residence), except that the 1938 Convention stated in addition that where refugees have retained a nationality, their personal status shall be governed by the "rules applicable in the country concerned to foreigners possessing a nationality".

Article 7 of the 1938 Convention provides for respecting of "acquired rights" under the former national law of the refugee and, in particular, rights pertaining to marriage. These provisions are similar to Article 4(3) of the 1933 Convention.

Article 9 of the 1938 Convention omitted the following paragraph from the list of conditions of refugees and were exempt from restrictive labour conditions in Article 7 of the 1933 Convention: "The refugee is an ex-combatant of the Great War".

This was no longer required since several years had lapsed since the end of the Great War, but the drafters were not to know that another Great War was just around the corner! Ratifying States did not want refugees on a permanent basis and the drafters of the 1938 Convention made sure that every step was taken to ensure that the refugees would only stay on a temporary basis. One such step was installed in Article 4 (of the 1938 Convention) emphasising educational facilities available to refugees, and also in Article 15 (of the 1938 Convention) which facilitated educational training (colleges and universities) for the refugees so as to enable them to emigrate to overseas countries.

The United Kingdom made a reservation on Article 5 regarding the position of extradition and public order. The reasons were exactly the same as those which were mentioned in the 1933 Convention.<sup>131</sup>

#### 2.9.7 German Refugees including Refugees from Austria

German refugees included refugees coming from the territory which was formerly Austria. The competence of the High Commissioner for refugees coming from Germany was extended to cover Austrian refugees by a resolution of the Council of the League of Nations of May 1938. On 9 June 1938, the Secretary-General of the League submitted to the governments concerning a draft protocol, which was signed on 14 September 1939.<sup>132</sup>

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<sup>131</sup> Only three States accepted this Convention.

<sup>132</sup> Vol.198, LNTS, No.4634, pp.141-145.

More crucially, the important principle of non-refoulement was not produced in the 1938 Convention. States could not refouler refugees at their frontiers or borders and effectively once the refugees entered the territory or the territorial jurisdiction of the asylum State, the refugee State was obliged to "grant leave" for the refugees to enter and could not return them. The refugees were authorised to reside by the High Commissioner, and States did not really have a say in the matter as long as the States had ratified the 1938 Convention.

#### 2.9.8 United Nation Creations

The 1938 Refugee Convention afforded some basic rights for refugees, but there was no effective international protection for an individual as against his own State.

After the Second World War, there were significant developments. The adoption of the Charter of the United Nations which included the individual to acquire a status and stature, irrespective of his nationality, and to transform him from being an object of international goodwill into a subject of international right. Situations which involve a breach or violation of the UN Charter will be dealt with by the United Nations General Assembly. In basic terms, the provisions of the Charter recognises the international nature of the protection of the human being as an individual. It states:

"(c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." 133

The Charter fails to define and identify what these rights are. This was rectified to some extent by another significant legal instrument which was adopted by the United Nations General Assembly on 10 December 1948.<sup>134</sup> This instrument was named the Universal Declaration of Human Rights and this was adopted in order to elaborate on the content of standards and the machinery for protection of human rights, which were referred to in the United Nations Charter (Preamble, Articles 1, 55, 56, 62, 68 and 76). The Universal Declaration of Human Rights contained 30 articles which stipulated the rights of individuals including the protection of refugees and aliens. Many new States have incorporated these provisions within their constitutions. However, the Universal Declaration of Human Rights is not legally binding; it is merely a recommendation. This document forms an important part for the protection of human rights in the world today. Many instruments have been adopted with the Universal Declaration of Rights as a guideline.<sup>135</sup>

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133 Article 55.

134 GA Res.217A(III), GAOR, 3rd Session, Part I, Res., p.71. The voting was 41:0 with 8 abstentions.

135 For instance, the European Convention on Human Rights; the International Covenants on Human Rights; the International Convention on the Elimination of all Forms of Racial Discrimination; and the Charter of the Organisation of African Unity.

The Second World War highlighted the scale and the problems of the refugees. The scale was massive and at that time the international community felt the need to form an organisation to deal with the refugee problem specifically. Apart from the organisation, an international convention was needed which could list the rights especially designed for the post-war refugee. This need was fulfilled by the set-up of the United Nations High Commissioner for Refugees and its Statute but, more importantly, the drafting and adoption of the 1951 Convention Relating to the Status of Refugees. This Convention will be examined in detail in the next chapter which proved a major step forward for the protection of the refugee.

However, it is perhaps advantageous here to mention that in the final weeks of 1956 some 160,000 Hungarian refugees fled across the Austrian border in search of refuge. Austria opened its doors and hearts to them. On 28 October 1956, the Austrian Government announced publicly that Austria would grant unconditional asylum to all Hungarians who entered their territory. Only the previous year Austria and four other occupying powers signed the treaty that re-established its sovereignty, and a constitutional law of perpetual neutrality was promulgated. Why did Austria grant asylum to the Hungarians?

Austria had just emerged from the post-war economic slump. It was concerned for the people who, only two generations earlier, were part and parcel of its Empire that was dismantled after

the First World War. Some loyalty was owed.

Austria appealed to the United Nations Security Council for assistance, who referred the matter to the General Assembly which called on the Hungarian and Soviet authorities to facilitate humanitarian assistance to the people of Hungary.

The General Assembly appealed to Member States to make special contributions for this purpose and Mr James Read (acting High Commissioner)<sup>136</sup> launched an appeal to the member countries of the United Nations Refugee Fund (UNREF).<sup>137</sup> Apart from the appeals, the General Assembly adopted resolutions<sup>138</sup> confirming the authority of UNHCR in matters of refugee relief and granting it prerogatives beyond those laid down in its statute (see later).

## 2.10 POSTSCRIPT

As mentioned above, the 1951 Convention Relating to the Status of Refugees was the first Convention to list some rights

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136 Since the death three months previously of Mr van Heuven Goedhart.

137 See later for further details of UNREF, in the UNHCR chapter.

138 Resolution 1006 of 9 November 1956, declared that the intervention of UNHCR was desirable to provide emergency relief to the refugees from Hungary. Resolution 1165 of 26 November 1959 noted "with appreciation the effective manner in which the High Commissioner had been dealing with special emergencies". And Resolution 1166 of 26 November 1957 authorised UNHCR to launch on its own authority appeals for funds. These resolutions expressed a growing awareness on the part of the General Assembly that UNHCR should be able to fulfil its mission in a purely humanitarian spirit.

especially designed for the refugees. The next chapter will examine this Convention in great depth along with reference to the 1967 Protocol relating to the Status of Refugees and the African Refugee Convention, respectively.

## **CHAPTER THREE**

### **The 1951 Convention Relating to the Status of Refugees**

### CHAPTER THREE

#### THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES (1951 CONVENTION)

The 1951 Convention is the expression of a connection by the comity of nations that refugees are not a temporary phenomenon which can be either ignored or rejected. The problem of refugees requires an international effort to grant fundamental rights and freedoms to these unfortunate human beings. There are several reasons which reflect the significance of the 1951 Convention:

1. The 1951 Convention attempted to establish an international code of rights and privileges of refugees on a general basis. Until 1951, several conventions, arrangements and agreements dealt with the small numbers of refugees. There was no general international instrument until then.
2. The 1951 Convention took examples from earlier conventions, agreements and arrangements but the scope of rights for refugees in the 1951 Convention have exceeded these earlier instruments. The 1951 Convention covers aspects of life and guarantees to refugees as a minimum and these aspects are broader than in any of the previous

instruments.<sup>1</sup>

3. Treatment of refugees is more favourable in the 1951 Convention than the previous instruments. For instance, in the earlier agreements relating to the Russian and German refugees only accorded social security or relief provisions. While the 1951 Convention accorded that refugee status was equal to that of the nationals of the country of asylum.<sup>2</sup>
4. The 1951 Convention allowed expulsion for reasons of breach of national security and connection with serious crimes, while the earlier convention concerning German refugees could expel refugees if they refused to a "sufficient cause". No explanation of this term was given.
5. The 1951 Convention was the first Convention which received a large number of States in its drafting. Earlier conventions had received only a very small number

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<sup>1</sup> For instance, the 1938 Convention concerning the Status of Refugees coming from Germany did not contain such provisions as properties to which refugees could acquire; the prohibition of penalties for illegal entry into refuge States by bona fide refugees; the benefits of accommodation; etc.

<sup>2</sup> The earlier conventions merely granted refugees the same rights as foreigners in general, while the 1951 Convention treated them as nationals, especially relating to elementary education.

of States in the participation of drafting.<sup>3</sup> The Conference of Plenipotentiaries (Conference) which actually drafted the 1951 Convention was attended by 26 representatives of States and 2 observers. Furthermore, the representatives attending the Conference were from the five major continents rather than simply European or American representatives.

6. The 1951 Convention relates to refugees from all parts of the world,<sup>4</sup> whereas the earlier conventions referred to European refugees. The 1951 Convention does contain some stipulations of a restrictive nature, due to the desire of the founders of the 1951 Convention to reach unanimity in the Conference and not to draft a document which may have been perfectly worded but not acceptable to many of the participating governments. It is important to note that provisions of the 1951 Convention need not be applied by the States as they have been drafted; most of the provisions will be weakened by reservations (see Articles below). Much will obviously depend on the conditions under which the individual governments will agree to adhere to this Convention.<sup>5</sup> The 1951 Convention, although

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3 The first agreement on the legal status of refugees (Russian and Armenian) consisted of 12 members but was drastically reduced to 5 when the actual convention was revised. Only 8 representatives took part in drafting the provisional agreement on the status of German refugees, but the number dropped to 7 when the permanent convention was drafted.

4 The 1967 Protocol Relating to the Status of Refugees abolished the geographical and dateline limitations.

5 So far, 106 States have ratified this Convention.

needing improvement in certain areas, does establish a satisfactory legal status, in the absence of any other refugee instrument.

### 3.1 DEFINITION OF THE TERM "REFUGEE": COMMENTARY AND ANALYSIS

Article 1 of the 1951 Convention was not properly drafted,<sup>6</sup> and the heading was too narrow, dealing with exclusion grounds, geographical scope of application and definition of a "refugee". The sequence of paragraphs does not appear to be logical;<sup>7</sup> the three separate sections (D, E and F) begin with the same words: "This Convention shall not apply ...". They should have been combined into one. The actual text contains expressions which confused the representatives at the Conference about interpretation and meaning<sup>8</sup> and there were some deficiencies and irregularities. Why was this? Basically because of two prime factors. Firstly, there was shortage of time available and, secondly, there appeared to be a reluctance by several delegates to change a text which had been adopted by the General Assembly.

The actual definition of the term "refugee" was the result of the work of the Ad Hoc Committee at its first session; the

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<sup>6</sup> The Representative of Israel was very critical, see SR.34, p.13 in which others joined: SR.34, p.14.

<sup>7</sup> For instance, para (6) would logically belong at the end. See below.

<sup>8</sup> For instance, the Representative of France was unsure of the expression "in Europe or elsewhere" in para B; see SR.34, p.13.

definition adopted by the Economic and Social Council on 11 August 1950; and the Resolution of the XI Session which was a proposal to the General Assembly. It was incorporated in the draft convention prepared by the Ad Hoc Committee at its second session. The revision took place in the General Assembly at its 5th Session and amendments introduced in the latter by the Conference. It was the same as adopted in Resolution 429(v) of the General Assembly of the "Draft Convention Relating to the Status of Refugees" annex.

The Conference did introduce several corrections and amendments, which refer to para A(2),<sup>9</sup> para F(b)<sup>10</sup> and changes of wording without amendment in substance in para C(5), C(6), F(a) and F(c). The Conference extended Section F of the General Assembly's resolution whereby the contracting States could add to the definition of the term "refugee" other persons, including such as might be recommended by the General Assembly. However, the Conference adopted Resolution E which, incidentally, was introduced by the British representative,<sup>11</sup> in order to cover the contents of former para F of Article 1,<sup>12</sup> to read the following:

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<sup>9</sup> Assimilating membership in a particular social group in a race, etc; Section B (instead of global validity, the possibility of extending the scope of the Convention to extra-European refugees); Section D (providing that refugees, now under the protection of the UNHCR shall come under the provisions of the Convention when the protection ceased).

<sup>10</sup> Exclusion of common criminal from protection - only a verbal amendment.

<sup>11</sup> A/Conf.2/107.

<sup>12</sup> SR.35, p.43.

"THE CONFERENCE,

EXPRESSES the hope that the Convention relating to the Status of Refugees will have values as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory or refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

3.1.1 Article 1: Section A

Text

"Article 1

DEFINITION OF THE TERM "REFUGEE"

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;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of

which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

### Analysis

As one can see from the text of Article 1, the definition is partially described in words and partially refers to the following six international documents:

- (i) Arrangements of 12th May 1926.
- (ii) Arrangements of 30th June 1928.
- (iii) Conventions of 28th October 1933.
- (iv) Conventions of 10th February 1938.
- (v) The Protocol of 14th September 1939.
- (vi) The Constitution of the International Refugee Organisations.

In the original draft prepared by the Ad Hoc Committee at its first session, no reference to these previous documents was made and the term "refugee" per se was described in full in the draft. The new system which was introduced by the aforementioned Resolution of the ECOSOC, was taken over by the Ad Hoc Committee at its second session, the General Assembly and the Conference. It was based on a proposal made by the representative of France<sup>13</sup> to the Social Committee of ECOSOC which acknowledged to rewrite the definition adopted by the Ad

Hoc Committee more in form than in substance.<sup>14</sup> On the basis of Article 1, para A(1), the following categories of persons were considered "refugees":

Group A

Persons recognised as refugees on the basis of conventions preceding the Second World War:

- (i) Russian refugees.
- (ii) Armenian refugees.
- (iii) Assyrian or Assyro-Chaldean and assimilated refugees.
- (iv) Turkish refugees.<sup>15</sup>
- (v) Refugees coming from Germany.
- (vi) Austrian refugees.

Group B

There were some refugees who were under the mandate of the IRO who also enjoyed the benefits of other conventions before the outbreak of the Second World War. Among this category, there are many persons who have been recognised as "refugees" under the 1951 Convention, even if they had not come under the mandate of the IRO. There were seven categories of persons

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14 E/AC.7/SR.159, p.8.

15 Under the terms of the Protocol of Lausanne of 24 July 1923.

which the IRO cared for.<sup>16</sup> In contrast to Article 1, the IRO Constitution did provide for the exclusion from protection of certain groups, for instance, war criminals or traitors and those who had persecuted the populations of United Nations member countries.

In para A(1), stress must be placed on the phrase "Has been considered as a refugee under ...". These words clearly indicate that Article 1, para A(1) refers to only such refugees as were in fact recognised as "refugees" by the competent authority to make such a determination and not to call all persons who could qualify as such on the basis of the arrangements stipulated in para A(1). The High Commissioner stipulated:

"... an Armenian presenting himself for the first time as a refugee would not be covered by the provisions of sub para 1 ..." <sup>17</sup>

Similarly, it is clear that a determination made by the competent authorities under the international acts stated in this section recognising a person as coming under any of these agreements is sufficient to make this person a "refugee" in the

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<sup>16</sup> (i) Victims of Nazi and Fascist regimes; (ii) Spanish Republicans and other sections of the Falangist regimes; (iii) Persons who were already refugees before the outbreak of World War II; Persons, other than displaced, who are outside the country of their nationality or former habitual residence and who, as a result of events subsequent to the outbreak of the Second World War, are unable or unwilling to avail themselves of the protection of the government of their country of nationality or former nationality.

<sup>17</sup> SR.22, p.17.

conventional sense. It appears that the determination arrived at is binding on all contracting States, irrespective of whether it was made by IRO, any other competent international agency or a party to a convention.

In the second part of para A(1), there may have been persons who were not recognised as refugees by the IRO, for whatever reasons,<sup>18</sup> but were recognised as refugees by the 1951 Convention, provided they satisfied para A(2). Para A(2) was intended to cater for those persons who were not covered by para A(1). This definition, along with that stipulated in sub para (1) was used in the statute of the office of the UNHCR, stipulating the persons who, in the view of the United Nations, were in need of international protection. There are some conditions attached to para A(2) which are as follows:

- (i) If the asylum-seeker and seeker of refugee status has a nationality he must be outside the country of his nationality; if, however, he has no nationality then he must be outside the country of his habitual residence.
- (ii) The asylum-seeker and seeker of refugee status has a nationality owing to well-founded fear of being persecuted for specified reasons of race, religion, nationality, membership of social groups<sup>19</sup> or of political opinion.<sup>20</sup>

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18 Maybe because they did not apply for protection or assistance or because their application was rejected.

19 This particular phrase was introduced by the Conference on the basis of a Swedish amendment (A/Conf.2.9).

It seems clear that a person without nationality must be outside the country of his habitual residence for the same reasons because otherwise he could not be unable to return thereto, although para A(2) does not say so directly. The draft<sup>21</sup> read as follows: "... who has had habitual residence ...". The General Assembly did improve on the text but there is no reason to assume that it intended to do more than simply improve the language. The British representative was of the opinion that sub para 2, as drafted by the General Assembly, provided two conditions:-

- (a) One referring to persons with a nationality.
- (b) The other referring to stateless persons.

The British representative contended that:

"... in his view, under a literal interpretation of this sub para, the requirements that the events took place before Jan 1 1951, and that the departure from his home country happened for fear of persecution did not apply to stateless persons." <sup>22</sup>

- (iii) If the asylum-seeker has a nationality, he must be unable or, because of fear of persecution, unwilling to avail himself of the protection of his government. If the asylum-seeker is stateless, he must be unable or, because

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20 See below.

21 Which was adopted by the Ad Hoc Committee (second session), Article 1, para A(3).

22 SR.23, p.8.

of the same fear, be unwilling to return to the country of his former habitual residence.

- (iv) The fear of persecution in both of the above cases must be based on events which occurred before January 1, 1951.

Para A(2) contains a number of expressions which require commentary and analysis

(a) "Events occurring before 1 January 1951"

What are these "events"? This term refers to actual happenings which provoke "fear of persecution". The Ad Hoc Committee defined the word "event" as "happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution (in this period) which are after-effects of earlier changes".<sup>23</sup>

The Ad Hoc Committee may have defined the expression rather too restrictively, because a government may begin persecuting a racial or religious minority or it may prohibit certain political movements, although no "profound political changes" have occurred.<sup>24</sup> It may be appropriate to define "events" as happenings which create conditions under which a group of persons become victims of racial, religious, national, social or political persecutions. This may get rid of the instances such as

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<sup>23</sup> E/1618, p.39.

<sup>24</sup> For instance, South Africa.

riots in certain regions or events which are being combatted by the authorities because in such cases there would be no reason for a person possessing a nationality to avail himself of the protection or be unwilling to return to the country of his former residence. The term "former habitual residence" does not necessarily refer to a locality but to:

"... the country in which he (the refugee) had resided and where he had suffered or fear he would suffer persecution if returned." <sup>25</sup>

The Ad Hoc Committee had stipulated that "events" included certain "after-effects". The Ad Hoc Committee further contended that the date of January 1, 1951:

"... excludes events ... which happened after that date but does not exclude persons who may become refugees at a later date as a result of events before them, or as a result of after-effects which occurred at a later date ..." <sup>26</sup>

The representative of France correctly stipulated that "events occurring before January 1, 1951 imply all the consequences of such events".<sup>27</sup>

There is no doubt that the circumstances that an asylum-seeker found himself outside his country after January 1,

25 E/1618, p.39.

26 E/1618, p.39.

27 SR.28, p.9.

1951 would make him eligible under the 1951 Convention provided the reason for his persecution lay in an event or happening which occurred before this date. The representative of France, in order to clarify the intention of the Ad Hoc Committee, proposed the format "events in Europe before 1 January 1951 or circumstances directly resulting from such events".<sup>28</sup> The Committee agreed to implement this form of words,<sup>29</sup> but the representative of the US was unhappy and requested the elimination of the latter part on the grounds that they appeared redundant and did not modify the meaning of the original text proposed by the Ad Hoc Committee and that "to legislate for the result of a result might be taking things too far".<sup>30</sup>

In the ECOSOC, the US representative stated:

"... these words were too vague and that, if they are retained, the Convention would be applicable to persons who became refugees because of results of events which have taken place before January 1, 1951 and might establish a chain of causes and effects extending into the year 3,000 AD and beyond." <sup>31</sup>

The ECOSOC decided to keep these words, but the General Assembly excluded them on the assumption that the term

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28 E/L.82 and E/AC.7/SR.159, p.16. (Social Committee).

29 E/AC 7/L.66.

30 E/AC 7/SR.165, pp.9, 11.

31 XI Session, 406 meeting, para 87.

"events" included their consequences. There is no real problem of persons fleeing from States in which governments had changed and these persons had actually faced the threat of "well-founded fear of being persecuted" or on any grounds stipulated in para A(2); such people would be eligible under the 1951 Convention.

(b) "Fear of being persecuted"

The 1951 Convention does not speak of actual persecution to which a person is subjected to, but speaks of "fear of being persecuted". This expression was established to signify that a "person has either been actually a victim of persecution or can show good reason why he suffers fear of persecution".<sup>32</sup>

Who decides whether the "fear" suffered by the asylum-seeker is well-founded or not? The whole question of deciding upon the eligibility of persons falling within para A(2). This paragraph deals with persons whose "refugee status" has not been made binding for the Contracting Parties. There appears to be no provision within the 1951 Convention which enforces the Contracting States to accept a decision made by the United Nations or other authority. De facto, the determination made by the High Commissioner under section 6A(ii) of the Statute<sup>33</sup> is not binding upon a State. The definition for the purposes

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<sup>32</sup> E/1618, p.39. For full elaboration, see Chapter Eight.

<sup>33</sup> See UNHCR section.

of UNHCR is broader than under the 1951 Convention. So a person may be a refugee under the terms of the Statute and not under the 1951 Convention and vice versa. The definition of "refugee" in the Statute is different from the 1951 Convention purely because para C(b) of the Statute is not incorporated into the 1951 Convention. The asylum-granting State has complete discretion. The right of Contracting States to define the refugee is limited in two ways: firstly, by the right granted to the High Commissioner to supervise the application of the 1951 Convention<sup>34</sup> and, secondly, by the general right of every Contracting State to follow up the implementation by others and especially by the provision of Article 38 of the 1951 Convention.

(c) "Person must be outside the country of his nationality"

The 1951 Convention provides, as one of the conditions for being granted "refugee status", that the person be "outside the country of his nationality or habitual residence" owing to fear of being persecuted. It does not require that the person shall have left the country of his nationality for such a reason.

In the first draft of the Ad Hoc Committee, the condition was that the person "has left or ... is outside the country ...", whilst the text of ECOSOC and that of the Ad

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<sup>34</sup> Section 8(8) of the Statute and Article 35 of the 1951 Convention.

Hoc Committee (second session) referred to "persons who had to leave, shall leave or remain(s) outside the country". Since "being" or "remaining" was considered as sufficient grounds, it was clear that "leaving" per se was not a precondition for making a person a "refugee" or, alternatively, the circumstance that a person might have left the country in a regular manner but remained abroad because "fear of persecution" was sufficient under the first two drafts to meet the requirements of Article 1. It was for this reason that the General Assembly dropped the term "leaving" and made the definition contingent on "being outside the country". However, despite this, the British representative insisted that departure for fear of persecution was required.<sup>35</sup> The French representative on the Ad Hoc Committee suggested that Article 1 should also cover persons who were outside their country when persecution began and were unable to return because of fear of persecution.<sup>36</sup>

The 1951 Convention is also applicable to asylum-seekers who had lost their nationality (a proposal of the US representative),<sup>37</sup> after they had left their country because such a case is covered by the inability of a person to avail himself of the protection of the country of his nationality. One is unsure of the term "habitual

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35 SR.23, p.8.

36 SR.17, p.6.

37 E/AC 7/SR.160, p.11.

residence". Does it mean the country where a non-persecuted stateless person<sup>38</sup> resided and which later began to persecute him, or does it mean that residence of persons who had left their country of nationality owing to "fear of persecution" and were later subjected to persecution in the country of refuge?

(d) The dateline "January 1, 1951"

Why was this particular date chosen? It was chosen for the following reasons:-

(i) On this date, the office of the UNHCR had begun its official work.

(ii) The Ad Hoc Committee had agreed on this date to enable the governments to know at the time they became parties of the 1951 Convention, the extent of their obligations,<sup>39</sup> while without such a dateline, the Contracting States may have been asked to undertake obligations in respect of refugees (future numbers would be unknown and unpredictable).

(iii) The dateline of "January 1, 1951" was retained, mainly to have the same date in order to restrict the obligations of governments to such groups of refugees as they could assess. Opposition to unlimited responsibility was voiced at the time of the

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<sup>38</sup> For instance, a resident before the First World War.

<sup>39</sup> E/1618, para 3.

discussion of the Ad Hoc Committee draft, in the Social Committee of the ECOSOC.<sup>40</sup>

(e) The term "unwillingness"

This term did not bring joy to the drafters, purely because there is a formal connection between being "unable" and having "a well-founded fear of being persecuted". However, if the term "well-founded fear" is taken as discussed above, it can be seen that "inability" or "unwillingness" refers to persons (either possessing a nationality or statelessness) whose protection by the country or return thereto is actually derived. It is advantageous at this stage to note the comments of the Ad Hoc Committee. They stated:

"... that for the purpose of this subparagraph (a.1(c)) and subparagraph A2(c) and therefore for the draft convention as a whole, "unable" refers primarily to stateless refugees but includes also refugees possessing a nationality who are refused passports or other protection by their own government. "Unwilling" refers to refugees who refuse to accept the protection of the government of their nationality."<sup>41</sup>

It may be better to follow this interpretation which, incidentally, was based upon that of the French representative in the ECOSOC (Social Committee).

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<sup>40</sup> E/AC 7/SR.158, p.15; SR.159, pp.5-6.

<sup>41</sup> E/1618, p.39.

- (f) "Race, religion, nationality, membership of a particular social group and political opinion" as being grounds for persecution

The UNHCR Handbook states that a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them.<sup>42</sup> These reasons for persecution will frequently overlap. Usually there will be more than one element combined in one person; for instance, a political opponent who belongs to a religious or national group, or both.

#### Race

The term "race", along with "political opinion" and "religious belief", was first used in 1938 to allow emigration from Germany and Austria. The Administrative Memorandum 39 of Supreme Headquarters' Allied Expeditionary Force, in paragraph 32, were responsible for assistance to displaced persons and refugees from Germany and Austria. In this paragraph, assistance was only to be granted to persons persecuted because of their race, religion or activities in favour of the United Nations. The force helped Jewish victims of Nazi persecution who had been persecuted for race or religion or both. It can be said that the early meaning of race is not only major ethnic groups, but also groups which are less easily

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42 Para 66.

differentiated by colour. Hence, in this context, race refers as much to social prejudice as to colour, ethnic origins and so on.

After the Second World War, the five categories were incorporated in the 1951 Convention and the UNHCR statute (except social group).

Paragraph 68 of the UNHCR Handbook understand the term "race", in its widest sense, to include "all kinds of ethnic groups that are referred to as "races" in common usage. Frequently, the term "race" will entail membership of a specific social group of common descent forming a minority within a larger population. Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution.

The international community as a whole has expressed particular abhorrence at discrimination on racial grounds, as supported and evidenced by repeated resolutions of the General Assembly.<sup>43</sup> It is worthwhile mentioning Article 1 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, which defines that practice to include distinctions based on "race, colour, descent or

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<sup>43</sup> See McKean, Equality and Discrimination under International Law, Clarendon Press, Oxford, 1985, pp.152-165.

national or ethnic origin".

The UNHCR Handbook, in paragraph 69, goes on to say:

"Discrimination on racial grounds will frequently amount to persecution in the sense of the 1951 Convention. This will be the case if, as a result of racial discrimination, a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences."

The mere fact of belonging to a certain racial group will not normally be enough to substantiate a claim to refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient grounds to fear persecution.<sup>44</sup>

The European Commission on Human Rights<sup>45</sup> determined that in certain circumstances, degrading treatment within the meaning of Article 3 of the European Convention can be invoked in cases of discrimination on racial grounds. In application 4403/76, Patel et al v United Kingdom, regarding the claims by Ugandan Asians, it was alleged that the effect of the Commonwealth Immigrants Act 1968 was to discriminate against certain citizens of the UK and Colonies on the grounds of race and colour and that the

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<sup>44</sup> UNHCR Handbook, para 70.

<sup>45</sup> Decisions of the ECHR, 31-7, 1979071, at 112, IV.

Act contravened Article 14 of the European Convention read in conjunction with Articles 3 and 8. Discrimination on racial grounds can, in certain circumstances, constitute degrading treatment within the meaning of Article 3 of the European Convention on Human Rights. The main object of the 1968 Act was to exclude from the UK, citizens of the UK and Colonies from East Africa who were of Asian origin.

It is important to mention that membership of a minority<sup>46</sup> does not automatically lead to recognition of refugee status.<sup>47</sup> The co-existence of several national groups within the same frontiers can create conflict likely to lead to persecution. Although in paragraph 69 (above) discrimination on racial grounds will frequently amount to persecution in the sense of the 1951 Convention, States are very reluctant to accept that certain discriminatory treatments amount to persecution on the grounds of "race".

### Religion

The UNHCR Handbook refers to the Universal Declaration of Human Rights, and the Human Rights Covenant proclaims the right to freedom of thought, conscience and religion (which includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.<sup>48</sup>

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46 That is, persecuted.

47 The Viraj Mendis case. See Chapter Eight.

48 Para 71.

In paragraph 72, the Handbook states:

"Persecution for "reasons of religion" may assume various forms, eg. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community."

Persecution on the grounds of religion can cover a great many issues but the main theme is to what extent discrimination or religious intolerance constitutes persecution within the meaning of the 1951 Convention. Unfortunately, religion has been the basis upon which governments and peoples have singled out other for persecution.<sup>49</sup> The intolerance may be based upon, firstly, a person's membership of a religious community; secondly, religiously motivated acts or omissions such as refusal to do military service; thirdly, personal faith or private worship; and, fourthly, participation or insistence on forms of public worship.

The Universal Declaration of Human Rights in Article 18<sup>50</sup> states that:

"Everyone has the right to freedom of thought, conscience and religion; this right includes

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49 For instance, the Turks and the Christians; and the Nazis and the Jews. Contemporary examples include Jehovah's Witnesses in Africa or members of the Baha'i faith in Iran.

50 GA Resolution 217A (III), 10 December 1948.

freedom to change his religion or belief, and freedom, either alone or in community with others, and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

This is elaborated upon in Article 18 of the 1966 Covenant on Civil and Political Rights<sup>51</sup> and again in Article 9 of the European Convention on Human Rights which also expressly recognises the freedom to change a religion or belief.

In 1981 the UN General Assembly adopted the "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief".<sup>52</sup> This Declaration proclaims and stipulates basic religious rights and freedoms and indicates the interests to be protected, the infringement of which may signal persecution.

Refugee status has been granted to groups such as the Baha'i faith in Iran, but States still require that such attacks be personalised against individual members of the faith. If this is so, then a person fleeing a massacre would often not count as a "refugee".

The Handbook, in paragraph 73, states:

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51 See Louis Henkins' The International Bill of Rights: The Covenant on Civil and Political Rights, Columbia University Press, New York, 1981.

52 GA Resolution 36/55 of 25 November 1981.

"Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground."

The "special circumstances" is not defined by the Handbook and it is unclear as to what these circumstances are.

There is a great reluctance within municipal laws to actually recognise discrimination based either on race or on religion within the meaning of the 1951 Convention. It is still unclear today as to what the domestic courts imply as "racial" or "religious" discrimination, although these courts are using a case-by-case adjudication which could result in decisions going the other way.

### Nationality 53

The term "nationality" was originally included in the first draft of the Ad Hoc Committee. The interesting question arises, how can a national of a country be persecuted by his/her own government purely on the basis of his nationality? Also, could a person having no nationality be persecuted on reasons of nationality. The term "nationality" was taken from Article 2 of the Universal Declaration of Human Rights (reference was made

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53 The term "nationality" is discussed by E. Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", ICLO, Vol.15, 1966, pp.1006-1011. See also Brita Sundberg-Weitman, Discrimination on Grounds of Nationality, North-Holland, New York, 1977.

in the Preamble of the 1951 Convention). However, the term "nationality" is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to a well-founded fear of persecution.<sup>54</sup> This category may also include persecution for lack of nationality and under the 1951 Convention such stateless persons may probably claim persecution because of membership of a particular social group. Moreover, it is not necessary that those persecuted should constitute a minority in their own country.<sup>55</sup>

The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific "nationality".<sup>56</sup>

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54 See UNHCR Handbook, para 74.

55 Ibid., para 76.

56 See UNHCR Handbook, para 75.

The travaux préparatoires did not define the meaning of "nationality" but it can be said that this term is usually interpreted quite broadly to include religious, cultural origins and membership of ethnic and linguistic communities, within the 1951 Convention and the UNHCR Statute.<sup>57</sup>

Article 27 of the 1966 Covenant on Civil and Political Rights states:

"In these States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

Related work of the Commission on Human Rights has also included "national minorities", but controversial aspects do exist in the meaning of the term. One can also argue that inclusion of national minorities in the Commission's work was inappropriate in view of the wording of Article 27.<sup>58</sup> Can one argue that those persecuted should always constitute a minority in their own country? Governments which are controlled by a small number of people tend to

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57 Article 1B and para 6(ii), respectively.

58 See UN Doc. 1980/13, pp.126-34; Resolution 37 (XXXVI), 12 March 1980, p.198.

resort to oppression,<sup>59</sup> and any 'undesirable' or opposition groups, no matter what their size, could be their target.

"Nationality" can be broadly interpreted, in that points of distinction can be illustrated as the basis for the policy and practice of persecution. There may be some overlap between the various grounds and, likewise, factors from the criteria on analysing "nationality" may substantially contribute to a "well-founded fear of persecution".

#### Membership of a particular social Group <sup>60</sup>

The representative of Sweden in the Ad Hoc Committee introduced an amendment to include a "catch all" social group category in Article 1A stating:

"... experience had shown that certain refugees had been persecuted because they belonged to particular social groups ... such cases existed and it would be well to mention them explicitly." <sup>61</sup>

The term "social group"<sup>62</sup> is far from easy to define.

59 See "Selective Genocide in Burundi", Minority Rights Group, Report No.20, 1974. See also, "The Two Irelands - The double minority", Minority Rights Group, Report No.2 (Rev.), 1979.

60 For a comprehensive analysis of definition of "social group and minorities", see Tajfel in The Psychology of Minorities, Minority Rights Group, Report No.38, 1978, p.3.

61 UN Doc. A/Conf. 2/SR3 at 14. And see Helton, "Persecution on Account of Membership in a Social Group as a Basis for Refugee Status", CHRLR, Vol.15, No.1, Fall, 1983.

62 "Social group" is missing from the UNHCR Statute.

There is a substantial body of material which discusses the term "social group". Examples of "social group" include "family, age, sex, language, religions, ..." and so on. Basically, the term "social group" could mean people within a certain relationship or having a certain degree of similarity, or a coming together of those of like class or kindred interests.

"Social group", although difficult to define has the potential to considerably extend the scope of the 1951 Convention. Thirty-seven years after the completion of the 1951 Convention, it is only the individual States who can take this initiative of State interpretation. The essential element in any description is the factor of shared interests, values or background.

International practice has recognised social factors in the scope of other international instruments. Article 2 of the 1948 Universal Declaration of Human Rights includes "national or social origin, property, birth or other status" as prohibited grounds of distinction and this form of words is repeated in Article 2 of the 1966 Covenants on Economic, Social and Cultural Rights and Article 26 of Civil and Political Rights which states that equality and protection before the law should be observed and implemented.

The UNHCR Handbook attempts to define a "particular social

group" as comprising of persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, ie. race, religion or nationality.<sup>63</sup>

Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.<sup>64</sup> Importantly, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances when mere membership can be a sufficient group to fear persecution.<sup>65</sup>

#### Political opinion

The term "political opinion" is by far the most widely recognised category of persecution. The aspect of political opinion is inherent in the interpretation of "social group" and as well seems part of the categories of "race", "religion" and "nationality", since persecution of these latter groups is usually based on an assessment by

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63 Para 77.

64 Para 78.

65 Para 79.

the ruling government and these groups constitute a political threat to the status quo. Consequently, there is usually some political underpinning to every claim. For this reason the political opinion category constitutes the broadest grounds for persecution. The travaux préparatoires of the 1951 Convention simply borrows the category from the Constitution of 1946, IRO Section A1(c) and remains silent about its scope and meaning.

Article 19 of the Universal Declaration of Human Rights states:

"Everyone has the right to freedom of opinion and expression; the right to include freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontier."

The basic principle is restated in Article 19 of the Covenant on Civil and Political Rights, but the right to freedom of expression is qualified with reference to special duties and responsibilities, although certain types of opinion may therefore be unacceptable.<sup>66</sup>

Holding political opinions different from those of governments is not in itself a ground for claiming refugee status and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the

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<sup>66</sup> See Henkin, *op.cit.*, at p.216.

authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant. the political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions - insofar as this can be established from all the circumstances of the case - will also be relevant.<sup>67</sup>

While the definition speaks of persecution "for reasons of political opinion", it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based explicitly on "opinion". More frequently, such measures take the form of sanctions for alleged criminal acts against the ruling power. It is, therefore, necessary to establish the applicant's political opinion which is at the root of his behaviour, and the fact that it has led or may lead to his persecution that he claims to fear. An asylum-seeker claiming fear of persecution because of political opinions need not show that the authorities of his country of origin know of his opinions before he left the country. He may have concealed his political opinions and never suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection

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67 UNHCR Handbook, para 80.

of his government, or a refusal to return, may disclose the applicant's true state of mind which gave rise to fear of persecution. In such circumstances, the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned.<sup>68</sup>

Where a person is subject to prosecution or punishment for a political offence, the Handbook states:

"... a distinction may have to be drawn according to whether the prosecution is for political opinion or for politically-motivated acts. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee."<sup>69</sup>

The Handbook, in paragraph 85, does refer to excessive or arbitrary punishment which will amount to persecution. The Handbook states that in determining whether a political offender can be considered a refugee, regard should be had to the following elements:-

- (i) his political opinion;
- (ii) personality of the applicant;
- (iii) the motive behind the act;
- (iv) the nature of the act committed;

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<sup>68</sup> Ibid., para 83.

<sup>69</sup> UNHCR Handbook, para 84.

- (v) the nature of the prosecution and its motives; and,
- (vi) the nature of the law on which persecution is based.<sup>70</sup>

These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment (within the law) for an act committed by him. Thus, the UNHCR Handbook gives a fairly liberal interpretation, but nowhere is the issue of "political opinion" realistically handled.

What value can be attached to protection by the present State if the persecutee cannot return to his permanent residence because the protecting State has no authority to intervene if he suffers persecution? There is no mention of this within the 1951 Convention and these persons have to be treated on the basis of realities. Alternatively, if "protection" per se is a mere formality, the person in question should be regarded (if he so desires) as a refugee even if the protecting State is willing to grant him protection and the refugee has no valid reason for refusing to accept it.

The British representative proposed a provision relating to treatment of persecutees who possess dual or even

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<sup>70</sup> Ibid., para 86.

triple nationalities.<sup>71</sup> The second sub-paragraph of para A(2) deals with this provision. Since only those persons possessing a nationality are deemed to be refugees who do not enjoy the protection of a government, the circumstance that a person is unable or unwilling to avail himself of the protection of one country is not sufficient if there is another country willing to extend to him protection and there appears to be no valid reason for him to refuse such protection. As stated above, the unwillingness must be based upon "well-founded fear" of persecution, the valid reason for refusing protection must be based on "fear".

### 3.1.2 Article 1: Section B

#### Text

"B.(1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either:

a. "events occurring in Europe before 1 January 1951" or

b. "events occurring in Europe or elsewhere before 1 January 1951", and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations."

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<sup>71</sup> For instance, Pakistani, Irish and Jamaican nationals. Discussed at the Social Committee of the ECOSOC (E/AC.7/L.63).

### Analysis

Section B deals with the "geographical" origin of the refugees. The question arose whether the 1951 Convention should be restricted to events in Europe or in the world at large.<sup>72</sup> The Ad Hoc Committee proposed to limit the events to Europe and the ECOSOC sustained this view. The General Assembly, however, crossed out the reference to Europe,<sup>73</sup> which would have made para A(2) applicable to the whole world. The Conference, on the suggestion of the French representative,<sup>74</sup> followed a neutral line by wording Section B in such a way as to leave to every Contracting State the choice of restricting the 1951 Convention to "events occurring in Europe" or extending it to cover Europe and any other Continent. From the text (above) one can see the words "events occurring in Europe and elsewhere". The earlier wording was "in Europe or in Europe and other Continents". The Conference took the view that the Committee should permit every State to add to Europe any Continent it wanted, but the President of the Conference restricted the choice to persons who became refugees as a result of events in Europe alone or of events in Europe or anywhere else in the world,<sup>75</sup> or the aspect of Europe and the

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72 The African States in the early 60s felt that this Convention was primarily for the European refugees and there was a need for an African Convention which could cater for the African refugees, hence the OAU Convention on African refugees was born. Also, the 1967 Protocol abolished this geographical limitation. See Chapter Five.

73 Both in the Statute and in the proposed Article 1 of the 1951 Convention.

74 SR.3, p.12 and SR.19, pp.11ff.

75 SR.33, p.20.

rest of the world, or "without qualifications as to area of origin".<sup>76</sup> This provision has clearly caused the most difficulties, so a person who fulfils the section A(2) of Article 1 may be considered a refugee in one Contracting State and yet not recognised as such in another. To elaborate these difficulties, two new refugee instruments were formulated in the 1960s, namely the 1967 Protocol and the 1969 OAU Convention (further elaboration in Chapter Five).

### 3.1.3 Article 1: Section C

#### Text

"C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

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<sup>76</sup> Ibid., pp.13 ff.

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

### Analysis

The provisions of sub-paragraphs (2) to (4) are simple to understand, although these conditions were different to those which were established in the IRO Convention.<sup>77</sup> Paragraph C(3) has produced some confusion and vagueness. The Dutch representative introduced and proposed an amendment<sup>78</sup> which he explained:

"... that a refugee, who had acquired a new nationality (either voluntarily or involuntarily) was not to be deprived of his status as a refugee, if he did not, or did not wish to, avail himself of the protection of the country of his new nationality."

The wording of this sub-paragraph referred only to cases of voluntary acquisition of a nationality,<sup>79</sup> in which case there could be no question of lack of desire to avail oneself of the protection of the country but only of an objective impossibility to do so.

Paras C(1) and C(5) are rather strange and prompted great debate. In the first case, para C(1) stipulated the persons who have voluntarily re-availed themselves of the protection of

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77 See IRO Constitution, Annex 1, Part 1, Section D.

78 SR.23, p.16.

79 SR.23, p.16.

the country of their nationality. The French representative contended that the French word for "re-availed" was "reclamee". He stated that there was an obvious discrepancy between the two words, the first he explained indicated the country of former nationality acceded to the request, while the second referred only to a request for protection. The difference was made more prominent in the Social Committee when the French representative expressed his opinion that "the very fact that a refugee asked his Consul for protection was proof that he could return to his country without fear". The British representative suggested that it would be necessary for a person to lose his status as a "refugee" that his request for protection have met with a favourable reception.<sup>80</sup> The French proposal (same wording as in the text proposed by the Drafting Committee of the Social Committee)<sup>81</sup> in its English translation and version, stipulated a person who "voluntarily makes a new claim for the protection of the government of the country of his former nationality". The final version which was actually adopted by the ECOSOC used the word "re-availed", but the French text was not corrected accordingly. It can be stated that from the above wording a request alone is not sufficient and the approval of the Government is a must.

Para C(5) stipulated persons who became "refugees" as a result of "persecutory measures" which at a given time ceased to be applied. The drafters of the 1951 Convention assumed that if a

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80 E/AC. 7/SR.160, p.22.

81 E/AC. 7/L.66.

"refugee" retained his original nationality, there will be no reason for him to continue refusing to avail himself of the protection of his former government, which will not persecute him and offer him some kind of protection. The drafters of the 1951 Convention also noted the psychological factor which existed with persecution, torture or violation of human rights. On suffering persecution or violation of human rights, the asylum-seeker will develop some kind of distrust and scepticism with that country or its nationals for the precise reason that the drafters inserted the second part of para C(5).

"Compelling reasons arising out of previous persecution" was substituted by the Conference for the words "grounds other than those of personal convenience" used in General Assembly Resolution 429(V). The latter phrase was inserted by the Israeli representative<sup>82</sup> whose "compelling reasons" could be established in the same way as "well-founded fear". "Compelling reasons" could cover either racial and religious persecution, not only by governments but also by large sections of the population which may not have changed their attitude with the changes in the political arena. It need not necessarily cover political persecution, because such persecution can only be restricted to governmental action.

Para C(6) relates to stateless persons on the principle that also applied to nationals in para C(5). The test in the former

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<sup>82</sup> He stated, "... such considerations could be referred to memory of past sufferings". SR.19, p.14.

is "return", while in the latter it is "protection". This subparagraph basically refers to such persons only who were stateless when they became refugees, regardless of their previous states. Literally, it could not relate to persons who lost their nationality thereafter.

The words "former habitual residence" indicates that the drafters of the 1951 Convention had in mind only persons who had no nationality when they had to depart their country. Subsequently, para C(5) corresponds to the first part of para A(2) and para C(6) to the second part.

The introductory words in section C, "shall cease to exist" refers to categories stipulated in (1) to (6). Treatments may differ and vary because persons in categories (1) and (3) become "ordinary" foreigners who cannot be treated as "refugees" while category (4) are out of reach of the States which granted them the status of refugee. The two other categories of they refuse to avail themselves of protection or return to their habitual residence are aliens without State protection to whom Resolution E could apply to.

#### 3.1.4 Article 1: Section D

##### Text

"D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."

### Analysis

Section D basically treats the asylum-seekers who have been granted refugee status and subsequently have a special status under the United Nations. This refers to the Palestinian refugees who are receiving assistance and not protection from the United Nations Relief and Works Agency for Palestine Refugees (UNRWA). The French representative contended that the General Assembly had already delegated some of its powers regarding the Palestine refugees,<sup>83</sup> so there was no need to repeat the assistance programmes. The reasons for excluding this group were as follows:-

1. As stated above by the French representative, it was desirable not to overlap the competence of the High Commissioner and the special agencies.
2. The Iraqi and French representatives stated that it was the express request of the Arab countries which:

"... did not wish to impose on Contracting States the burden of Arab refugees from Palestine so long as the United Nations was caring for them."<sup>84</sup>

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83 326th Meeting, p.48.

84 SR.19, pp.17 and 27-28.

3. Section D, para 2 provides for the automatic assimilation of these categories to the regular refugees, subject to two conditions:-

- (a) If the special assistance had ceased; and,
- (b) The position of these persons had not definitely been settled by a General Assembly resolution.

4. The French representative acknowledged these two conditions but stated that there was a third condition which extended from Section B. In as much as the refugees to which Section D refers became refugees because of event occurring outside Europe, they would be eligible under the 1951 Convention only in relation to such States as did not restrict the application of the 1951 Convention to events which occurred in Europe alone.<sup>85</sup>

### 3.1.5 Article 1: Section E

#### Text

"E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

#### Analysis

This provision stipulates for a special group of persons who are outside their country for reasons of persecution but do

enjoy (in an asylum granting State) a status ordinarily not accorded to foreigners.<sup>86</sup> It is sufficient if they are only de facto citizens of the country. This view was stipulated in the Conference that equality with nationals in areas of economic and social rights was sufficient. What about political rights and obligations? The possession of these rights was not a condition for the application of Section E.<sup>87</sup> The present wording was introduced by the General Assembly. There appears to be no reason why asylum-seekers dealt with in Section D and F should not be assimilated to refugees under Resolution E, despite the expression "shall not apply". This expression only means that such persons cannot be "primary" or main refugees in the full meaning of the 1951 Convention.

### 3.1.6 Article 1: Section F

#### Text

"F. 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

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<sup>86</sup> These people enjoy the rights and obligations which are attached to the grasping of nationality, although they need not officially be naturalised.

<sup>87</sup> SR.23, pp.25-26.

purposes and principles of the United Nations." 88

### Analysis

Section F treats persons who fulfil conditions in Section A but are not deemed in need of international protection. The first draft did not contain such an exclusion clause. It was introduced by ECOSOC but amended by the General Assembly only to be changed by the Conference.

Para (a) seems quite straightforward and requires no explanation. Para(b), however, needs a little explanation. The person under Section F is assumed to be a common criminal. It is a moot point whether the word "crime" should be used in a broad sense of the word, that is every punishable act; or in its narrower meaning, such as grave offence as distinguished from a minor crime.

"Serious" was asserted to illustrate that the word "crime" should and could be used in the broad sense. Thus, only grave offences such as murder, theft and burglary would come under this subsection (b), while lesser crimes and administrative offences such as traffic violations (parking, etc.) could not be regarded as a reason for exclusion. The British representative asserted to the Ad Hoc Committee that refugees

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88 These are basically the Nuremberg Categories. See also the Genocide Conventions. For further reading, see Tusa, The Nuremberg Trial, Macmillan-Papermac, Hong Kong, 1984; also, Woetzel, R., The Nuremberg Trials in International Law, Stevens & Sons, London, 1980; also, "International Criminal Law", in Bassiouni & Nanda, A Treatise in International Criminal Law, Volumes I & II, Charles C Thomas, USA, 1973.

who committed such crimes as petty thefts would not be deprived of the benefit of the 1951 Convention.

Subsection (b) is unclear as to whether the crime must have been committed before the person became a refugee or thereafter. One aspect of note is that the introductory paragraphs speak of "persons", not "refugees", which implies that subsection (b) refers only to such crimes as were committed before the person was recognised as a "refugee". The Yugoslav representative explained the two concepts which formed the initial proposal for the provision:

"(i) That of crimes committed outside the receiving country",

and,

"(ii) ... such acts as war-crimes, genocide and subversion or overthrow of democratic regimes."<sup>89</sup>

There appears to be some overlapping between para (a) and para (c), because "crimes against peace" are also illegal acts and contrary to the purposes and principles of the United Nations. The French representative in the Social Committee of the ECOSOC, stated that the clause may refer to, "persons guilty of genocide".<sup>90</sup> Interestingly, the US representative thought it referred to "collaboration".<sup>91</sup> While the representative of the Secretariat added that this referred to persons violating human

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89 SR.29, p.26.

90 SR.24, p.5.

91 E/AC. 7/SR.160, p.15.

rights without committing a crime.<sup>92</sup> The three above views seem correct.

### 3.1.7 Some Final Comments on Article 1

- i) Article 1 deals on an individualistic basis and does not cater for mass refugees.
  
- ii) There are divergences between the definition of a refugee in the Statute and the 1951 Convention. The 1951 Convention legally binds the Contracting States. The General Assembly adopted two definitions of refugees, one for the Statute and the other for the 1951 Convention. The divergences were accepted by the General Assembly as reflecting differing legal imports of the two documents. Representatives of Belgium, Canada, Turkey and the UK suggested a single definition for both documents.<sup>93</sup> Some representatives followed the Statute and some followed the 1951 Convention's definition. The representative of Chile suggested that the definition should be as broad as possible in the 1951 Convention in order that the refugees might obtain the fullest rights in the countries of asylum and narrower in the Statute because of the administrative and financial implications for the United Nations.<sup>94</sup> The latter view seems to be the most sensible one. There is a

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<sup>92</sup> E/AC. 7/SR.166, p.9.

<sup>93</sup> A/C. 3/L.130.

<sup>94</sup> Third Committee, 328th Meeting, para 8.

need for a broader definition of a refugee, which the 1969 OAU Convention for African refugees have implemented to a greater degree .

iii) No reservation is allowed on Article 1 by Article 42 of the 1951 Convention.

3.1.8

### Article 2

#### Text

"Article 2

#### GENERAL OBLIGATIONS

Every refugee has duties to the countries in which he finds himself, which require in particular that the conforms to its laws and regulations as well as to measures taken for the maintenance of public order."

#### Analysis

This provision was adopted in the same wording as drafted by the Ad Hoc Committee. This provision is quite straightforward. It is an accepted rule of international law that foreigners are under the territorial supremacy of the State they enter. The Ad Hoc Committee felt that it was a desire of the membership to provide a more balanced document, which would make States granting refugee status and asylum more confident in the sense that refugees would still be under their control and not be a menace. The French representative expressed a view that "measures taken for the maintenance of public order" implied a restriction of political activity, but the Ad Hoc Committee

were of the opinion that not all such activity should be restricted; unless the contrary is stated, every State was entitled to exercise control over political activities of foreigners which it considered objectionable. Quite simply, Article 2 stipulated that refugees must comply with the municipal laws and regulations of the country of their residence and also restrict their political activity in the interest of the country's public order.<sup>95</sup>

### 3.1.9 Article 3

#### Text

"Article 3

#### NON-DISCRIMINATION

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

#### Analysis

In the first draft of the Ad Hoc Committee, there was a non-discrimination article of wider application, requiring the States not to discriminate against a refugee simply because he

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<sup>95</sup> "Public order" is simply a translation of "ordre public" which is used in international documents such as Article 29(2) of the Universal Declaration of Human Rights; it covers everything essential to the life of the country and its security. See E. Daes Report, "The Individual Duties to the Community and the Limitations on Human Rights & Freedoms Under Article 29 of UDHR, E/CN.4, sub.2/4/Rev.2.

was a "refugee".<sup>96</sup> At the second session of the Ad Hoc Committee, it was stipulated that the obligation not to discriminate against a refugee because of his special status might be inferred to include the prohibition to apply "special conditions of immigration imposed on aliens". For this precise reason, the Committee added "within its territory" to indicate that the non-discrimination clause referred to the treatment of aliens within the territory of the Contracting State. The US representative stated at the Conference:

"... that the history of the drafting of Article 3 showed that if the words 'within its territory' were deleted the Convention would affect the whole field of immigration policy ..."<sup>97</sup>

Strong words indeed from the US representative. The Conference added the words "within the territory" to denote that there was a legal obligation upon the Contracting States and not only on States which took in the refugees. Article 3 does not contain a full list of discriminations, it only contains discrimination concerning race, religion or country of origin. There are obvious other reasons for discrimination, such as colour, nationality, sex, social status and political opinion. Why were only three measures adopted as a basis for non-discrimination? It seems from the travaux préparatoires, the Conference held that Article 3 ought to deal with such grounds

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<sup>96</sup> This would mean that the refugee status could not be used as a reason for refusing to grant him/her rights which are enjoyed by other nationals or aliens.

<sup>97</sup> SR.5, p.5.

of discrimination as were applied in the countries of persecution<sup>98</sup> and that all other aspects were left to the municipal laws of the country of refuge. To sum up, one can follow the views of the representatives of Yugoslavia and Egypt when they stated that: "Article 3 does not cover every type of discrimination", and why did the drafters mention "race, religion, nationality, social group and political opinion" and yet only mention "race, religion or country of origin" in Article 3. The answer is not known and only the drafters knew the reason for the exclusion of certain terms.

### 3.1.10 Article 4

#### Text

"Article 4

#### RELIGION

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children."

#### Analysis

It can be observed that none of the drafts of the 1951 Convention contained provisions on the freedoms of practising religion and freedom regarding religious education for children. Also it can further be observed that there was no such provision within the earlier conventions, arrangements or

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<sup>98</sup> SR.5, pp.11-12.

agreements. The proposal to include such an article initially came from the representative of Pax Romana,<sup>99</sup> while the Belgian representative in the Ad Hoc Committee suggested the actual inclusion of an article reproducing Article 19 of the Universal Declaration of Human Rights.<sup>100</sup> There was some response, as expected, but the Committee did not consider it in any further detail.

Article 4 stipulates the Contracting States should grant refugees "at least" the same freedom of practising their religion and teaching their religion, as it accords to its own nationals.

The words "at least as favourable" were introduced by the representative of the Holy See. He asked for the words "at least" to guarantee refugees a minimum of religious liberty in such countries.<sup>101</sup> In general terms, Article 4 merely provides a general guarantee that refugees should enjoy the same freedom to practice their religion and in the choice of religious education for their children as did nationals of the country concerned.<sup>102</sup>

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99 SR.11, p.9.

100 SR.11, para 35.

101 SR.33, p.7.

102 Sikhs leaving India and seeking refuge in Pakistan and Bangladesh, Pakistan gaining independence from India in 1947.

3.1.11 Article 5Text

## "Article 5

## RIGHTS GRANTED APART FROM THIS CONVENTION

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention."

Analysis

Article 5 of the 1951 Convention is an amended version of Article 3(A) of the Ad Hoc Committee's draft inserted during the second session. The whole emphasis of the 1951 Convention is to grant refugees as many rights as possible and not to restrict them.

In certain instances,<sup>103</sup> the Contracting States are obliged to maintain special, already existing rights of refugees and in general terms to grant them rights above the minimum prescribed. The Ad Hoc Committee included the relevant provision because it thought,

"... it advisable to make it clear that the adoption of the present Convention should not impair any greater rights which refugees may enjoy prior to or apart from this Convention." <sup>104</sup>

The actual wording of Article 5 seems to suggest that accession

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<sup>103</sup> Article 7(3) of the 1951 Convention.

<sup>104</sup> E/1850, para 19.

to the 1951 Convention need not result in abolition of these broader rights. It is a question whether Article 5 can be stipulated to mean an unconditional obligation on the part of the respective State to maintain a status quo on such rights. Omission of the words "prior to or" (apart from this Convention) which was used in the second Ad Hoc Committee draft cannot actually change the meaning of Article 5 because "apart from" obviously includes past, present and future provisions.

### 3.1.12 Article 6

#### Text

"Article 6

#### THE TERM "IN THE SAME CIRCUMSTANCES"

For the purpose of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling."

#### Analysis

There was no corresponding provision in the first draft of the 1951 Convention or indeed in any of the earlier conventions, agreements and arrangements. From observation of various documents, the expression "in the same circumstances" was used in different articles of the first draft. These words are used to clarify the "assimilation" because the treatment of foreigners or nationals need not necessarily be uniform but

depends, in many instances, upon the special status of the persons.<sup>105</sup> The Ad Hoc Committee actually reflected on the words "in the same circumstances" as meaning that the treatment of refugees should correspond to that granted to other aliens. The Chairman of the Committee suggested that the phrase meant "aliens who have the same right to stay in the country with respect to duration, place and employment".<sup>106</sup> However, later on, the Committee agreed that "in the same circumstances" implied:

"... with the same time limit and other conditions as are required of other aliens for the enjoyment of the same privilege." <sup>107</sup>

### 3.1.13 Article 7

#### Text

"Article 7 <sup>108</sup>

#### EXEMPTION FROM RECIPROCITY

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting

<sup>105</sup> Such as length of stay, the condition of admission, etc.

<sup>106</sup> SR.36, p.9.

<sup>107</sup> SR.42, pp.24/27.

<sup>108</sup> Reservations were made by Botswana (6 Jan 1969), Finland (10 Oct 1968), Madagascar (18 Dec 1967), Malta (17 June 1971), and Uganda (27 Sept 1976).

States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting State shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in Articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provided.

#### Analysis

Article 7 contains two segments which are not interrelated. Firstly, para 1 creates a rule of general application in favour of refugees which did not exist either in the first Ad Hoc Committee's draft or any other international instrument. The Ad Hoc Committee at its second session, decided to establish the following, after listening to various governments and discussions in the ECOSOC:

"... that refugees should enjoy at least the same treatment as aliens generally in regard to most provisions and that a preferred treatment - either that of nationals of the most favoured foreign nations or that of nationals of the Contracting States - be established as regards certain rights."<sup>109</sup>

The reference "to aliens generally" is to foreigners who do not enjoy any special privileges. It was pointed out in the Ad Hoc Committee that the treatment of "aliens generally" is ambiguous because in many countries it was based less on law than on administrative practice. Nonetheless, the expression was retained because there was no better one to be found.

Para 2 is fairly important. Aliens<sup>110</sup> only enjoy the most basic and elementary rights on the basis of accepted international rules. In all other instances, every State is free to treat them as it pleases. In general terms, a State is inclined to grant aliens broader rights if its own citizens will be treated in the same way - this is the meaning of "reciprocity".<sup>111</sup> "Exemption from reciprocity" denotes that a person is to be granted rights which ordinarily are accorded on the basis of reciprocity without requiring reciprocity. The justification for applying exemption from reciprocity to refugees lies in the fact that they are stateless persons.<sup>112</sup>

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110 See Richard Lillich, The Human Rights of Aliens in Contemporary International Law, Manchester University Press, 1984. Also see study by Baroness Elles, "International Provisions Protecting the Human Rights of Non-Citizens", E/CN.4/Sub.2/392/Rev.1.

111 "I will treat your citizens as you treat mine". There are three kinds of reciprocity: (i) Contractual refers to rights specified in particular conventions amongst States; (ii) Diplomatic is based on law but provides a foreigner to a country with the same rights as those granted to nationals; (iii) De facto is established on the basis of a law granting certain rights to foreigners in general, provided that the home State of the foreigner does the same in regard to the citizens of the State enacting the law.

112 See also views of representatives of Belgium, France and Holland: A/Conf.1/11; A/Conf.2./32; and SR.24, p.21.

Para 3 was introduced in the second session of the Ad Hoc Committee in accordance with the general tendency not to impair already existing rights. Para 3 makes an obligation (legal) upon the States to grant to refugees rights ordinarily accorded on the basis of reciprocity alone. This relates to right granted on domestic law as well as on the international conventions.<sup>113</sup> Para 4 was formulated by two views of the drafters of the 1951 Convention: firstly, the contention that some States may not be willing to grant all refugees exemption from all kinds of reciprocity; and, secondly, "exemption from reciprocity" is a very important condition for enjoying a status. Para 4 declares that States should grant broader exemptions than in paras 2 and 3.<sup>114</sup>

The 1951 Convention uses the word "shall" to stipulate an obligation requiring the States to consider favourably the possibility of according such rights. Para 4 stipulates "refugees" as not only those residing in the Contracting States but also those residing outside these States.

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113 1933 and 1938 Conventions.

114 This can be done in three ways: (i) The States may extend the exemption from "legislative reciprocity" to other groups than those referred to in para 2; (ii) The States might also apply to "old" refugees the exemption from a kind of conventional reciprocity or from some of them; and (iii) They might do so in regard to all refugees covered in paras 2 and 3, or to some of them.

3.1.14 Article 8Text

"Article 8 115

## EXEMPTION FROM EXCEPTIONAL MEASURES

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees."

Analysis

Article 8 deals with exceptional measures without actually defining them. Generally, there are measures, in time of war or threat of war or severance of diplomatic relations or other tensions between two States, taken by a State to curb the rights of citizens of a State against which these measures are directed. They could involve limitation of movement, right to a free press, assembly or use of certain channels of communication (eg. radio). Article 8 was drafted by the Ad Hoc Committee to prevent the occurrence of such practices to the 1951 Convention refugees. There is a second sentence,<sup>116</sup> which considerably restricts the import of Article 8.

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115 Reservations made by Ethiopia (10 Nov 1969); Fiji (12 June 1972), Finland, Israel (1 Oct 1954), Jamaica (30 July 1964), Madagascar (18 Dec 1967), Spain (14 Aug 1978), and Uganda (27 Sept 1976).

116 Included in the Conference.

The first sentence of Article 8 does not preclude the application of exceptional measures to refugees, it only prohibits their limitation to a "refugee solely on account of nationality". The person must be a bona fide refugee.

The expression "under their legislation are prevented from applying" was included in order to 'appease' States which are not or would not be willing to accept the general rule as expressed in the first sentence. In Contracting States, where legislation (not the legislative system), as mentioned in the second sentence, exists, the State is to grant exemption "in appropriate cases".<sup>117</sup>

The term "shall" produced some confusion in the Conference.<sup>118</sup> Was it to be interpreted as 'mandatory' or 'permissive provision'? The French representative pointed out that the French equivalent for "shall grant" is "accorderont" which is undoubtedly of a mandatory, not permissible, nature.<sup>119</sup>

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117 These cases depend on what the law provides.

118 SR.34, p.19.

119 SR.34, p.20.

3.1.15 Article 9Text

"Article 9 120

## PROVISIONAL MEASURES

Nothing in this Convention shall prevent a Contracting State, in time of war other grave and exceptional circumstances, from taking provisional measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Analysis

The Ad Hoc Committee, in its second session, included Article 9 in order to clarify "the application of this article in regard to measures related to national security in time of war or national emergency".<sup>121</sup> The actual purpose of Article 9 was to allow refugees in time of war but then followed by a screening process.<sup>122</sup> There may be case where the authorities of the asylum State are unsure whether the person is a bona fide refugee or not or, whilst the asylum-seeker may fulfil the conditions of Article 1, his status as a refugee has not yet been determined by the administrative authorities. In such circumstances, States can apply exceptional measures. However,

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120 Reservations by Ethiopia, Fiji, Jamaica, Madagascar, and Uganda.

121 E.1850, para 23.

122 SR.6, p.15; SR.26, p.6.

such measures can only be applied in time of war or other grave and exceptional circumstances and only if they are necessary to the case of the refugee in the interests of national security.

Article 9 describes "time of war or other grave or exceptional circumstances". These last words were substantiated by the Conference instead of "national emergency", which was agreed by the Ad Hoc Committee. These words were decided on as a compromise between the wording of the Ad Hoc Committee, which some representatives considered the wording too restrictive. The British representative proposed that, "in the interests of national security" should be added, which would enable States to take exceptional measures at any time. "Other grave and exceptional circumstance" could include intermediate areas between war and national security such as state of emergency. Quite basically, Article 9 grants the Contracting States the authority to determine for themselves what measures are needed to their national security and whether the person involved is actually a refugee or not.

### 3.1.16 Article 10

#### Text

#### "Article 10

#### CONTINUITY OF RESIDENCE

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required."

### Analysis

The first paragraph deals with the lack of legal entry and "animus" which is the essence of enforced sojourn. It stipulates that enforced residence in the Contracting State due to displacement during the last war of a refugee, who arrived without proper documents should not militate against considering such sojourn as part of a period of "residence" required for the enjoyment of certain rights.

The second paragraph requires a State to consider two periods as one, while there was an enforced interruption.<sup>123</sup> The only requirement is that the 1951 Convention must be in force when the refugee is to return to his former residence.<sup>124</sup>

### 3.1.17 Article 11

#### Text

"Article 11

REFUGEE SEAMEN

<sup>123</sup> For instance, a refugee residing in country X, during the war was deported to Y and some time later returned to country X.

<sup>124</sup> Introduced by Yugoslavian representative, SR.7, p.4.

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country."

### Analysis

The ILO<sup>125</sup> has introduced this provision, which stipulates the strange position of refugees serving on ships flying the flag of a Contracting State. In these circumstances, the position of vessels under Customary International Law must be considered. Public and private vessels are treated as if they were floating territories of the State under whose flag they sailed. However, the synopsis does not extend to crews as having residence on the territory of the flag State.

### 3.1.18 Article 12

#### Text

"Article 12 126

#### PERSONAL STATUS

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly

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125 SR.30, p.8.

126 Reservations on Article 12 by Botswana, Egypt (22 May 1981), Israel and Finland.

rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee."

### Analysis

Article 12 stipulates the "personal status" of refugees. In other words, their legal capacity (age of majority, the rights of persons under age to marry), capacity of married women, family rights (marriage, divorce, adoption and recognition of children, powers of parents over their children, husbands over wives), the matrimonial regime (rights of property, succession and inheritance).

### 3.1.19 Article 13

#### Text

"Article 13 127

#### MOVABLE AND IMMOVABLE PROPERTY

The Contracting States shall accord to a refugee treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property."

### Analysis

Article 13 does not contain a requirement of domicile or

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127 Reservations by Mozambique (16 Dec 1983) and Uganda (27 Sept 1976).

residence for the enjoyment of the rights conferred by it on refugees. In other words, it applies to refugees irrespective of whether they have their domicile or residence in the country in which they wish to acquire property or elsewhere. The rights covered by Article 13 are fully enumerated: acquisition of movable and immovable property, and other rights relating to movable or immovable properties (for instance, sale, exchange, mortgaging administration, contracts relating to such properties, etc.).

Article 13 does stipulate "rights pertaining to property of "rights" as such. One can assume that the word "property" is used in a very broad sense of the word, which could include securities, money, and bank accounts.

### 3.1.20 Article 14

#### Text

"Article 14 128

#### ARTISTIC RIGHTS AND INDUSTRIAL PROPERTY

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence."

Analysis

Article 14 differentiates between two groups of States. Firstly, the State of habitual residence of the refugee who claims the rights; and, secondly, all other Contracting States. In the first country he is granted the same protection as the nationals of the country and in the second he is granted the rights granted to nationals of the country of his habitual residence.

3.1.21 Article 15Text

"Article 15<sup>129</sup>

## RIGHT OF ASSOCIATION.

As regards non-political and non-profit making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Analysis

Article 15 was based upon Article 23(4) of the Universal Declaration of Human Rights and is more restrictive than the Ad Hoc Committee's Draft. The Ad Hoc Committee had referred to "non-profit making associations and trade unions" which could include political association, while one can note that under the 1951 Convention, political associations are not covered by Article 15. The Swiss representative insisted that the words

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129 Reservations by Uganda, Belgium (22 July 1953) and Ecuador (17 Aug 1955).

"non-political" should be included in the text,<sup>130</sup> which maintained that it was necessary to debar refugees from enjoying political activity.<sup>131</sup> Article 15 does stipulate "associations" and "unions". There is a right of refugees to form their association, union or to join those associations or unions. Article 15 does not impose an obligation for these associations or trade unions to admit refugees on the same conditions and terms as foreigners. Article 15 can be coupled with Article 17 which grants refugees the "most favourable treatment accorded to nationals of a foreign country". These words can imply "the best treatment, which is given to nationals of any country by convention". The term "most favourable treatment accorded to nationals of a foreign country" varies from State to State and from time to time.

### 3.1.22 Article 16

#### Text

"Article 15 132"

#### ACCESS TO COURTS

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to

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130 A/Conf.2/35.

131 This was one of the conditions attached to the granting of asylum - SR.8, pp.9ff.

132 Reservations by Uganda, Belgium (22 July 1953) and Ecuador (17 Aug 1955).

access to the Courts, including legal assistance and exemption from cautio judicatum solvi.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

### Analysis

The Ad Hoc Committee, in its draft, reproduced provision of the 1933 and 1938 Conventions in relation to rights in countries other than that of the habitual residence of the refugee. The Conference had introduced changes but they were only of a verbal nature - no undertaking was given. The right of appearing before the domestic courts is given to all persons - even if they are stateless. The 1951 Convention imposes a legal obligation to Contracting States to enable refugees to have free access to domestic courts.

On considering para 1, the Ad Hoc Committee stated that this paragraph applied to persons who had recently become refugees and therefore had no habitual residence anywhere.<sup>133</sup> In this case, para 1 may grant a special favour to refugees. From observation, one can note similar rights in Article 14, para 2.

There are difficulties which foreigners usually encounter, due to the requirement of a deposit to cover the court expenses of the other party in the event that the foreigner loses the case (cautio judicatum solvi) and the absence of free legal

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133 SR.25, para 19.

assistance to indigenous foreign claimants. So to get rid of these difficulties, which refugees may face in para 2, refugees are directly assimilated as habitual residents of the country where the court is located, insofar as access to the courts in general and the requirement of cautio judicatum solvi and free legal assistance in particular are concerned.

Para 3 stipulates that refugees in other Contracting States are assimilated as nationals of the country of their habitual residence.

### 3.1.23 Article 17 <sup>134</sup>

#### Text

"Chapter III

GAINFUL EMPLOYMENT

Article 17

WAGE-EARNING EMPLOYMENT

"1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on

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134 Reservations by Angola (23 June 1981), Austria (1 Nov 1954), Botswana, Chile (28 Jan 1972), Denmark (4 Dec 1952), Ethiopia (10 Nov 1969), France (23 June 1954), Greece (5 Apr 1960), Iran (28 July 1976), Ireland (29 Nov 1956), Italy (15 Nov 1954), Jamaica (30 July 1964), Liechtenstein (8 Mar 1957), Madagascar, Mozambique, Norway (23 Mar 1953), Sierra Leone (22 May 1981), Uganda (27 Sept 1976), UK (11 Mar 1954), Zambia (24 Sept 1969), and Zimbabwe (25 Aug 1981). The majority view was that Article 17 was merely a Recommendation.

aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions: (a) He has completed 3 years' residence in the country; (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse; (c) He has one or more children possessing the nationality of the country of nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes."

### Analysis

The wording in Article 17 is practically identical to that proposed by the Ad Hoc Committee in its second session. The first draft granted refugees the same treatment as nationals. However, this draft was criticised on this ground in the Social Committee,<sup>135</sup> and changes were made accordingly.

Para 1 applies in the same way as in Article 15. The 1951 Convention does not define "wage-earning employment", so it can be taken in its broad terms.

Para 2 seeks to integrate certain categories of refugees to nationals: once resolutions imposed on aliens in "wage-earning employment" are declared non-applicable, the refugee is placed in the same position as a national of the country of residence.

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<sup>135</sup> E/AC. 7/SR.167, pp.16ff.

Para 2 treats two kinds of restrictions imposed for the protection of national labour markets. Firstly, measures imposed on the employment of aliens, and, secondly, measures imposed on aliens.

Para 3 is self-explanatory and further elaboration is not required. Article 17 stipulates an important provision because without the right to work all other provisions are practically meaningless.

### 3.1.24 Article 18

#### Text

"Article 18 136

#### SELF-EMPLOYMENT

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies."

#### Analysis

The structure of Article 18 clearly grants the refugee the right to engage in industry and economy, but is not applicable to refugees residing outside the country where the self-employed activity is exercised; Article 7(1) is applicable in

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136 Reservations by Italy (15 Nov 1954). As Article 17, Italy stated that Article 18 was merely a Recommendation.

such cases.

The terms "lawfully in their country" and "lawfully staying in the country" are different. Whenever "lawful stay" is required, a refugee just temporarily in the country would not enjoy the right granted under the conditions of "lawfully staying". Alternatively, where "lawful being" is sufficient, refugees temporarily in the country would enjoy the relevant rights. The Ad Hoc Committee explained:

"It was decided that in most instances the provision in question should apply to all refugees whose presence in the territory was lawful, if it applies also to other aliens in the same circumstances."

Wherever higher requirements were made (for instance, Articles 15, 17, 19, etc.) the Ad Hoc Committee used the expression "lawfully staying".<sup>137</sup>

### 3.1.25 Article 19

#### Text

"Article 19 138

#### LIBERAL PROFESSIONS

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and,

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137 E/1850, para 25.

138 Reservation by Mozambique.

in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible."

### Analysis

There appears to be no corresponding article in the previous conventions, arrangements or agreements. Article 19 grants the same treatment as the preceding one but with one restriction, that the diplomas must be recognised. The term "liberal profession" is not precise, it can mean doctors, lawyers, teachers, etc. However, there appears to be no distinction between certain liberal professions and the self-employed or wage-earners, except when a special diploma is required for the exercise of work - the rule is not absolute.<sup>139</sup>

Basically, para 2 is appealing to the Contracting States to provide employment for refugee profession. Para 2 also imposes the moral obligation to try and secure employment within the laws and regulations of the Contracting State. The British representative who suggested the inclusion of this phrase emphasised that it was inserted to reassure colonial governments that the provision did not infringe or breach the constitutional position in their territory.<sup>140</sup>

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139 Nobody has asked to see a diploma of a poet or a singer.

140 SR.14, para 6.

3.1.26 Article 20Text

"Article 20 141

## RATIONING

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals."

Analysis

The words "where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, ..." did not appear in the first Ad Hoc Committee's draft; the Committee made it clear that the meaning of the word "rationing" was that it was rather unusual to treat aliens in the matter of rationing differently from nationals. The French representative in the Ad Hoc Committee was of the opinion that this article refers to essential goods for individual use but not for products for industrial use.<sup>142</sup> The Ad Hoc Committee eventually incorporated the above word in its 2nd draft. Article 20 does not refer to all products in short supply, but only to those which are allocated to the general population. This seems to indicate that Article 20 deals only with consumer goods.

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141 Reservation by Egypt (22 May 1981).

142 SR.15, para 16.

3.1.27 Article 21Text

"Article 21

## HOUSING

As regards housing, the Contracting States, insofar as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."

Analysis

Article 21 deals with rent control and assignment of premises. It does carry an obligation not only for the State but also for other public authorities (regional self-governments).

3.1.28 Article 22Text

"Article 22 143

## PUBLIC EDUCATION

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the

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143 Reservations by Zambia, Zimbabwe, Mozambique, Egypt, Austria and Ethiopia.

recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships."

### Analysis

The Conference voted 17:3:3 on the heading of this title, but the heading is quite important. Para 1 speaks of "elementary education" which could mean public and private secondary schools. There appears to be a restriction of application excluding private schools. This is in agreement with the intention of the Ad Hoc Committee:

"This provision should apply only to education provided by public authorities from public funds and to any education subsidised in whole or in part by public funds or to scholarships deprived from them."  
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Obviously the terms "elementary" and "higher" education depend on a given country. Para 1 was encouraged and inspired by Article 26(1) of the Universal Declaration of Human Rights which, in brief, stipulated that elementary education should be free and compulsory.

The Conference was less liberal in discussing para 2 than the Ad Hoc Committee and reverted to the treatment accorded by previous contentions. The Ad Hoc Committee had suggested: "... the most favourable treatment accorded to nationals of a foreign country." While the Conference conferred treatment "as favourable as possible" and in any event "not less favourable

than that accorded to aliens generally in the same circumstances".<sup>145</sup>

Para 2 deals with all grades of education other than elementary, including recognition of school certificates and diplomas gained abroad.

### 3.1.29 Article 23

#### Text

"Article 23 <sup>146</sup>

#### PUBLIC RELIEF

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nations."

#### Analysis

The 1951 Convention does not contain a definition of "public relief" and "assistance". The definitions will depend on the Contracting States and how much assistance can be given to the refugees. No difficulties will, as a rule, arise in practicable terms concerning the delimitation between public relief and assistance, on the one hand, and social security on the other, because the 1951 Convention provides for the same treatment in both instances.<sup>147</sup>

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145 E/1850, para 23.

146 Reservations by Canada (4 June 1969), Egypt, Iran, and Malta (17 June 1971).

147 Except for the cases stipulated in Article 24(1)(b)(i) & (ii).

3.1.30 Article 24 148Text

## "Article 24

## LABOUR LEGISLATION AND SOCIAL SECURITY

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment is accorded to nationals in respect of the following matters:

(a) Insofar as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

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148 Reservations by the UK, Zimbabwe, Finland, Iran, Liechtenstein, Egypt, Canada and Jamaica.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-Contracting States."

### Analysis

Article 24 covers a whole range of official employment regulations and social security. It does not, however, apply to agreements between employers and employees. There are two limitations:-

- (i) The lack of obligation by the State of residence of the refugee to maintain the rights which he has acquired elsewhere or which he was about to acquire there.
- (ii) Such portions of social security benefits which are payable wholly out of public funds and to allowances which are paid instead of pensions.

In both of these limitations, the Contracting States are free to apply in part to refugees, or not to apply at all, the usual laws and regulations.

Para 2 can apply not only to refugees but also to foreign labourers. Para 3 does not state or explain clearly where the

rights acquired, or in the process of acquisition, were acquired: in the home State of the refugee or in a Contracting State where the refugee moved to another Contracting State?

Para 4 is not clear cut. However, the Belgium representative explained that he thought that if an agreement on social benefits were signed between the United Kingdom and Hungary, the latter country not being a signatory to the 1951 Convention, a Rumanian refugee residing in the United Kingdom would under para 4 benefit from it.<sup>149</sup> This explanation seems sufficient to explain the workings of para 4.

### 3.1.31 Article 25

#### Text

"Article 25 150

#### ADMINISTRATIVE ASSISTANCE

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall

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149 SR.11, p.8.

150 Reservations by Uganda, the UK, Fiji (12 June 1972), Finland and Jamaica.

stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28."

### Analysis

Para 1 deals with a number of services which nationals of a country ordinarily receive from their judicial or administrative department, such as documents (for instance, birth, death and marriage certificates) or school or professional certificates. Since the refugee cannot gain these documents from the country he has fled, the asylum granting States will have to make these arrangements.<sup>151</sup> The choice is within the competence of every Contracting State. The UNHCR can do so on the basis of para 8(b) of the Statute.

Para 2 deals with documents delivered or caused to be delivered "under their (of the authorities) supervision". The words were inserted to indicate that if a document is not directly delivered by the authorities of a Contracting State, their attestation will not be required in order to make them authentic. In explaining para 3, the Ad Hoc Committee provided that:

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<sup>151</sup> The UNHCR can assist in these matters.

" ... the purpose of this clause is to have the Contracting States give documents issued to refugees the same validity as if the documents had been issued by the competent authority of the country of nationality of an alien or as if the act had been certified by such authority. Such documents would be accepted as evidence of the facts or acts certified in accordance with the law of the country in which the document is presented." 152

The Conference amended the Ad Hoc Committee text by providing that such documents be given, not the "same validity" as instruments issued by the national authorities, but only "credence in the absence of proof to the contrary". Para 3 does not say so explicitly but it can be assumed that such documents and certificates are valid in all Contracting States even if delivered by the authorities of one Contracting State.

Para 4 may not have been correctly drafted. The permissive word "may" is used. It seems rather unusual to make a permissive reservation to a permissive pronoun. Para 4 could mean that it is within the discretion of the proper authority in every single case to charge fees, except in regard to indigent persons who may be exempt from the fees in a general way.

"Administrative assistance" includes the issue of identity papers and travel documents.

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152 E/1618, comments on Article 20.

3.1.32 Article 26Text

"Article 26 153

## FREEDOM OF MOVEMENT

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances." 154

Analysis

The intention of Article 26 is to "assimilate" refugees to "aliens" in general. This was considered sufficient because free residence and movement are ordinarily granted to all aliens but in some instances certain restrictions may exist.<sup>155</sup>

The European Agreement on the Abolition of Visas for Refugees<sup>156</sup> provides exemption for refugees who are resident in the territory of a Contracting State from having to obtain visas to visit the territory of another State. The refugee must hold a valid travel document under Article 28 of the 1951 Convention and the visit is limited to 3 months. If the

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153 Reservations by Botswana, Angola (23 June 1981), Greece (5 April 1960), Iran, Sudan (22 Feb 1974), Mozambique, Rwanda (3 Jan 1980), and Zambia.

154 See Burrows, Free Movement in European Community Law, Clarendon Press, Oxford, 1987.

155 A need for a special licence to move to overcrowded places or to go to restricted no-go areas.

156 By unanimous vote of the Committee of Ministers a Government which is party to the 1951 Convention may be invited to accede (Art.10).

refugee wishes to seek employment or stay longer than 3 months, then a visa may be required.<sup>157</sup>

### EEC Treaty

In order to realize one of the objectives of the EEC, free movement of workers is ensured by the end of the transitional period at the latest (Art.48(i)). Discrimination based on nationality between workers of Member States is abolished<sup>158</sup> as regards employment, remuneration and other conditions of work. Workers and their families are free to move within the EEC.

#### 3.1.33 Article 27

##### Text

"Article 27

##### IDENTITY PAPERS

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

##### Analysis

Article 27 deals with "identity papers" which are for internal use. These papers should not be confused with "travel documents" which are needed to travel abroad. Identity papers

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<sup>157</sup> The terms of the Agreement are subject to reciprocity between Contracting States and are subject to national legislation governing the entry of aliens (Article 4). In Article 5, each Contracting State reserves the right to prohibit the entry of persons it deems undesirable.

<sup>158</sup> Regulation 1612/68.

certify the identity of a refugee (certificate of identity) and in countries without a passport system, a substitute for a passport.

The 1951 Convention does not prescribe the nature of identity papers. They do not have to be official papers in the ordinary sense, they may simply be documents showing the identity of a refugee. Finally, where no identity papers are required or issued, Article 27<sup>159</sup> would not be applied purely because it is meant to be a safeguard in the refugees' interests.

### 3.1.34 Article 28

#### Text

"Article 28 160

#### TRAVEL DOCUMENTS

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to

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159 Reservation by Malta.

160 Reservations by Finland, Malta and Zambia.

this article.

### Analysis

The problem of travel documents was a concern to the international community at the time of drafting the 1951 Convention.

Para 1, sentence 1, relates to the Contracting States to oblige in giving a travel document to a refugee if he so wishes to travel abroad. The representative of Venezuela stated:

"States like his own could not admit that it was mandatory for them to issue a travel document to refugees while a similar obligation did not exist in respect of his own nationals." <sup>161</sup>

However, on the strength of the opposition, the Conference replaced the words "the obligation" (to issue a document) in para 11 of the Schedule (see later) with the words "the responsibility".<sup>162</sup> There appears to be a restriction of the obligation, viz. that it is not to be applied if compelling reasons of national security or public order militate against the issue of travel documents. The Schedule attached to Article 28 directly states that the provisions of the Schedule do not in any way affect the laws and regulations governing the condition of departure from the Contracting States. From the wording, one can assume that this rule was not considered to be

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161 SR.33, p.5.

162 SR.33, p.6.

an additional restriction to the obligation to issue a travel document to every person who was granted refugee status lawfully within the Contracting State.

Sentence two stipulates that the Contracting States have complete discretion in issuance of travel documents to refugees who are in their territory but are not lawfully staying there.<sup>163</sup> Para 2 stipulates the validity of travel documents issued under previous arrangement even if they do not fulfil the conditions of Article 28 and of the attached Schedule. In other words, the travel documents issued under earlier documents are legally assimilated or integrated to such documents issued under Article 28 and the Schedule.

What would be the position of non-parties to the 1951 Convention regarding the acceptance of refugees with travel documents? Para 2 implies an obligation on the parties to the 1951 Convention to recognize travel documents issued by non-parties thereto while the latter are not bound to do the same in regard to member parties of the 1951 Convention. It seems that para 2 was purely and mainly administrative, that is, to avoid the necessity of exchanging all existing travel documents.<sup>164</sup>

#### Schedule to Article 28

See Appendix - nearly all the paragraphs are self-explanatory.

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<sup>163</sup> That is, on a temporary basis or even illegally.

<sup>164</sup> SR.17, p.13.

3.1.35 Article 29Text

"Article 29 165

## FISCAL CHARGES

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers."

Analysis

Article 29 is based upon articles in previous arrangements, agreements and conventions.<sup>166</sup> Article 29 deals with refugees in general, enjoying equal status with nationals "in similar situations" in a country where the fiscal charges are payable, the refugees need not reside in either the State concerned or in another Contracting State. This is important because duties and charges are levied not only from residents and they may refer not only to taxes on income or property but also to duties on imports or exports. The expression "duties, charges or taxes" taken in the context of "fiscal charges" must refer to every kind of public assessment, whether of a general nature or a specific nature.

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<sup>165</sup> Reservations by Ireland and France (23 June 1954).

<sup>166</sup> Para 8 of the 1928 Arrangement; Article 13 of the 1933 Convention; and Article 16 of the 1938 Convention.

Para 2 stipulates the word "alien" which implies "aliens in the same circumstances", that is, refugees are not to pay higher or other charges of those described in para 2 than those imposed on aliens generally in the same position for the same services.

### 3.1.36 Article 30

#### Text

"Article 30

#### TRANSFER OF ASSETS

"1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted."

#### Analysis

Article 30 imposes an obligation on the Contracting State to permit the transfer of assets to refugees, provided these assets have been brought in by the refugee and the transfer is made to another country. Thus, no such obligation exists in cases where the refugee leaves the country of his residence for a temporary stay abroad. What was the purpose of this Article? The Belgium representative stated that the purpose of this Article was in fact to lift, in the case of refugees, the restrictions imposed on the transfer of assets in receiving

countries.<sup>167</sup> The President of the Conference interpreted para 1 as relating to such assets only as the refugee brought into the country of asylum as a refugee.<sup>168</sup> This interpretation may be in accord with the literal interpretation of the intention of the Ad Hoc Committee,<sup>169</sup> but prima facie, it does not correspond to the real intention of the Ad Hoc Committee and the aim of the 1951 Convention is to facilitate as far as possible the resettlement of refugees. In fact, the Conference actually deleted the words "with him" (in connection with "bringing in") which cannot but mean that the refugee may have sent the assets to the country before he personally arrived there.

Para 2 recommends more favourable treatment wherever possible.

### 3.1.37 Articles 31-46 (See Appendix) <sup>170</sup>

For interpretation and analysis of Articles 31-33 of the 1951 Convention, see the section relating to the principle of non-refoulement.

Article 34<sup>171</sup> comprises two parts: firstly, a recommendation to

167 SR.13, p.5.

168 SR.13, p.8.

169 SR.24, para 46.

170 Reservations on Article 32(1)(2) by Uganda, Ireland and Botswana.

171 Reservations by Chile and Botswana.

or a general moral obligation on the Contracting States to facilitate as far as possible the naturalisation and assimilation of the refugee residing in their countries; and, secondly, a more specific obligation to expedite proceedings wherever an application for naturalisation can be or has been made and to reduce its costs involved. The word "assimilation" does not mean the loss of the specific identity of the persons involved but in the sense of integration into the economic, social and cultural life of the country. It is interesting to note the views of the French representative in the Ad Hoc Committee who considered "assimilation" to mean "the intermediate stage between the establishment of a refugee on a particular territory and his naturalisation".<sup>172</sup> The term "assimilation" was used to grant the refugee certain rights and privileges which are available to the nationals of the refuge State. These could include schooling, health facilities, social security, prospects of employment and so on.

Article 35 is the result of a set up and existence of the office of UNHCR and of para 6 of the Preamble to the 1951 Convention. Since the UNHCR will in substance deal with the same person under the 1951 Convention, co-operation between UNHCR and the Contracting States is a must if the best results are required for the assistance and protection of refugees; further reference is made in Chapter Nine. The General Assembly envisaged the UNHCR office as a means of making the 1951 Convention a "dynamic and living reality".<sup>173</sup> However,

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172 SR.39, p.28.

173 SR.24, p.22.

the French representative thought that the "High Commissioner's office and the Convention were two entirely separate matters, the fact of them coming together was an historical event but not an absolute necessity".<sup>174</sup> The High Commissioner is summoned to report to the General Assembly yearly, to present his annual report. The General Assembly passed a resolution (unanimously) calling upon governments to co-operate with the High Commissioner and to provide the office with the necessary assistance and co-operation.<sup>175</sup> Article 35 actually transforms this resolution into a legally-binding obligation on the part of the Contracting States. It is worthwhile to note that there may be Contracting States who are not members of the United Nations. Article 35 does not make any distinction between members or non-members of the United Nations because there is no legal barrier to the co-operation of non-members with the High Commissioner. However, Article 35 is not included in the list of provisions to which no reservations are permitted, so that non-members of the UN may enter a reservation to this Article.

Articles 36, 37, 38 and 39 are self-explanatory. The expression "without prejudice to article 28, par 2" within Article 37 stipulates that although the agreement on the basis of which a travel document was issued has become invalid as between the State acceding to the 1951 Convention, the travel document shall continue to be recognised.

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174 SR.27, p.12.

175 Note also Article II of the 1967 Protocol in Chapter Five.

Article 38 can be compared to provisions within Article IX of the OAU Refugee Convention. The former requires disputes to be referred to the International Court of Justice and there were no reservations to this article, whereas Article IX of the OAU Refugee Convention requires disputes to be referred to the Commission for Mediation Conciliation and Arbitration of the OAU.

In Article 40, paragraph 1 allows variations in the geographical application but only insofar as dependent territories are concerned. Paragraph 2 stipulates the result of the freedom granted to States regarding the geographical application of the 1951 Convention. Once it is left to their discretion to extend it to any of their dependent territories they may do so at any time by unilateral notification. Paragraph 3 is a moral obligation on the part of the Contracting States to extend its application wherever possible.

Article 41 is self-explanatory. This article was introduced by the Israeli delegate<sup>176</sup> with a British supplement.<sup>177</sup> The reason for this introduction was that the implementation of the provisions of the 1951 Convention might, to some extent, fall within the jurisdiction of the component parts of a Federal State.

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176 A/Conf. 2/90.

177 A/Conf. 2/97.

Article 42 stipulates a number of provisions to which no reservations are permissible. They include:

- (i) The term "refugee" and its definition.
- (ii) Non-discrimination clause.
- (iii) Freedom of religion.
- (iv) Access to courts.
- (v) Non-Refoulement.
- (vi) Settlement of dispute.
- (vii) Procedures.
- (viii) Territorial application.

Article 42 does not state when a notification concerning the withdrawal of a reservation becomes valid. It can be safely assumed that the usual 90 days period will be appropriate. There are no reservations recorded on Article 42 per se.<sup>178</sup>

Article 43 deals with the two dates of the coming into force of the 1951 Convention:

- (i) The original date (paragraph 1).
- (ii) The subsequent date (paragraph 2).

The original date signifies the entry of the 1951 Convention into force among the States which were first to comply with the requirement of Article 39. Article 43 requires that at least 6 States must legally become parties to the 1951 Convention.

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<sup>178</sup> As of April 1989.

However, at the present moment (April 1989) there are 106 States which are parties to the 1951 Convention. The 1951 Convention entered into force on 22nd April 1954 in accordance with Article 43.

Article 44 requires no further explanation. In Article 45, a revision of the 1951 Convention could be effected at any time with the consent of all parties, despite the provisions of this Article. The Conference interpreted Article 45 that the consent of the General Assembly was required in order to provide the financial means necessary to hold a conference under UN auspices. However, the President of the Conference interpreted Article 45 officially to mean that the Contracting States would if necessary be entitled to take action independently of the UN, making their own financial provisions for holding the Conference.<sup>179</sup>

### 3.2 POSTSCRIPT

After having examined the 1951 Convention, it is now possible to note the definition of the refugee and its relation to human rights. Extensive study is not undertaken, but nevertheless it is useful to incorporate in this thesis.

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<sup>179</sup> SR.55, pp.33-34.

## **CHAPTER FOUR**

### **Human Rights and the Refugee Definitions**

## CHAPTER FOUR

### HUMAN RIGHTS AND THE REFUGEE DEFINITIONS

The classical definition of the term "refugee" is found in Article 1 of the 1951 Convention, Article 1 of the 1967 Protocol and in paragraph 6 of the Statute of the Office of the United Nations High Commissioner for Refugees. This definition has been incorporated in many municipal legal systems all around the world. Since the 1950s, there have been individuals who have been considered as refugees even though they do not fulfil this classical definition incorporated within international documents and instruments. The United Nations General Assembly had to adopt resolutions which prompted the High Commissioner to assist refugees outside the mandate of the UNHCR. In a few resolutions, reference was made to the High Commissioner's "good offices". Other resolutions referred to refugees from specific situations.<sup>1</sup> From 1961, there was a policy by the UNHCR which related that the term "refugee" was restricted to persons who fulfilled the criteria of the Statute or the 1951 Convention. If the refugee was from outside Europe, then UNHCR could assist refugees on the basis of specific resolutions. The 1969 OAU Convention Governing the Specific Aspects of the Refugee Problems in Africa, has defined the refugee in very broad terms (see Chapter Five), more so than the earlier refugee instruments. The addition is an

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<sup>1</sup> For instance, GAOR 1166 (XII), GAOR 1388 (XIV) and GAOR 1671 (XVI).

attempt to describe in legal terms the refugee assisted through the specific General Assembly resolutions.

The definition within Article 1 of the refugee instruments and the UNHCR Statute is certainly a European definition. Although the definition was drafted against the background of a particular situation, resulting from two World Wars in Europe, it cannot be used in developing or Third World countries. As mentioned above, the definition is outdated and very narrow and it does not correspond to the "real" refugee situation of today. The present definition could be replaced by a definition more or less on the lines of the wording of the additional paragraph of the OAU and could include provisions relating to natural disasters. One such definition could be:

A person is a refugee who:

"Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion; or of reasons of external aggression, occupation, foreign domination, events seriously disturbing public order; or from natural disasters, is outside the country of his nationality and is unable or owing to such fear of these events 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." (my emphasis)

Such a solution seems unrealistic because of the political climate between East and West States, especially in the West are no longer prepared to accept refugees on a bona fide basis. These States have adopted very restrictive policies

aimed at deterring asylum-seekers, especially those who escape from the Third World countries. One can immediately refer to the 1977 Conference on Territorial Asylum, even when discussing the personal scope of the draft Convention, several proposals were made to restrict its application. The discussion, with regard to the definition, was based on a text similar to the 1951 Convention and the 1967 Protocol. Surprisingly, there was not a single proposal to enlarge the personal scope of the draft Convention in line with the OAU Convention.

It can be argued that the numbers of "refugees" would increase if the above definition was implemented or incorporated. However, the numbers would remain the same, except that 100% of the asylum-seekers will be classified as refugees, rather than only 5%. Obviously, more international co-operation and solidarity will be required. The UNHCR would have to increase its staff and assistance, which would result in the western countries having to pay more to the UNHCR. The Western States would be obliged to submit more effort in, firstly, preventing the causes of refugee flow and, secondly, to cater for refugees on a bona-fide basis.

Professor Melander states:

"In my view, it is a serious mistake to conclude that the definition as contained in the 1951 Refugee

Convention/1967 Protocol is outdated." <sup>2</sup>

The simple answer to Professor Melander's statement is that the refugee definition is outdated, because only 5% of the world's refugee population actually fulfils this definition. The other 95% simply do not satisfy this definition. The 1969 OAU is an improvement but not a complete solution. As mentioned earlier, it is now generally accepted that the 1951 Convention was to cater for the European refugees and no one else; although the 1967 Protocol was formulated to remove the geographical and time limitations. Today, refugees emerge from all corners of the globe. Nearly all of these corners have problems - whether from persecution, man-made, or natural disasters. Europeans have the least problems. Very few refugees are recorded that emerge from Europe, except those people escaping communist regimes, who are often absorbed by neighbouring or sympathetic States within the European Community.

There are two types of refugees. Firstly, the Human Rights refugees and, secondly, Humanitarian law refugees:

#### 4.1 HUMAN RIGHTS REFUGEES

This category of refugees is based on the definition which is incorporated in the refugee instruments. From observing these

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<sup>2</sup> Melander, The Two Refugee Definitions, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Report No.4, Sweden, 1987. See also paper presented at the University of Liverpool, March 1988.

definitions and the actual instruments, one can note that the term "persecution" is not defined. It seems to be an ambiguous word. There is no universally accepted definition of a "refugee". Various attempts to formulate a definition of "persecution" have been unsuccessful, purely because of the uncertainty. From Article 33(1) of the 1951 Convention and the 1967 Protocol, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinions or membership of a particular social group is always persecution.<sup>3</sup> Other violations of human rights - for the same reasons - would also constitute persecution. Whether other prejudiced actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in light of such opinions and feelings that any actual or anticipated measures against the asylum-seekers must necessarily be viewed. Every person is different and due to the variations in individual psychological traits and their present circumstances, interpretations of what amounts to persecution is bound to vary. An asylum-seeker may have been subjected to various measures, not in themselves amounting to persecution, but just as harmful, for instance, discrimination in all its different forms,<sup>4</sup> and in some cases

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3 See UNHCR Handbook, para 51.

4 Racial, sexual, religious, etc.

combined with other adverse factors.<sup>5</sup> In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to a well-founded fear of persecution on "eliminative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances including the particular geographical, historical and ethnological context.<sup>6</sup>

As mentioned above, a threat to life or freedom normally stipulates and constitutes persecution. Professor Grahl-Madsen concludes that:

"Whenever a person is faced with the likelihood of losing his life or physical freedom for more than a negligible period of time, if he should return to his home country or is likewise threatened with other measures which, in his particular case and his special circumstances, appear as more severe than a short-term imprisonment, that person has "well-founded fear of being persecuted."<sup>7</sup>

The criterion of persecution may be fulfilled if the asylum-seeker is being exposed to human rights violations. In this

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5 For instance, general atmosphere of insecurity in the country of origin.

6 See also UNHCR Handbook, para 53.

7 Grahl-Madsen, op.cit., Vol.I, p.216. See also Goodwin, G.U., The Refugee in International Law, Clarendon Press, Oxford, 1983, p.43, who defines persecution in terms of reasons, interests and measures, and receives support by analogy in the International Convention on the Suppression and Punishment of the Crime of Apartheid.

case, it is the Civil and Political Rights which are relevant, that is, human rights dealing with the relation between the individual and the State. This criterion may also be fulfilled when economic, social and cultural rights may be violated, especially if the asylum-seeker fears discriminatory measures based on sexuality, race, religion, membership of a social group or political opinion.

There are some human rights instruments which can be used to assist the term "persecution", for instance, the Universal Declaration of Human Rights and the two Covenants (Civil and Political, and Social, Economic and Cultural) stipulate guidelines (see later) in deciding if persecution is involved.<sup>8</sup> Nearly all of the articles in the Universal Declaration of Human Rights (UDHR) imply persecution. Does this mean that everyone who faces violations of human rights will be an asylum-seeker or a refugee? No, it does not. There does not appear to be a difference between violation of human rights and persecution, although intensity of the crime will vary and the severity of a degree must be reached in order to be considered as persecution. On the other hand, an asylum-seeker may be subjected to or feels various human rights violations and yet not amount to persecution. These violations must reach a degree to justify a claim of or to "well-founded fear of persecution". Also, as mentioned above, the subjective character of fear of persecution will require

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<sup>8</sup> A person who is arbitrarily detained contrary to Article 9 of the Universal Declaration of Human Rights may be persecuted.

an evaluation of the opinion and feelings of the asylum-seeker concerned.

The human rights violations must be influenced and to a certain degree motivated by one of the five causes of persecution mentioned in the 1951 Convention, as stated in Chapter Three. One of the major problems is that the 1951 Convention and the 1967 Protocol are very individualised and it is necessary for the individual asylum-seeker to face such measures himself or herself. The same applies to human rights violations which, according to some international human rights instruments, can be related to individuals. However, today's refugees are rarely individuals, they emerge in groups or masses.<sup>9</sup> An asylum-seeker who has obtained the classification of a "refugee" in accordance with the definition incorporated within the 1951 Convention and/or 1967 Protocol, will and can be described as a person who has left his country of origin or nationality for fear of human rights violations or actual human rights violations.

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9 For instance, the blacks in South Africa are subjected to degrading treatment due to apartheid. They have no choice but to leave, basically due to the international crime of apartheid, and they are almost certainly subjected to human rights violations. On the other hand, group determination of the type which happened after the 1956 events in Hungary is debateable. Some Western countries considered that any Hungarian should be considered a refugee in accordance with the 1951 Convention. However, if the application for refugee status had been determined at a different time and strictly on an individual basis, then these asylum-seekers would not have been recognised as refugees.

#### 4.2 HUMANITARIAN LAW REFUGEES

Very often, asylum-seekers who leave their countries of origin are members of the group of "the good offices" refugees. There appears to be a factor of coercion which affects this group which differentiates from other groups and movements. Contemporary refugees are a result of mainly wars and armed conflicts, in many cases the movements of refugees has taken place as a result of aggression, alien domination, foreign armed intervention and occupation.<sup>10</sup> In other examples, armed conflict takes place between armed forces in a State and dissident armed forces or other organised armed groups;<sup>11</sup> in these cases, the only escape for the people is to flee to neighbouring states. Communal violence is perhaps the most terrifying form of social conflict, especially when members of ethnic, religious or linguistic groups turn on members of other groups, and atrocities are almost inevitable.<sup>12</sup> On the other hand, circumstances and situations such as riots and isolated acts of violence rarely cause massive flows of refugees. In the UK, asylum-seekers have applied for refugee status and asylum, invoking danger to life because of armed conflict if they are returned to their countries of origin. However, if their applications are rejected then they are usually returned to their country of origin.<sup>13</sup> However, in some western

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10 See Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, para 31, UN Doc A/41/324.

11 For instance, South Africa and neighbouring countries.

12 For example, Palestinians and Israelis.

13 Tamils in the recent House of Lords case. See *infra*.

countries, the asylum-seekers have had their application rejected and yet they have been allowed to remain in the country due to humanitarian reasons.<sup>14</sup> Refugees belonging to this category have difficulties in rendering credible their fear of being individually subjected to persecution.<sup>15</sup> Many of the asylum-seekers arriving in western States have left their countries of origin because of dangers to their lives. However, they cannot prove, as the 1951 Convention and/or 1967 Protocol require, that they have a well-founded fear of persecution, particularly since the asylum-seeker has to prove both objective and subjective element in order to be eligible for refugee status and asylum.<sup>16</sup> Extensive restriction of human rights are not the reason for asylum seekers fleeing. He or she is a person who has not taken part in such hostilities. This person is lacking the protection to which he is entitled under international humanitarian law. The source for this category of refugee lies in the area of humanitarian law.

#### 4.3 REFUGEES AND THE LAWS OF ARMED CONFLICT

Article 44 in the Convention (IV) relative to the Protection of Civilian Population in time of war, which was signed in

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14 Sweden, USA, Switzerland, Italy and Spain.

15 Telephone interview with S. Bari, UNHCR, Geneva, on 28 April 1987.

16 See Chapter Eight on Eligibility for Asylum, far more comprehensive an explanation of the meaning of "subjectively and objectivity".

Geneva on 12 August 1949,<sup>17</sup> states:

"In applying the measures of control mentioned in the present Convention, the detaining Power shall not treat the enemy aliens exclusively on the basis of their nationality de jure of an enemy State refugees who do not in fact enjoy the protection of any government."

Brazil and Pakistan were the only two countries which reserved on Article 44. Brazil stated that Article 44 was liable to hamper the action of the Detaining Power and in regard to Article 46,<sup>18</sup> because the matter dealt with in its second paragraph is outside the scope of the Convention, the essential and specific purpose of what is the protection of persons and not of their property. Pakistan stated that every protected person who is a national de jure of an enemy state against action is taken or sought to be taken under Article 41 (assigned residence internment) by assignment of residence or internment or in accordance with any law, on the ground of his being an enemy alien shall be entitled to submit proofs to the Detaining Power or, as the case may be, to any appropriate court or administrative board which may review his case, that he does not enjoy the protection of the enemy state, and full

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17 See Schindler and Toman, The Laws of Armed Conflicts - A Collection of Conventions, Resolutions and Other Documents, Sijthoff & Noordhoff, Henry Denant Institute, Geneva, 1981, pp.433-485.

18 Article 46 states: "Insofar as they have been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities. Restrictive measures affecting their property shall be cancelled in accordance with the law of the Detaining Power as soon as possible after the close of hostilities".

weight shall be given to his circumstance, if it is established whether with or without further enquiry by the Detaining Power in deciding action, by way of an initial order or, as the case may be, by amendment thereof.

It is also interesting to note Article 70 of the same Convention. It states:

"Protected persons shall not be arrested, prosecuted or corrected by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interpretation thereof, with the exception of breaches of laws and customs of war.

Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the Occupied State shall not be arrested, prosecuted, corrected or deported from the occupied territory, except for offences committed under common law committed before the outbreak of hostilities which according to the law of the occupied states would have justified extradition in time of peace."

There is a provision for protection of the refugees in the Protocol Additional to the Geneva Convention of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted at Geneva, 8th June 1977. This provision states in Article 73 (Refugees and Stateless Persons):

"Persons who before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State or refuge or State of residence shall be protected persons within the

meanings of Parts I and III<sup>19</sup> of the Fourth Convention in all circumstances and without any adverse distinction."

#### 4.4 HUMANITARIAN LAW AND HUMAN RIGHTS: WHAT ARE THE DIFFERENCES AND SIMILARITIES?

The concept of international humanitarian law<sup>20</sup> can be defined as the corpus of international rules, which are established or set up by treaties or customs, which are specifically intended to be applied in international or non-international armed conflicts. These rules restrict, on humanitarian grounds, the rights of the parties to the conflict to employ means and methods of warfare of their choice and protect persons and property which are or could be affected by the conflict. They are inspired by humanitarian principles and also aim to restrict unlimited violence. Human Rights, on the other hand, are concerned with the relation between the State and its nationals. Human Rights foundations are in ethical, moral or religious<sup>21</sup> ideas of a universal character. Human rights were not really formulated in the legal sense until the 17th

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19 Part I contains: Respect for the Convention; Application of the Convention; Conflicts of an international character; Definition of protected persons; Derogations; Beginning and end of application; Special agreements; Activities of the International Committee of the Red Cross; Substitute for Protecting Power and so on. Part III contains: Treatment; Aliens in the Territory of a Party to the Conflict; Occupied Territories; Regulations for Treatment of internees; and, Information Bureau and Central Agency.

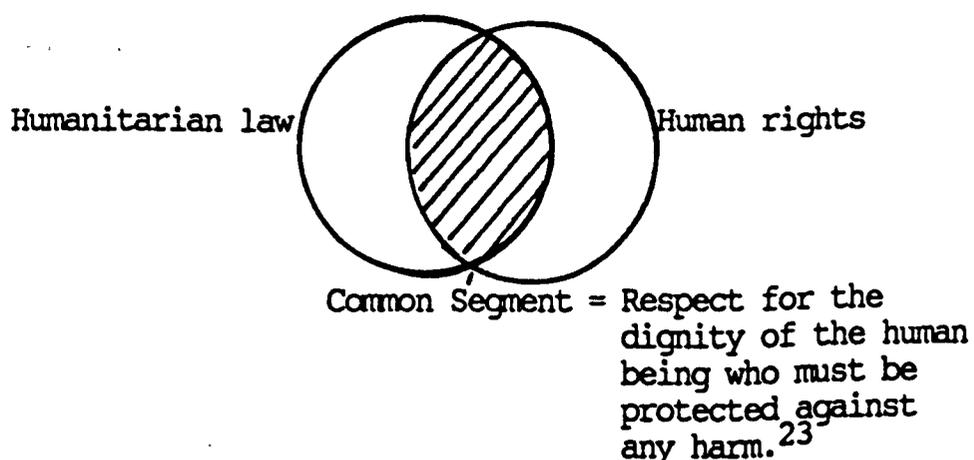
20 See Cassese, "The New Humanitarian Law of Armed Conflict", Editoriale Scientifica Sr 1 Napoli, 1979, Vols.I&II; and, Schindler and Toman, op.cit.

21 In nearly all religions, violation of human rights is condemned.

Century<sup>22</sup> and it was only after the jurists and philosophers had formulated rules and regulations that human rights became visualised and concrete. After the beginning of the 17th Century, a completely new approach was adopted of looking at the State and the individual.

The set of rules of Human Rights consists, inter alia, civil and political rights, viz. the integrity of the human being, the right of liberty, family and so on.

Traditionally, clear separating lines have been upheld between human rights and humanitarian law. Although one can say that they have different sources and different purposes. There appears to be a clear tendency that the links between humanitarian law and human rights are real and growing stronger. One can say that in recent times, the two systems complement each other. Perhaps a graphical approach will explain the trend:



**Figure 1**

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22 Works of Grotius, Locke and Montesqieu.

23 Where one begins and the other one ends depends on, for instance, derogation clauses in Human Rights treaties.

Although the Humanitarian Law and Human Rights have similarities, there is a distinction between Human Rights and Humanitarian Law, for instance the prohibition to use bullets which expand in the human body<sup>24</sup> have no connection with Human rights. It is a humanitarian principle which should be applied in armed conflicts.

How does Figure 1 affect the refugees and asylum-seekers. The asylum-seekers may fulfil the criteria for Human Rights refugee status as well as for humanitarian law refugee status, for instance, a person who during an armed conflict fears torture in his country of origin. Massive flow of refugees often comprise both Human Rights and Humanitarian Law.<sup>25</sup> The emigration of Bangladesh refugees consisted of Human Rights refugees and Humanitarian Law refugees. The former were entitled to international assistance and protection but not because of fear of Human Rights violations. The reason was that they had left Pakistan during internal disturbance. They were also Humanitarian Law refugees.

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24 As laid down by the 1899 Hague Declaration. See the International Committee of the Red Cross, "The Red Cross and Human Rights", working document prepared by the ICRC in collaboration with the Secretariat of the League of Red Cross Societies, Geneva, 1983, p.29.

25 For instance, Russian refugees escaping the Russian Revolution, Bangladeshis escaping Pakistan to flee to Bangladesh.

AN OVERVIEW AND DEFINITION OF REFUGEES AND HUMAN RIGHTS

The 1951 Convention does not resolve the problems which the refugees cause for the international community. For instance, the 1951 Convention does not require the asylum granting States to integrate the refugees completely into their infrastructures,<sup>26</sup> but instead it merely sets out a list of particular rights to which refugees are entitled. There is an absence of a great number of rights to which human beings are entitled. The nearest the 1951 Convention or the 1967 Protocol comes to granting these rights is set out in Article 34 of the 1951 Convention which states:

"The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees ..."

States are allowed to make reservations on this article, which both Chile and Botswana have made.

From the interpretation of articles of the two refugee instruments and from observing the travaux préparatoires, one can see that these instruments simply acknowledge the refugees' presence and state few minimal rights to the refugees.

It will be advantageous to set out briefly the deficiencies in the 1951 Convention relating to basic human rights. This will

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<sup>26</sup> Structures of social, economic, legal and political magnitudes.

not be an exhaustive study, but just to highlight the gaps in the 1951 Convention. Some similarities between the 1951 Convention and other human rights instruments will also be noted:

1. Article 3 of the 1951 Convention does not refer to non-discrimination between refugees and some other groups, such as nationals of the asylum granting State, but it refers to non-discrimination within the class of refugees on the basis of race, religion or country of origin.<sup>27</sup>
2. Article 5 of the 1951 Convention does impair any other rights granted apart from within the 1951 Convention.
3. The International Covenant on Economic, Social and Cultural Rights (ESCR) states the right to work in Articles 6(1) and 7, whereas the refugee is not completely guaranteed complete equality of treatment such as work.
4. Article 8 of the ESCR and Article 22 of the International Covenant on Civil and Political Rights (ICPR) state the right to strike or join a trade union. However, no such provision exists in the 1951 Convention.

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<sup>27</sup> For example, a State granting asylum under Article 3 may not treat members of one religious group differently to another religious group. However, it may treat refugees as a class differently from another class of aliens or immigrants.

5. The right of social security is stated in Article 24(3) of the 1951 Convention similar to Article 9 of ESCR.
6. Refugees do not have the same rights regarding the right to living standards or adequate food. These rights are stated in Article 11 of ESCR which provides for adequate living. No such provision is found in the 1951 Convention.
7. The 1951 Convention does, however, contain a provision for housing in Article 21, but not for adequate living.
8. Article 12 of ESCR contains the right to enjoy high standards of physical and mental health, but there is no provision found in the 1951 Convention.
9. Article 10 of ESCR contains the right to family, motherhood and childhood protection and acceptance. However, no such provision is found in the 1951 Convention.
10. Article 22 of the 1951 Convention has similar rights regarding the right to education to Article 13 of ESCR.
11. Article 15 of the 1951 Convention has similar rights to science, literature and the arts as Article 15 of ESCR.

12. Article 6 of ICPR states that there may be no derogation from the right to life and no one shall be arbitrarily deprived of his life. No such provisions are found in the 1951 Convention.
13. Article 7 of ICPR contains prohibition from torture or to cruel, inhuman or degrading treatment, or punishment,<sup>28</sup> medical or scientific experimentation. The 1951 Convention contains no such provisions.
14. The ICPR contains prohibition on slavery (Article 8(1)); servitude (Article 8(2)); and forced labour (Article 8(3)), while there are no provisions in the 1951 Convention on these prohibitions.
15. Article 18 of ICPR and Article 9 of the European Convention on Human Rights (ECHR) state the right to freedom of thought, conscience and religion, but the 1951 Convention only states the right to religion - in Article 4. The 1951 Convention does not mention freedom of thought or conscience.
16. Article 5 of the Universal Declaration of Human Rights states a right to recognise a person before the law. No such provision is found in the 1951 Convention.

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28 See the Convention against Torture and other cruel, inhuman or degrading treatment or punishment adopted by the General Assembly of the United Nations on 10 December 1984, came into force on 26 June 1987, in accordance with Article 27(1).

17. There is no provision on the right to "arbitrary arrest" in the 1951 Convention.
18. There are similarities on the freedom of movement within the country of asylum. Article 12(1) of ICPR and Article V(3) of the 1969 OAU Convention are similar to Article 26 of the 1951 Convention.
19. Article 11 of the UDHR states that everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial. No such provision is found in the 1951 Convention.
20. Article 17 of ICPR, Article 8 of ECHR and Article 12 of UDHR state that no one shall be subject to arbitrary interference with his privacy, family or home, his honour or reputation. No such provision exists in the 1951 Convention.
21. Article 9 of ICPR and Article 5(2) of the ECHR states that everyone who is arrested shall be informed promptly in a language which he understands of the reason for his arrest and of any charge against him. No such provision exists in the 1951 Convention.
22. Although Article 16 (access to courts) exists in the 1951 Convention, there are no provisions for a full and public

hearing as stated in Article 14 of the ICPR.

23. Article 16 of UDHR; Article 12 of ECHR; and Article 17 of American Convention on Human Rights (ACHR) - all state the right to marry. However, no such provision exists in the 1951 Convention.
24. Article 24 in the ICPR states protection for children, whereas there is no provision providing protection for children in the 1951 Convention.
25. Article 25 of ICPR; Article 23(1)(b) of ACHR; and 1st Protocol Article 3 of ECHR - contain the right to vote.<sup>29</sup> However, since refugees are not classified as citizens, they are not entitled to vote. There is no provision in the 1951 Convention.
26. Article 25 of ICPR and Article 16 of ECHR state the right to participate in the conduct of public affairs, whereas refugees have no such rights. There is no such provision in the 1951 Convention.
27. Article 25(3) of ICPR (main treaty) and Article 23(1)(e) of ACHR and Article 48(4) of EEC Treaty (Regional treaties) - state access to public service. No such provision is found in the 1951 Convention.

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<sup>29</sup> However, the term "people" remains unclear.

28. There is a right of association in Article 15 of the 1951 Convention as there is in Article 22 of ICPR, but there is no right of peaceful assembly within the 1951 Convention as there is in Article 21 of ICPR.

From observing the above 28 points, one can notice the gaps and deficiencies that exist within the 1951 Convention. It is not a complete protection treaty and it provides very little in way of human rights.

The term "Human Rights" is unclear, while the "Human" part is clear, the "Rights" is ambiguous, it implies entitlement (the possibility to claim legitimately what may be denied).<sup>30</sup> These "Rights" must be respected by all. The Universal Declaration of Human Rights (UDHR) of 1948 stipulates a set of guidelines of how an idealistic society should deal with the individual and the State. The latter should not abuse the former.<sup>31</sup> The rule of law should reign supreme and impartial courts, tribunals and administration must enforce them against the governments. Individuals must be protected, regardless of race, creed, sex, national origin, social class, colour, or political differences, from the governments. The relevant

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30 Interestingly enough, governments will not view Human Rights on these grounds.

31 See Article 29 Universal Declaration of Human Rights.

human rights instruments<sup>32</sup> speak not of citizens or of nationals but of individuals. According to the Universal Declaration the obligations of governments under the rule of law refers to all people within their territories and not citizens alone. Article 2 of the UDHR stipulates that "every one" is entitled to the rights and freedoms listed in the other articles. No distinction is made among people due to their "national or social origins". Further, the state of origin to which the person belongs, is irrelevant to an individual's claim for enjoyment of Human Rights. These States who rule non-self governing States or trust territories must still recognise the applicability of Human Rights in their dominions. Article 2(2) of the UDHR merely confirms that the principle of the first paragraph, that individuals, regardless of national status, are to benefit from the rights and freedom enumerated therein. Exile and banishment do not take away from man his human personality, nor his right to live somewhere or other.

Article 21 of the UDHR stipulates that only nationals have the right to take part in the government of their country and that the right of equal access to public services applies only to persons in their capacity as nationals of a given State.

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32 The International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, the International Convention on the Elimination of Racial Discrimination, the European Convention on Human Rights, do not discriminate between nationals and aliens with regard to basic rights. In fact, one can note that the preamble to the American Convention even goes so far to say that the essential rights of man are not derived from one being a national of a certain State but are based upon attributes of the human personality.

Article 13(a) reserves the right to return to a country only to nationals thereof. The remaining rights listed in the Universal Declaration, then, can be taken to define a status of territorial resident applicable to citizens and non-citizens alike (refugees and aliens).

One can say that the UDHR lists three main aspects which create the status: firstly, the UDHR provide in several articles for the economic and social advancement of individuals;<sup>33</sup> secondly, the State should not abuse any individual and may not deny him or her access to the courts;<sup>34</sup> and, thirdly, individuals may surround themselves with intellectual, emotional and physical privacy free from arbitrary interference by the State,<sup>35</sup> part of this sphere of privacy consists of freedom of thought, conscience, religion and expression.<sup>36</sup> These articles stipulate and provide for the ownership of property, social security, employment opportunities, food, clothing, housing and education. It is interesting to note the similarities between the rights mentioned above and those incorporated within the 1951 Convention. The UDHR sets out a life for individuals even though they may not participate as nationals in the political process of their country of residence or nationality.

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33 Articles 17, 22-26, 27(2).

34 Articles 3-11.

35 Articles 12, 16, 18, 19.

36 The "nuclear family" is also protected with provision for freedom of marriage.

The two international covenants in individual rights do not significantly detract from the status of territorial residents there provided. Article 2 of the International Covenant on Civil and Political Rights (ICCPR) commits that each signatory States ensures the right enumerated in the Covenant to "all individuals within its territory and subject to its jurisdiction". However, Article 4 allows States, consistent with their obligations under international law, to derogate from their obligations under the Covenant in time of emergency threatening the nation's existence.<sup>37</sup>

The ICCPR provides two aspects to territorial resident status, namely, protection from abusive State action and personal privacy, powers of arrest and incarceration.<sup>38</sup> While Article 14 provides for fair and public trials, Article 16 stipulates for recognition before the law. Article 15 limits the grounds on which persons can be convicted, while Article 17 prohibits torture and inhuman punishment. Article 10(3) stipulates humane treatment of those deprived of their liberty, while Articles 17, 18 and 19 stipulate the effects of privacy, thoughts and opinions. Article 23 protects the family; Article 24 is on children; and Article 27 stipulates ethnic, religious or linguistic minorities and adds protection for those who do

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37 However, provisions relating to protection from cruel and abusive police actions and freedom of thought, conscience and religion are immune from derogation even in these circumstances - ICCPR, Article 4(2).

38 Articles 9, 10, 11.

not appear in the UDHR. Finally, Article 25 reserves explicitly for citizens, the right and opportunity to participate in public affairs.<sup>39</sup>

The International Covenant of Economic, Social and Cultural Rights (ICESCR) provides for the first aspect of territorial resident status (economic and social advancement of individuals). Articles 6 and 7 stipulate a right to support oneself through freely chosen work. Article 9 stipulates social security to all, while Article 11 caters for people to have a right to food, clothing and shelter. Articles 12 and 13 provide for rights to health care and education, respectively.

Human rights law only covers people who are under the authority of a State within their territorial residence. However, sadly perhaps, international law on Human Rights does not mention refugees obtaining access to a land of refuge or asylum. Human Rights law addresses the treatment of people within a jurisdiction but not to their case of entry. There is one point which the Human Rights instruments have either overlooked or missed. From the travaux préparatoires of the UDHR, it is clearly seen that there was a conscious effort not to adopt asylum as a universal human right. Under current law, therefore, the most serious hinderance and obstacle covering the asylum-seeker seeking a measure of protection is entry into

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<sup>39</sup> This Article shows that the other rights of the Covenant may be enjoyed by non-citizens (Article 2(1)).

a sovereign's jurisdiction. To remove this obstacle, the right of asylum to the Human Rights instruments would be implemented and incorporated.

The status of territorial resident provided by human rights documents is not one of licence. Article 29(1) of the UDHR stipulates that everyone has duties to his or her community. The rights and freedom of others must be respected by individuals and the just requirement of morality, public order and general welfare must be met. There is, then, a reciprocal aspect to being a territorial resident. Refugees are already under such an obligation (in articles within the 1951 Convention and the 1967 Protocol, both prescribing duties of individuals under the protection of these covenants to obey the laws, regulations and measures taken to maintain the public order of countries and States granting refuge and asylum.

The application of Human Rights standards to all refugees, once they are within the State of asylum, would give them a status of territorial resident, something less than the status of a national. With the use of Human Rights standards, definitions of who is a refugee or who is not fade away, all persons within the territorial jurisdiction of a refuge State without regard to nationality deserve protection, international and national.<sup>40</sup> A State may still refuse entrance to asylum-seekers under Human Rights law, but those who become subjects

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<sup>40</sup> Cf. the principle of non-refoulement incorporated in Article 33(1) of the 1951 Convention in Chapter Seven.

to its jurisdiction, have to give way, at least a little piece of consideration.<sup>41</sup>

The 1951 Convention and the 1967 Protocol do not cater for gaps between territorial residency and citizenship. Usually, the second or third generation refugee requires citizenship, not the first category. Having territorial residency must not be confused with citizenship. The latter is granted after a certain prescribed number of years of residency in the country of asylum. For instance, this period is 5 years, that is, a refugee has to reside continuously for 5 years within the UK before he or she can apply for citizenship through naturalisation procedures. On obtaining citizenship the refugee can then apply for a British passport and become a British citizen. During the 5 year period, the refugee may have had certain conditions attached to him, such as prohibition of employment, jury duty and voting.

The General Assembly of the United Nations has recognised the relevance of Human Rights norms for persons in flight. On December 9, 1986, the General Assembly urged members of the UN to improve the legal status of refugees residing in their territory by treating refugees in accordance with the Universal Declaration of Human Rights.<sup>42</sup> (My emphasis)

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41 For instance, Malaysia, Singapore, when they allowed boat people to stay (temporarily) on their coasts but later were refouled out to sea.

42 GA Res.2398; UN Doc A/7369.

In general terms, Human Rights standards bind governments very loosely - and the governments are aware of this deficiency; individuals' access to courts for enforcement of such standards are problematic in most countries.<sup>43</sup>

The major obstacle preventing acceptance of Human Rights standards for refugees lies with the governments which produce refugees rather than States which grant asylum. There are no examples in the world where the international community has imposed sanctions (military or economic) on States which cause refugees to flee their territories.<sup>44</sup> A possible threat of sanctions would certainly deter governments. However, in reality this proposal seems unlikely due to the trends of friendship, diplomacy and politics among States and the international community.<sup>45</sup>

States granting asylum can take action (legal) against the States which produce refugees through the International Court of Justice (ICJ) and ask for monetary judgements. The principle at work would be analogous to the law of torts rather than to criminal prosecution. The ICJ can listen to both sides and make its decision accordingly which would be binding to the States. The decision could impose sanctions or

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43 See Amnesty International's "Memorandum to the European Parliament", 1986, POL 33/02/86.

44 South Africa may be one exception, where other motives are involved, such as apartheid, discrimination, torture and so on.

45 For instance, it seems unlikely that the EEC would impose sanctions upon one of its members producing refugees.

damages amounting to many millions of pounds or dollars,<sup>46</sup> which would be used to pay for the refugees. A case by case determination would be carried out. One can be sure that the number of refugees would certainly drop.<sup>47</sup>

Rights enunciated in the ICESCR are to be provided by States without discrimination as to "race, colour, sex, language, religion, political or other opinions".<sup>48</sup> But if people leave their homeland, not from concern over discriminatory exclusion from social and economic advantages, but from a perception that the government's and the society's incompetence foreclose opportunity for personal advancement, the government's breach is clear. Article 2 commits States to the maximum use of the available resources stipulated as rights in the 1951 Convention and the 1967 Protocol. A test would be to see whether a State provides the refugees maximum economic rights. The action of the governments would and could be examined and should these governments be found "wanting", then a violation of economic or social Human Rights have occurred.

Apart from personal hardship - fear of persecution, man-made or natural disaster - there are two basic downfalls and

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46 For instance, Pakistan can take Afghanistan to the ICJ and claim damages for the 3 million refugees in Pakistan. The ICJ could then impose X number of dollars/pounds per person. Therefore, 3 million refugees would amount to 3 million multiplied by X. Certainly a deterrent to future refugee producing countries.

47 One exception would be refugees from natural disasters.

48 Article 2.

injuries to refugees once they have had their Human Rights violated. Firstly, individuals who are forced to flee from their homelands suffer economic and moral damage;<sup>49</sup> and, secondly, economic and political burdens fall on the State granting refuge and asylum. Finally, International Human Rights Standards are widely known and recognised, even if not universally applied. Foreign governments that commit violations of Human Rights cannot plead "unfairness" because of inadequate notice when subjected to such standards. While ideological goals may be at stake in the creation of refugee problems and populations, the validity of these goals cease when Human Rights are violated.

#### 4.6 POSTSCRIPT

The status of refugees in accordance with the 1951 Convention, as seen above in Chapter Three, was still not free of many defects. Some of these defects were eliminated with the birth of two new international instruments, namely the 1967 Protocol and the 1969 African Refugee Convention. Chapter Five will examine these instruments, highlighting their adequacies and inadequacies.

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<sup>49</sup> Many readers may think that safety of life far outweighs economic and moral values. Can individuals sue their former governments? This right was sustained in Filartiga v Pena-Irala, f.2d 876 (2nd Civ.1980), grounding Federal jurisdiction on the Alien Tort Statute, 28 USC, para 1350.

## **CHAPTER FIVE**

### **The 1967 Protocol and the 1969 OAU Convention**

## CHAPTER FIVE

### THE 1967 PROTOCOL & THE 1969 OAU CONVENTION

#### 5.1 THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

The 1951 Convention was limited by the words "as a result of events occurring before 1 January 1951". Moreover, Article 1B of the 1951 Convention stipulates that Contracting States are to make declarations at the time of signature, ratification or accession, specifying whether the words, "events occurring before 1 January 1951" shall be stipulated to imply:

- (a) events occurring in Europe before 1 January 1951;
- or
- (b) events occurring in Europe or elsewhere before 1 January 1951.

Any State which has adopted alternatives:

- (i) may at any time extend its obligation by adopting an alternative;
- (ii) by means of a notification addressed to the Secretary-General of the UN.

Although States were generally quite liberal in their interpretation of the words "events occurring before 1 January 1951", the limitative aspect and nature of the date became

increasingly apparent as time passed. At that moment in time, Africa witnessed many thousands of refugees, but these so-called "new refugees" could not be considered as conventional refugees purely because they had become refugees after the dateline. There was a discrepancy between the UNHCR and the 1951 Convention. The Statute of the UNHCR does not contain a dateline and the competence of the High Commissioner extends to persons who became refugees as a result of events subsequent to 1 January 1951 and who were not covered by the terms of the 1951 Convention.

The problem of the 1951 Convention dateline was raised by many delegates in the Executive Committee of the High Commissioner's Programme,<sup>1</sup> in which the Executive Committee studied the fact of how to expand the personal scope of the 1951 Convention. After the liberalised views in the Executive Committee in 1965, preparatory action for the establishment of a 1967 Protocol to remove the dateline was commenced.<sup>2</sup>

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<sup>1</sup> At its second special session in 1964 and the 12th session in 1965.

<sup>2</sup> Report of the 12th session of the Executive Committee of the High Commissioner's Programme, UN Doc. A/AC.96/270, p.7, para 33.

5.1.1 Preparations for the Inauguration of the 1967 Protocol

5.1.1.1 Colloquium on legal aspects of refugee problems with particular reference to the 1951 Convention and the Statute of the office of the UNHCR (1965) (Colloquium)

The Carnegie Endowment for International Peace<sup>3</sup> convened a "Colloquium on Legal Aspects of Refugee Problems with particular reference to the 1951 Convention and the Statute of the office of the UNHCR", which was held at Bellagio, Italy, from 21 to 28 April 1965. The meeting comprised of thirteen international lawyers and jurists from various parts of the world who took part purely in a personal capacity.

The High Commissioner was concerned about the refugees which would not be classified as refugees because of the dateline and he submitted a background paper to the Colloquium which actually highlighted the problem of this dateline. He suggested that he was well aware of the preparation involved to extend such a dateline but stressed that there appeared to be no other alternative. He further stipulated that the aforementioned Recommendation in the Final Act of the 1951 Conference of Plenipotentiaries brought about grave doubts as to the recommendation providing a generally satisfactory solution for the problem of post-dateline refugees. It could have been difficult, on the basis of mere recommendation, for the governments of certain States to apply the provision of a

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<sup>3</sup> Along with the support of the Swiss Government and in consultation with the High Commissioner's Office.

convention which went beyond its contractual scope and might involve a modification of municipal jus cogens relating to matters such as personal status. Moreover, on an international level, measures taken on the basis of a recommendation whereby the treatment accorded to post-dateline refugees would be assimilated to that stipulated to refugees covered by the 1951 Convention, might not have the requisite extra-territorial effect. There were two avenues possible to remove the dateline and establish a binding legal obligation:

- (i) Revision of the 1951 Convention, or
- (ii) Establish a separate instrument.

(i) Revision of the 1951 Convention

Article 45 of the 1951 Convention stipulates:

"1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary General of the UN.

2. The General Assembly shall recommend the steps, if any, to be taken in respect of such request."

Article 45 is clear enough to understand, but what is implied by the term "revision"?

If one observes in the Yearbook of International Law Commission, there is a reference to the term "revision" and its meaning. The term "revision" took on a great debate in the International Law Commission.<sup>4</sup> Some members stated that the

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<sup>4</sup> YBILC 1964, I, pp.133-39.

term applied mainly to the revision of a treaty as a whole, while other members stated that it implied a political connotation. Although the term "revision" was not applied, a distinction can be drawn between "amendment" and "modification". The former stipulates a formal amendment of a treaty intended to alter its provisions with respect to all the parties, while the latter implies that it is used in connection with an intense agreement concluded or reached between certain of the parties only and intended to vary provisions of the treaty as between themselves alone and in connection with a variation of the provisions of a treaty resulting in Articles 35 to 38 of the Law of the Treaties, relating to amendments and modifications of treaties, which are beyond the scope of this thesis.

**(ii) Establishment of a separate instrument**

In establishing a separate instrument, the acceptance by the largest number of States is required. The Colloquium presented and formulated a report which it presented to the High Commissioner for refugees.<sup>5</sup> Along with the important issue of the dateline (January 1st 1951), the report stated that all members of the Colloquium were of the opinion that it was urgent for humanitarian reasons that non-Convention refugees should be granted similar rights and benefits as the Convention refugees, by formulating an international instrument. Crucially, the Colloquium was in total agreement that a

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<sup>5</sup> UN Doc. A/Ac. 96/Inf.40.

recommendation or a resolution would not be sufficient for this purpose and that a "legally binding instrument" would be acceptable. States often ignore recommendations and resolutions. Some form of document was required which would bind the States. To actually prepare and adopt a new document on similar lines as to the 1951 Convention, would be too lengthy, cumbersome and in realistic terms very impracticable. The Colloquium finally considered that the best view in overcoming this problem would be to attach a protocol to the 1951 Convention. They assumed that nearly all Contracting States to the 1951 Convention would consent to such an idea. The Colloquium was in agreement that it would be quite essential that such a Protocol would and should remove the existing dateline, namely January 1st 1951 in Article 1(A)(2) of the 1951 Convention, thereby making the "substantive provisions of the 1951 Convention applicable in new refugee situations".<sup>6</sup> However, the Colloquium had various views as to whether the Protocol should allow for reservations to Article 38 of the 1951 Convention<sup>7</sup> and as to whether, in view of extended obligations imposed upon States which acceded to the Protocol, it would be desirable to allow States which actually acceded, to suspend in exceptional circumstances the operation of these articles of the 1951 Convention which may, under its Article 42, be subject to reservations. The Colloquium felt that the response and attitude of States should be collected. The Colloquium agreed upon the terms of the preamble and

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6 Ibid.

7 Providing for the compulsory jurisdiction of the ICJ.

substantive provisions of the draft Protocol, and also on the questions of the compulsory jurisdiction of the ICJ<sup>8</sup> and the possible suspension of certain obligations under the 1951 Convention in exceptional circumstances. Commenting on the text, the Colloquium stated that adherence to the Protocol would not be limited to States which were parties to the 1951 Convention but would be open to other States, and that the Protocol would allow reservations within the limits of Article 42 of the 1951 Convention. The Colloquium felt that by introducing the geographical limitations to "events occurring in Europe", would be inconsistent with its purpose. However, in order not to dishearten some State parties to the 1951 Convention which had to make a declaration from accepting the Protocol, the text included a provision to the effect that existing declarations limiting the application of the 1951 Convention, unless withdrawn, apply also under the Protocol.<sup>9</sup>

The High Commissioner communicated the report of the Colloquium to the Executive Committee of the High Commissioner's programme and subsequently addressed letters to governments of States<sup>10</sup> inviting them to express their views as to the form and substance of the proposal made by the Colloquium. The High Commissioner received very promising replies from governments and nearly all the replies contained the desirability and

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8 Article 38 of the 1951 Convention.

9 UN Doc. A/AC.96/Inf.40, pp.3-4.

10 Which were members of the Executive and parties to the 1951 Convention.

consent of extending the personal scope of the 1951 Convention by way of a Protocol.<sup>11</sup> After the receipt of replies from governments, the High Commissioner submitted to the 16th session of the Executive-Committee in October 1966.

5.1.2 The Sixteenth Session of the Executive Committee Held in October 1966

The Executive Committee considered the paper, entitled "Proposed Measures to Extend the Personal Scope of the Convention relating to the Status of Refugees of 28 July 1951",<sup>12</sup> which consisted of a summary of replies received from governments, a draft text of the Protocol based on the draft of The Bellagnio Colloquium and amended in the light of the replies received from governments.<sup>13</sup> The Executive Committee noted the contents of this paper and made a couple of suggestions:

(i) "Article VII of the draft Protocol (concerning reservations) should not permit reservations to Article II regarding co-operation of the national authorities with the United Nations or its bodies."

and,

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11 Some States had enquiries relating to compulsory jurisdiction of the ICJ derogation clause in the case of exceptional circumstance, reservation and number of accessions required for entry into force: France, Uruguay, Yugoslavia, etc.

12 UN Doc.A/AC.96/346.

13 This paper made it clear that such a Protocol would not prevent the States from proceeding to a revision of the 1951 Convention.

"(ii) That the High Commissioner should submit the draft Protocol as modified in the discussion in the Committee, to the General Assembly of the United Nations (through the Economics and Social Council) in order that the Secretary-General might be authorised to open the Protocol for accession by governments within the shortest possible time.<sup>14</sup>

The High Commissioner modified the text in accordance with the wishes of the Executive Committee and accordingly submitted the proposal to the General Assembly through the ECOSOC<sup>15</sup> in an Addendum to his Annual Report.<sup>16</sup> The ECOSOC resumed its 41st session in November, "unanimously" approved the Document (A/6311/Add.1) and subsequently transmitted it to the General Assembly as an Addendum to the High Commissioner's Annual Report.<sup>17</sup>

### 5.1.3 The General Assembly

In the General Assembly, at its 21st session, third committee,<sup>18</sup> agenda item 55, discussions took place relating to the Protocol. The representative of Norway stipulated that:

"These frameworks,<sup>19</sup> which provided a detailed legal framework for the High Commissioner's activities

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14 UN Doc. A/AC.36-8, p.10.

15 See para 11 of the Statute of the UNHCR.

16 UN Doc. A/6311/Add.1.

17 ECOSOC Res.1186 (XLI) on 15th November 1966.

18 1447th meeting - 1450th meeting.

19 Referring to 1951 Convention and 1954 Convention relating to the status of stateless persons.

needed to be brought up to date. In particular, the dual limitation - geographical and chronological - of the 1951 Convention was out of current needs. The refugee problem had shifted from Europe to other parts of the world, particularly Africa, and circumstances were such that the 1 January 1951 limit did not meet the facts of the present situation..."<sup>20</sup>

He continued that:

"His delegation therefore generally endorsed the ... protocol [draft], which was intended to remove the time restriction laid down in the 1951 Convention. In addition, geographical limitations would apply only in the case of parties to the Convention maintaining their restrictive declaration under Article 1B of the Convention. His Government hoped that the new Protocol might quickly be opened for signature."<sup>21</sup>

The representative of the United Kingdom was in agreement with the representative of Norway and stated that:

"Her Government ... supported the High Commissioner's proposal to extend the personal scope of the 1951 Convention relative to the Status of Refugees. A proposal which had been noted with approval by the ECOSOC ..., she hoped it would prove possible to adopt the relevant draft protocol at the present session."<sup>22</sup>

The representative of Yugoslavia stated her delegation's total approval of the draft protocol and stated:

"..., she considered it desirable to extend the

20 1447th meeting - 5 December 1966, para 48.

21 Ibid.

22 1447th meeting, para 60.

ratione personae scope of that instrument [meaning the 1951 Convention] ... Her delegation approved the ... protocol ... which would extend the scope of the Convention." 23

However, the representative of the USSR made a point that:

"... the Convention (1951) ... had not been adopted by the United Nations but by a Conference of Plenipotentiaries at Geneva in which 26 States, including only 21 members of the United Nations, had taken part. The Soviet Union ... had not participated in the Conference ..." 24

He continued:

"Since the Convention could only be amended only by the Conference which had adopted it and in accordance with the procedure laid down in Article 45, the General Assembly should confine itself to making recommendations."

The Soviet delegation did not study the draft Protocol, because they claimed that only Parties to the Convention per se, could be parties to the Protocol. They stated that an attempt was apparently being made by roundabout means to induce States to become parties to the Convention.<sup>25</sup> His delegation had not had the opportunity to give the Protocol careful study. The Soviet delegation insisted that from a legal standpoint, only States which were parties to the Convention, per se, could be parties

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23 1448th meeting, para 14. A well supported view by nearly all representatives.

24 1449th meeting, para 60.

25 1449th meeting, para 80.

to the Protocol. In these circumstances, the Soviet delegation had not been consulted with regard to the draft, it could not support the draft resolution.<sup>26</sup>

In response to the Soviet's disapproval, the Nigerian representative stated:

"..., that the Soviet delegation's remarks were unwarranted. The members of the Committee received their instructions from their countries' legal departments and could therefore speak on behalf of their respective governments." <sup>27</sup>

The Soviet delegation had contended that the USSR had not been consulted. However, the text in question had been adopted by the ECOSOC in November 1966; as a member of the Council, the USSR had surely seen the text and had, de facto, voted for it, since it had been unanimously adopted.

The text was voted upon and unanimously adopted.<sup>28</sup> Following the report of the third committee, the General Assembly adopted the resolution on 16 December 1966 by 91 votes to none with 15 abstentions (General Assembly Resolution 2198 (XXI)). The text of the Protocol was in accordance with its Article XI authenticated by the signature of a copy by the President and the Secretary General of the United Nations.<sup>29</sup> Certified true

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26 1449th meeting, para 80.

27 Ibid., para 88.

28 86:0:15; 82:0:19; the whole resolution 83:0:15 (F:A:A6).

29 31st January 1967.

copies were transmitted to governments by the Secretary-General on 10th March 1967, with a view of enabling the States to accede to the Protocol. The 1967 Protocol relating to the Status of Refugees entered into force on 4th October 1967.

5.1.3.1 General Assembly Resolution 2198 (XXI) (Protocol relating to the Status of Refugees)

"The General Assembly,

Considering that the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951,<sup>1/</sup> covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition of the Convention, irrespective of the date-line of 1 January 1951,

Taking note of the recommendation of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees<sup>2/</sup> that the draft Protocol relating to the Status of Refugees should be submitted to the General Assembly after consideration by the Economic and Social Council, in order that the Secretary-General might be authorized to open the Protocol for accession by Governments within the shortest possible time,

Considering that the Economic and Social Council, in its resolution 1186 (XLI) of 18 November 1966, took note with approval of the draft Protocol contained in the addendum to the report of the United Nations High Commissioner for Refugees concerning measures to extend the personal scope of the Convention<sup>3/</sup> and transmitted the addendum to the General Assembly,

1. Takes note of the Protocol relating to the Status of Refugees, the text of which<sup>3/</sup> is contained in the addendum to the report of the United Nations High

Commissioner for Refugees;

2. Requests the Secretary-General to transmit the text of the Protocol to the States mentioned in Article V thereof, with a view to enabling them to accede to the Protocol.<sup>4/</sup>

1495th plenary meeting  
16 December 1966

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- 1/ United Nations, Treaty Series, Vol.189, (1954), No.2545.
  - 2/ See A/6311/Rev.1/Add.1, Part Two, para 38.
  - 3/ Ibid., Part One, para 2.
  - 4/ The Protocol was signed by the President of the General Assembly and by the Secretary-General on 31 January 1967.

5.1.4 The 1967 Protocol Relating to the Status of Refugees - The Interpretation

Articles I, II, III, IV, V, VI, VII, VIII, IX, X, XI (See Appendix)

Article I of the 1967 Protocol is very clear to understand. Paragraph 1 undertakes to apply Articles 2 to 34 inclusive of the 1951 Convention. Paragraph 2 has omitted the words "as a result of such events" and "as a result of events occurring before 1 January 1951 .." Paragraph 3 removes any geographic limitations.

Article II encourages co-operation among States. Article II has the same commentary as Article 35 of the 1951 Convention, except that the word "convention" in the latter instrument has been replaced by "present protocol". Paragraph 2 of Article II of the 1967 Protocol has the same interpretation as Article 35, paragraph 2 of the 1951 Convention.

Article III of the 1967 Protocol has the same interpretation as Article 36 of the 1951 Convention.

Article IV<sup>30</sup> of the 1967 Protocol has the same commentary as Article 38 of the 1951 Convention,. Article V requires no further elaboration.

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30 Reservations made by Angola (23 June 1981); Botswana (6 Jan 1969); China (27 April 1972); Congo (10 July 1970); El Salvador (30 Oct 1968); Ghana (30 Oct 1968); Rwanda (3 Jan 1980).

Article VI resembles Article 41 of the 1951 Convention and Article VII requires no further elaboration.

Article VIII, paragraph 1 of the 1967 Protocol stipulates the date that the Protocol shall come into force. The 1967 Protocol actually came into force on the accession of Sweden, Holy See, the Central African Republic, Cameroon, Gambia and Senegal. It is interesting to note the heavy African influence.

Articles IX, X, and XI require no further comment, except that Article IX has the same commentary as Article 44 (paragraphs 1 & 2) of the 1951 Convention

The 1967 Protocol did not amend or revise the 1951 Convention but it modified it in the sense that States acceding to the 1967 Protocol accept the material obligations of the 1951 Convention in respect of a wide group of persons. The 1967 Protocol is of a dual nature:

- (i) As between State parties to the 1951 Convention, it is an inter-se agreement; and,
- (ii) For non-party States to the 1951 Convention, its an independent multilateral treaty.

Finally, from the travaux préparatoires of the 1967 Protocol, it can be seen that the Protocol was not intended to replace the 1951 Convention, it is a "Collateral treaty" and an inter-

se agreement.

The material content for the 1951 Convention and the 1967 Protocol are the same, basically both are standard for treatments of individuals.

5.2 THE CONVENTION OF THE ORGANISATION OF AFRICAN UNITY GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

5.2.1 Background

During the Middle Ages, most Africans lived in small tribal societies, where land and other food producing assets were owned or utilised in co-operation and subsistence production was the dominant economic activity. However, trade was also very important, especially when tribes began to depend on the old tradeways from the east to the west, south of Sahara and back again. Some Arab migrants travelled south from the Mediterranean through the deserts, stayed there and Arab civilisation flourished. The east coast region came under the economic and cultural influence of traders from Arabia, India and China. The horrors of slavery were only too apparent. Africa in the 17th Century had one-fifth of the world population. Today, it has only one-tenth. During the last 300 years, African civilisation and its human resources were destroyed by the slave trade which was prompted by the

European, American and Arab powers.<sup>31</sup> Slavery is one of the main reasons for instability in Africa. The dark and depressed centuries of slave trading did not come to an end until Africa was swamped by the irons of colonialism (another factor of today's refugee problem). By the early 1900s, eight European States had practically divided all of Africa among themselves. These colonialist powers were Belgium, Germany, Great Britain, France, Italy, Portugal, Spain and Holland.<sup>32</sup> Only Ethiopia and Liberia remained free from these powers.<sup>33</sup> The European States had drawn frontiers with "straightedge rulers" at conferences and meetings in Europe, regardless of the people whose lives were affected by these decisions. One can see today that those straight lines cut through tribes, clans, and families, splitting up ecological units, feeding grounds and market areas. Since sovereignty was not fixed by land boundaries, but was personal and family-oriented, this colonial boundary-drawing corrupted the tribal system extensively. Harsh and exploitative deals were made with the leaders and chiefs who were selected by the colonial States as fit for office. For their own personal gain and profit, the European States firmly exploited and controlled these colonies, through

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- 31 European sources claim that 30 to 40 million Africans dies on slave ships while being transported. However, in a paper by Bedjaoui, "Asylum in Africa", which was presented at the Pan African Conference on Refugees, in Arusha, Tanzania, May 1986, the figure was estimated at around 220 million.
- 32 Whose descendents were the Boers now responsible for apartheid.
- 33 The Ethiopians had defeated Italian invaders and concluded a treaty with them in 1908 according to which Ogaden was ceded to Ethiopia. This treaty, which disregarded the Somalis, was the root of today's conflict over Ogaden.

administration and structures. As Africa emerged from colonial domination, there were unresolved conflicts, territorial disputes, unnatural frontiers, ethnic combinations, etc., which were left by the colonial powers which, along with natural and man-made disasters, have caused people to flee to neighbouring States.<sup>34</sup>

The refugee problem in Africa was a phenomenon of the post-colonial epoch.<sup>35</sup> The Organisation of African Unity (OAU) was set up in 1963, and only four years following the establishment of the OAU, Africa hosted a refugee population of over 540,000

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34 Mr Zia Rizvi, (Secretary General of the Independent Commission on International Humanitarian Issues (ICCHI), in a report dated 14-28 September 1986 on "Implementation of the OAU/UN Conventions and Domestic Legislation Concerning the Rights and Obligations of Refugees in Africa", compiled at the Refugee Studies Programme, Queen Elizabeth House, Oxford University, commented: "(1) While some of the reasons for refugee flows are results of colonialism and neo-colonialism, more are self-created by leaders who lack nationalism, foresight and humanity. The structure of many African States encourages conflict which have been compounded by natural and man-made disasters. (2) Whatever the constitutional structures inherited from colonialism, administrations in Africa have tended to change them to ensure that governmental power is concentrated in their hands. (3) refugee situations are currently affected by national and geographical boundaries as a manifestation of the Nation State. In Africa, however, traditionally the boundaries prior to colonialism were founded on tribal or cultural divisions, reinforced by a common allegiance, a hierarchy of leadership, a common language and tradition. (4) Constitutions lacking political legitimacy have contributed to instability and unrest in the new nations of Africa; they have provided the incentives for post-independence governments to resort to emergency laws. (5) Many African governments have used the extraordinary powers of emergency not for public order or state security, but for the consolidation of their own political power and survival to the exclusion of other groups which might aspire to become alternative governments.

35 With certain exceptions, such as Rwanda which was torn by civil strife shortly before obtaining independence.

and was developing to produce many more. It can be said that the refugee problem was a product of colonialism and neo-colonialism and was associated with the process of decolonisation. The African States considered a fundamental question, this being that: the protection of persons dispossessed from their countries of origin. The 1951 Convention, as stated earlier, was predominantly a European convention, designed for the European refugees. The African refugees were certainly excluded from protection and assistance. The general attitude by the African States was that the 1951 Convention was very "western" in its nature and character. The African States also believed, in particular, that Articles 20-28 of the 1951 Convention imposed enormous burdens upon countries which were already under-developed with disintegrating economies.

The OAU still encouraged the member States to adhere to the 1951 Convention while the OAU formulated its own convention which specifically dealt with African refugees. A special committee on refugees<sup>36</sup> was established in Lagos in 1964, at the OAU Council of Ministers Session. That July the idea of a draft convention dealing with the specific issues raised by Africa's refugee problem was mooted. A year later at the 4th ordinary session of OAU Ministers held in Nairobi, a Committee of Legal Experts was designed to review the legal issues raised and to complete the draft.

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<sup>36</sup> Which now consists of 15 member States.

### 5.2.2 The 1969 OAU Convention

In September 1967, a session of the OAU Council of Ministers instructed the adoption of the instrument governing the "Specific Aspects of the Problem of African Refugees" as a complement to the 1951 Convention. The Council of Ministers, at that time recommended that member States should accede to the United Nations 1967 Protocol relating to the Status of Refugees. The final draft of the OAU Convention was adopted in February 1969 at Addis Ababa and came into force on June 20, 1974.

There were some basic principles which underlined the 1969 Convention, which were derived from the Charter of the OAU. The principal objectives for which the OAU was established (that is, the unity and solidarity of all member States) were the improved well-being of all African peoples, individually and collectively; international co-operation in accord with the principle stipulated in the United Nations Charter and the Universal Declaration of Human Rights; the defence of sovereignty, that is, the maintenance of the territorial integrity and independence of each member State; the complete eradication of all vestiges of colonial dominion from the African continent; and the peaceful settlement of disputes through mediation, negotiation, conciliation, or arbitration.

As it evolved, the OAU expressed the necessity to maintain a balance between prevention of subversive activities that might

be committed against the home State (given the circumstances in which the refugees were created) and refugee protection. In addition, the OAU firmly expressed the view that they would never permit the refugee question to create conflict among them.

Before moving on to the commentary and analysis of the articles implemented in the OAU Convention relating to refugees, it is worthwhile noting that, firstly, the OAU Convention relating to refugees was established without any regard to the 1951 Convention, which had been set up under the auspices of the United Nations. Had the OAU Convention neglected the United Nations or was it very bitter that the 1951 Convention catered only for Europe and its refugees? The answer seems to be yes. Secondly, it was contemplated to adapt the 1951 Convention to the specific conditions of Africa, in other words, to borrow the provisions of the 1951 Convention. And thirdly, it was decided that the OAU Convention relating to refugees should be complementary to the 1951 Convention and the 1967 Protocol, and should deal with specific aspects of the African problem which were not regulated or not sufficiently regulated in the UN refugee instrument.

5.2.3 Articles of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

5.2.3.1 Preamble and Article 1

Text

"PREAMBLE

We, the Heads of State and Government assembled in the city of Addis Ababa from 6 to 10 September 1969,

1. Noting with concern the constantly increasing numbers of refugees in Africa and desirous of finding ways and means of alleviating their misery and suffering as well as providing them with a better life and future,

2. Recognising the need for an essentially humanitarian approach towards solving the problems of refugees,

3. Aware, however, that refugee problems are a source of friction among many Member States, and desirous of eliminating the source of such discord,

4. Anxious to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside,

5. Determined that the activities of such subversive elements should be discouraged, in accordance with the Declaration of the Problem of Subversion and Resolution on the Problem of Refugees adopted at Accra in 1965,

6. Bearing in mind 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.

7. Recalling Resolution 2312 (XXII) of 14 December 1967 of the United Nations General Assembly, relating to the Declaration on Territorial Asylum,

8. Convinced that all the problems of our continent must be solved in the spirit of the Charter of the Organization of African Unity and in the African context.

9. Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment,

Recalling Resolutions 26 and 104 of the OAU Assemblies of Heads of State and Government, calling upon Members States of the Organization who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa.

Convinced that the efficiency of the measures recommended by the present Convention to solve the problem of refugees in Africa necessitates close and continuous collaboration between the Organization of African Unity and the Office of the United Nations High Commissioner for Refugees.

Have Agreed as follows:

#### Article I

##### DEFINITION OF THE TERM "REFUGEE"

1. For the purpose of this Convention, the term "refugee" shall mean every person who, 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.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be

lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

4. This Convention shall cease to apply to any refugee if:

- (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or,
- (b) having lost his nationality, he voluntarily re-acquired it, or,
- (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or,
- (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or,
- (e) he can no longer, because of the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or,
- (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or,
- (g) he has seriously infringed the purposes and objectives of this Convention.

5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has 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 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 Organization of African Unity;
- (d) he had been guilty of acts contrary to the purposes of principles of the United Nations.

6. For the purposes of this Convention the Contracting State of Asylum shall determine whether an applicant is a refugee."

### Analysis

The Preamble is self-explanatory and requires no further elaboration. The definition of the term "refugee" is closely modelled on the 1951 Convention. Para 1 is similar to the definition of a refugee in the 1951 Convention. The dateline and geographical limitations are absent along with certain earlier categories of refugees. The OAU definition is also based upon the "well-founded fear of being persecuted" standard as criterion for refugee character.

Para 2 is highly useful. This paragraph has expanded the definition of a refugee to include those: "who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order ...". This paragraph is therefore based upon objective criteria in the country of origin. Most of the refugee movements in Africa have been mass movements and in such cases it would be difficult to apply the subject test.<sup>37</sup> More importantly, the provision recognised the asylum-seekers from wider ramifications of civil strife, political unrest and coup d'état. Thus, for example, a person fleeing a state of emergency in his country would not necessarily be put to the onerous burden of strictly proving

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<sup>37</sup> The 1951 Convention and 1967 Protocol is individualistic and applies the subjective tests.

that she had been a victim of individual persecution.<sup>38</sup> As a consequence of this expansion and extension of the refugee definition, persons who in Europe would be considered as merely refugees not recognised de jure, only de facto, and thus outside the mandate of the 1951 Convention, "were recognised" as refugees for the purposes of Article 1. The expansion of the definition is a step forward for refugees. Refugees in Africa have been recognised as such purely on the reliance of this expanded definition. The OAU definition made no distinction between persons fleeing from independent African States and those emanating from colonial dominions or those still ruled by a white minority in South Africa.

The cessation and exclusion clause of the definition closely follows the 1951 Convention. A new cessation clause has, however, been added, that is, that the Convention shall cease to apply to any refugee if he has seriously infringed the purposes or objectives of the OAU Convention.

As to the exclusion clause, there is an additional exclusion ground, that is, excluded are not only persons with respect to whom the country of asylum has serious reasons for considering that they have been guilty of acts contrary to the purposes and principles of the United Nations, as in the 1951 Convention, but also persons with respect to whom the country has serious reasons for considering that they have been guilty of acts

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38 See Tamils case in Chapter Eight, where the Government and the House of Lords ruled that the Tamils came from civil disorder and hence did not come within the 1951 Convention as refugees.

contrary to the principle and purposes of the OAU. What are these purposes and principles of the OAU?

**(i) Purposes (Article II) of the OAU Charter**

"1. The Organisation shall have the following purposes:

- (a) to promote the unity and solidarity of the African State;
- (b) to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa;
- (c) to defend their sovereignty, their territorial integrity and independence;
- (d) to eradicate all forms of colonialism from Africa; and,
- (d) to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

2. To these ends, the Member States shall co-ordinate and harmonize their general policies, especially in the following fields:

- (a) political and diplomatic co-operation;
- (b) economic co-operation, including transport and communication;
- (c) educational and cultural co-operation;
- (d) health, sanitation, and nutritional co-operation;
- (e) scientific and technical co-operation; and,
- (f) co-operation for defence and security."

**(ii) Principles (Article III) of the OAU Charter**

- "1. the sovereign equality of all Member States;
- 2. non-interference in the internal affairs of States;
- 3. respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;
- 4. peaceful settlement of dispute by negotiation, mediation, conciliation or arbitration;
- 5. unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or

any other States;

6. absolute dedication to the total emancipation of the African territories which are still dependent;
7. affirmation of a policy of non-alignment with regard to all blocs."

#### 5.2.3.2 Article II

##### Text

"Article II.

##### ASYLUM

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality.
2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.
3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.
4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.
5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.
6. For reasons of security, countries of asylum

shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin."

### Analysis

Asylum per se is not defined or categorised in the 1951 Convention or the 1967 Protocol. However, the OAU Convention does actually stipulate the concept in paras 1-6. The OAU Convention stipulates the granting of asylum is a "peaceful and humanitarian" act and subsequently shall not be considered as an unfriendly act by any Member States. So, States can grant asylum to refugees and still possess friendly relations with the refugees' country of origin or nationality.

Para 1 has twofold interpretation. Firstly, it imposes a mandatory duty upon Member States to endeavour to receive and secure settlement for refugees; and, secondly, it advances beyond the 1951 Convention, which deals with the status of persons who have been granted asylum and does not address the question of the actual grant of it. It can be noted that paragraphs 2,3,4 and 5 of Article II are closely modelled on the UN "Declaration of Territorial Asylum" and their inclusion in the OAU makes them binding upon those States which are party to it. One major drawback of the Article is that refugee reception and resettlement was made subject to the application of domestic legislation, in effect raising the possibility of its nullification by individual States.

Paragraph 3 stipulates the principle of non-refoulement, which

is an important step forward in the advancement of the human rights of refugees and the development of the law of asylum.

Paragraph 4 contains the lightening of burdens upon States who grant refugees asylum. International Co-operation is also encouraged in this paragraph.

Paragraph 5 stipulates that a temporary residence in any country of asylum may be granted. The word "may" is used, which indicates a non-absolute duty, but it does follow from the principle of non-refoulement, that a refugee must be at least temporarily admitted if, in the case of non-admission, he would be compelled to return to, or to remain in, a country where he might be persecuted.

Paragraph 6 requires no explanation as it is straightforward to understand.

#### 5.2.3.3 Article III

##### Text

##### "Article III

##### PROHIBITION OF SUBVERSIVE ACTIVITIES

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member States of the OAU.

2. Signatory States undertake to prohibit refugees residing in their respective territories from

attacking any Member State of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio."

### Analysis

Article III expresses the prohibition of subversive activities by the refugees against any Member States of the OAU. It enshrined the same prohibition of subversive activities against other States as had the Banjul Charter and a declaration of the same issue adopted in Accra in 1965.<sup>39</sup> Moreover, at the same Conference, resolutions were further adopted which pledged Member States of the OAU to prevent all refugees living on their territory from carrying out, by any means whatsoever, any act harmful to Members States of the OAU and subsequently requested all Member States never to allow the refugee problem to become a focal point of agreement among them. Article III of the OAU Convention prohibits the rendering of any assistance to refugees in order to attack any Member States. In accordance with the objective of eradicating the vestiges of colonialism and armed apartheid from the continent, the prohibition did not extend to dependent countries and non-members of the OAU, especially those in Southern Africa.

Two questions arise from Article III. Firstly, who defines "subversion" and, secondly, if one is "subversive" does it mean a loss of rights? On answering the first question, Member

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Declaration on the Problem of Subversion adopted by the Heads of State and Government of the OAU at its second ordinary session in Accra in 1965 (AHG Res.27).

States of the OAU tend to follow the purposes and principles of the OAU Charter. Subversion would be interpreted to be a breach of these purposes and principles. On the second question, it seems that if one State deems an asylum-seeker to be a subversive, then it can deny all rights which are credited to him. Article III ensures African co-operation and solidarity, especially against activities of a subversive nature. This Article indicates the hostile nature of activities within Africa. See also Article 23 of the Banjul Charter on Human and People's Rights, which states:

"2. For the purpose of strengthening peace, solidarity and friendly relations, State parties to the present Charter shall ensure that:

- (a) Any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;
- (b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter."

The second paragraph of Article III is self-explanatory.

#### 5.2.3.4 Article IV

##### Text

"Article IV

NON-DISCRIMINATION 40

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40 See E. Schwelb, *op.cit.*, pp.996-1059.

Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions."

### Analysis

Article IV has the same commentary and reflections as Article 3 of the 1951 Convention, but added are nationality, membership of a particular social group or political opinions.

#### 5.2.3.5 Article V

##### Text

"Article V

##### VOLUNTARY REPATRIATION

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalised for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished and that the text of such appeal should be given to refugees and clearly

explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return."

### Analysis

Voluntary repatriation seems to be the ideal solution for returning refugees to their countries of origin or nationality. Paras 1-5 are simple and require no elaboration. It is worthwhile to note that there is no such provision in the 1951 Convention and the 1967 Protocol, although catered for in the rights and privileges of refugees, they did not implement the major solution, that is, when the returned. Perhaps the drafters of these two instruments assumed that refugees would not return to their countries of origin or nationality, perhaps they could not.

#### 5.2.3.6 Article VI

##### Text

"Article VI

##### TRAVEL DOCUMENTS

1. Subject to Article III, Members States shall issue to all refugees lawfully staying in their territories travel documents in accordance with the United Nations Convention relating to the Status of Refugees and the schedule and Annex thereto, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require. Members States may issue such a travel document to any other refugee in their

territory.

2. Where an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause.

3. Travel documents issued to refugees under previous international agreements by States Parties thereto shall be recognized and treated by Member States in the same way as if they had been issued to refugees pursuant to this Article."

### Analysis

Article VI of the OAU Convention is similar to Article 28 of the 1951 Convention, except on para 2 of Article VI. The 1951 Convention makes it mandatory to provide travel documents with a clause which stipulates the holder to return to the country which issued the document. The OAU Convention, however, in para 2, a country of first asylum may be dispensed from issuing a document with a return clause where an African country of second asylum accepts a refugee from a country of first asylum.

#### 5.2.3.7 Article VII

##### Text

##### "Article VII

##### CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE ORGANIZATION OF AFRICAN UNITY

In order to enable the Administrative Secretary-General of the Organization of African Unity to make reports to the competent organs of the Organization of African Unity, Member States undertake to provide the Secretariat in the appropriate form with information and statistical data requested concerning:

- (a) the condition of refugees;

- (b) the implementation of this Convention; and
- (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees."

No further elaboration is necessary.

#### 5.2.3.8 Article VIII

##### Text

##### "Article VIII

##### CO-OPERATION WITH THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

1. Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees.
2. The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees."

##### Analysis

The term "complement" relates to a supplement to the 1951 Convention and should be treated by Member States of the OAU as such.

#### 5.2.3.9 Article IX

##### Text

##### "Article IX

##### SETTLEMENT OF DISPUTES

Any dispute between States signatories to this Convention relating to its interpretation or application which cannot be settled by other means, shall be referred to the Commission for Mediation,

Conciliation and Arbitration of the Organization of African Unity, at the request of any one of the Parties to the dispute."

### Analysis

Any disputes in Africa are to be referred to the Commission for Mediation, Conciliation and Arbitration of the Organisation of African Unity, whereas in Article 38 of the 1951 Convention, any disputes are to be referred to the International Court of Justice. Many African States have reserved on Article IV of the 1967 Protocol, purely because of this Article. These States would prefer settling their disputes within Africa, rather than to proceed to the International Court of Justice.

#### 5.2.3.10 Articles X-XV

### Texts

#### "Article X

#### SIGNATURE AND RATIFICATION

1. This Convention is open for signature and accession by all Member States of the Organization of African Unity and shall be ratified by signatory States in accordance with their respective constitutional processes. The instruments of ratification shall be deposited with the Administrative Secretary-General of the Organization of African Unity.
2. The original instrument, done if possible in African languages, in English and French, all texts being equally authentic, should be deposited with the Administrative Secretary-General of the Organization of African Unity.
3. Any independent African State, Member of the Organization of African Unity, may at any time notify the Administrative Secretary-General of the Organization of African Unity of its accession to

this Convention.

## Article XI

### ENTRY INTO FORCE

This Convention shall come into force upon deposit of instruments of ratification by one-third of the Member States of the Organization of African Unity.

## Article XII

### AMENDMENT

This Convention may be amended or revised if any Member State makes a written request to the Administrative Secretary-General to that effect, provided however that the proposed amendment shall not be submitted to the Assembly of Heads of State and Government for consideration until all Member States have been duly notified of it and a period of one year has elapsed. Such an amendment shall not be effective unless approved by at least two-thirds of the Member States Parties to the present Convention.

## Article XIII

### DENUNCIATION

1. Any Member State Party to this Convention may denounce its provisions by a written notification to the Administrative Secretary-General.
2. At the end of one year from the date of such notification, if not withdrawn, the Convention shall cease to apply with respect to the denouncing State.

## Article XIV

Upon entry into force of this Convention, the Administrative Secretary-General of the OAU shall register it with the Secretary-General of the United Nations in accordance with Article 102 of the Charter of the United Nations.

## Article XV

### NOTIFICATION BY THE ADMINISTRATIVE SECRETARY-GENERAL OF THE ORGANIZATION OF AFRICAN UNITY

The Administrative Secretary-General of the

Organization of African Unity shall inform all Members of the Organization:

- (a) of signatures, ratifications and accessions in accordance with Article X;
- (b) of entry into force, in accordance with Article XI;
- (c) of requests for amendments submitted under the terms of Article XII;
- (d) of denunciations in accordance with Article XIII."

### Analysis

Articles X-XV stipulate the legal ramifications. Fourteen States were required to bring the OAU Convention into force. There are now more than 34 Member States which have ratified the provisions of the OAU Convention.

#### 5.2.4 Refugees and the African Human Rights Charter (The Banjul Charter) <sup>41</sup>

The passing of the African Charter on Human and Peoples' Rights<sup>42</sup> represented a growing concern among the OAU Member States for the African people who were in a dire condition in both dependent and liberated countries.

It is interesting to compare the Banjul Charter<sup>43</sup> with the 1969

<sup>41</sup> For a succinct and comprehensive account of Human Rights in Africa, see S. Neff, "Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the Light of Case Law from Botswana, Lesotho and Swaziland", *ICLQ*, 33, April 1984, pp.331-347.

<sup>42</sup> Text: OAU Document CAB/LEG/67/3, Rev.5, from the OAU Ministerial Meeting on the African Charter on Human and Peoples' Rights, Jan 7-19, 1981, Banjul, The Gambia.

<sup>43</sup> Ratified by 31 OAU Members and now in force.

OAU Convention. The latter imposes a duty upon Member States to receive refugees, while the former, especially in Article 12(3) confers the right to seek and obtain asylum:

"Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions."

The term "... in accordance with the laws of those countries ..." creates a great deal of concern, especially since many States are reluctant to implement refugee laws and international conventions. This issue will be dealt with later.

Article 12(3) represents a recognition of the reasons that might cause a person to leave his own country. Furthermore, it stipulates the right of asylum in the legal regime of the African Continent.

Under Article 12(4) of the Banjul Charter,<sup>44</sup> an alien whom a State Party has legally admitted into its territory may only be expelled from it by a decision made in accordance with the law. Once again, this has caused problems (see below).

Article 12(5) extends the prohibition of expulsion to masses of non-nationals:

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44 "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."

"The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."

In refoulement of masses to countries they have fled against their will on the grounds that they were or are illegal aliens. The distinction between the two is not very obvious and thus both of these provisions reinforce the principle of non-refoulement and voluntary repatriation.

#### 5.2.5 The Divergence Between Policy and Practice in Implementing the OAU Policy in Relation to Refugees

The dichotomy between practice and policy is prominently displayed in the municipal laws which are enforced in individual States. Any international convention establishes the framework of principles to be adhered to and gives the general direction that signatories should progress towards in implementing these principles. It may also enshrine certain explicit stipulations on what shall be done and some concrete prohibitions on what shall not. In reality, however, it has very little to say about how it is going to be put into actual practice.

On the domestic level, the translation of policy into practice should be manifested in three generalised approaches. Firstly, through methods and proceedings that ensure the actual reinforcement of the rules and laws; secondly, the

dissemination of the rules to both these persons charged with their implementation and those most directly affected by them; and, thirdly, the appointment of officers and agencies for the administration of the rules.

With the refugee issue in mind, a question arises, how do Contracting States that have not passed any national legislation adhere to an international convention and how do they know that they are doing so? The same query can be put to those States that have done so. The asylum-seeker and the refugee is greatly affected by this question. If he asylum-seeker or a refugee is denied his duties and obligations, then he will be in a very dangerous position. From noting the composition of the Contracting States that have ratified the 1969 OAU Convention, one can see that a number of those that are most significantly affected by the refugee crisis, such as Djibouti and Uganda, have not ratified it. Furthermore, of those that have done so, few have actually incorporated the provisions of the Convention into their indigenous legal regimes. There appears to be no common pattern in the attitudes of those States that have ratified the Convention in comparison with those that have not done so.

The attitude of States towards refugees is positive. Burundi has a refugee population of  $\frac{1}{2}$  million; it is a poor country but congratulations must be given to it for catering for refugees. yet for many years before it ratified the OAU Convention in December 1975, it maintained a comprehensive list of the rights

of refugees, primarily modelled on the articles and provisions of the 1951 Convention. Thus, although none of the provisions of international law had actually been enshrined in Burundi's domestic legal system, official guidelines existed to ensure the conformity of practice with principle.

Tanzania has ratified the 1969 OAU Convention and the Banjul Charter of 1981 and it has a tradition of being one of the most hospitable nations towards refugees in the continent.<sup>45</sup>

Comparatively speaking, the States of Francophile Africa have refugee laws which are slightly more advanced than those of their English-speaking counterparts. Similarly, their attitude towards international law is that of generally incorporating provisions into their national legislation without modification or reservation.

The divergence between practice and policy manifests itself on two levels:

- (i) It is in the "paucity" of national laws that incorporate the principle of the OAU Convention.

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<sup>45</sup> For instance, in late 1985 Tanzania began the formal resettlement of 35,000 refugees from Burundi at Mishamo, in the west of the country, on an agricultural project of nearly 1000 square miles in size. Unfortunately, in an act which sent severe tremors through the refugee population in the country in 1983, the Tanzanian Government returned refugees from Kenya in spite of a court ruling that they would probably face persecution for "offenses of a political nature" if sent home.

(ii) It is the existence of laws and regulations in other areas that have the greatest impact upon the manner in which host States treat refugees. The problem of the principle of non-refoulement and the often fine dividing line between illegal immigrants and refugees, freedom fighters and persecuted persons, all present considerable obstacles to the enforcement of the Convention.<sup>46</sup>

There is no doubt that the existence of institutional structures specifically delineating the rights of refugees would serve as a buffer against the adverse effects of these laws and, more importantly, against arbitrary actions by governments. Nevertheless, regardless of the nature or content of legal and institutional mechanisms that might be in force, ultimately it is within the context of the social, political and economic realities of the African Continent that the policies and the practices of the States that comprise the OAU must be appreciated and respected.

The following are a few examples which show the policies of African States that dictate their responses to the refugees in

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<sup>46</sup> For instance, in 1986, Algeria expelled thousands of citizens of Mali on the ground that they were de facto illegal aliens. However, it is difficult to assert that they were indeed so, and that among their numbers, there were no individuals who had in fact fled Mali in genuine fear of persecution. Without such evidence, such an act would constitute a violation of the Convention to which Algeria is a signatory. The Government of Lesotho has progressively been forced to adopt a more restrictive attitude towards refugees - particularly because of the nasty and hostile neighbour which surrounds it (South Africa) believes that those given refuge in such countries are nothing but insurgents. (Telephone conversation with UNHCR Information Director in Geneva on 17th August 1988).

their countries:

(i) Northern Africa

None of the countries of Northern Africa have a significant refugee population, with the exception of Algeria, which has approximately 170,000 refugees. Algeria, Egypt, Tunisia and Morocco have all acceded to the 1951 Convention and the 1967 Protocol and have ratified the OAU Convention. Libya and Morocco have both ratified the OAU Convention.<sup>47</sup>

Algeria, Tunisia and Morocco all have legislation based on the 1951 Convention. Morocco has the "Bureau de Refugies et Apartrides", while Algeria has the "Bureau de Pour la Protection des Refugies Apartrides", both being the main refugee-determination bodies which consider applications for refugee status and asylum. Appeals are allowed within 30 days of the date of the decision to the Commission De Recours. The UNHCR is allowed to assist the applicants.

In practice, Egypt and Algeria have been quite hospitable towards the refugees. The latter has granted asylum to the refugees fleeing intermittent conflict in the Western Sahara, as well as some of the victims of the drought that has afflicted the Sahara. Although Algeria returned thousands of refugees in 1986 on the grounds that they were illegal immigrants, it could well have been violating its legislation which incorporates the provisions of international refugee law

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<sup>47</sup> Even though Morocco is no longer a member of the OAU.

governing refoulement. There appears to be greater economic prosperity and a small number of refugees which gives the impression that Northern Africa can solve its refugee problem without any external assistance, or less external assistance than other areas of Africa.

(ii) Eastern Africa

The countries of Eastern Africa are host to the largest percentage of refugees in Africa. The Horn of Africa - scene of civil wars, struggles and natural disasters - is the largest refugee producer in Africa.

Uganda has produced thousands of refugees in its neighbouring borders. The responses have been varied. Some States, for instance Tanzania, have responded sympathetically to the plight of the refugees, while others, such as Somalia, have responded by complaining that refugees are still invading their territories and regardless of the attempts to stop it, refugees continue to enter Somalia. All seven countries in the region have acceded to the 1951 Convention and the 1967 Protocol. Four (Sudan, Ethiopia, Tanzania and Somalia) have ratified the 1969 OAU Convention.

Somalia has ratified the OAU Convention and acceded to the UN refugee instruments. In July 1979, a presidential decree established a Committee for Refugee Acceptance. The Committee's task was to process applications for refugee status and asylum. The final appeal could be made to the Justice

Committee in the Office of the President, in particular from decisions based on Articles 31, 32 and 33 of the 1951 Convention. In May 1981, the Government created the National Refugee Commission, charged with the welfare of refugees, which set up over 37 refugee camps. The National Refugee Commission was subsequently reconstituted under an Extraordinary Commissioner with ministerial rank and is the present machinery in force which governs refugee matters in Somalia.

Somalia has been unhappy with donor countries, voluntary agencies, international organizations and the government of Ethiopia over the manner in which refugee crisis matters have been handled. Not only have the attitudes and policies of the Somalia Government resulted in the decrease of assistance to that country, it has also meant worsening conditions for refugees living in poor camp sites.

In Tanzania, the Refugee (Control) Act 1965 governs refugees within Tanzania. There is no definition of the word "refugee" within this Act and the Minister responsible for these matters may issue a declaration which certifies as refugees a designated class of persons under this Act. Although the Act is vague, it does provide for the recognition of the Refugee States. Despite the Act predating the OAU Convention, the provisions of the Act are clear and they display striking foresight. Supplemented by Refugee Declaration Orders, the Act rests with the Minister responsible for refugee affairs who has discretionary powers to declare a particular class of aliens in

the country<sup>48</sup> as refugees under the Act. Such orders have been passed for Namibians (1969), Ugandans (1971) and Burundis (1973). By stipulating such a determination in events relating to period and geographical area, the Act obviates the need to determine refugee status when influxes involve many thousands. Individual cases are determined through a separate procedure which imposes upon an applicant seeking refugee status the onus of showing that his particular circumstances warrant it.

The Act also contains provisions covering non-refoulement. Discretionary power is vested in the Minister or any competent authority the Minister appoints, or a court which has convicted a refugee. That authority includes the power to refuse to grant an application permitting return to Tanzania, and to order return or deportation. Such power is subject to the provisions of the Act that prohibit the return of refugees in specified instances, although no reasons need to be given for the decision reached. This asylum, as opposed to the Banjul Charter, is merely a privilege and not a right. In practice, however, the Government and the UNHCR usually seek alternative countries of asylum for persons refused it in Tanzania.

(iii) Western and Central Africa

Drought has caused the greatest impact. The drought crisis in Chad has produced a great number of refugees. Of the 21 countries in the area, 20 have acceded to the 1951 Convention and to the 1967 Protocol. Seventeen have ratified the OAU

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48 "... persons ordinarily resident outside Tanzania ...".

Convention. In 1976, a law was passed creating the "Delegation Generalé aux Refugis (DGR)" to deal with refugee matters. The DGR has the following responsibilities: the legal and administrative protection of refugees; the implementation of international and regional agreements which have been ratified by Gabon; the financial assistance to refugees; co-operation with UNHCR; the power of revocation (upon advice by the Supreme Court) of refugee status of any person who no longer fulfils the conditions laid down in the international instruments, and so on.

Gabon is unique in the sense that it attempts to address the refugee question, although it is not affected by it to any significance (Gabon establishes clear guidelines for offices and it is still too early to say whether Gabon, if affected by a massive invasion of refugees, can cope with the problems which accompany such numbers of refugees.

Senegal has a small refugee population. It has acceded to both the 1951 Convention and the 1967 Protocol and has also ratified the 1969 OAU Convention. The main legislation governing refugee matters is the 1968 law on the Status of Refugees.<sup>49</sup> These provisions establish the National Commission for Refugees under the general secretariat of the President and chaired by a senior civil servant. Senegalese law adheres to the international definition of the term "refugee", thereby

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<sup>49</sup> Supplemented by decrees passed in 1972, 1975, 1976, 1978 - all made with UNHCR's active support and advice.

delimiting the deferring of refugee status and asylum.

(iv) Southern Africa <sup>50</sup>

Several countries in the area have only recently attained independence and are still struggling with the quest for national identity. Southern Africa consists of 10 countries; 2 (Angola and Mozambique) gained independence in the mid-seventies, one (Zimbabwe) has only been free for eight years, and two others (Namibia and South Africa) remain under a racist minority regime. The existence of a government which implements apartheid has necessitated the evolution of policies that express the OAU objective of eradicating and diminishing colonialism and apartheid from the continent, while fully cognizant that they are directed against a belligerent and racist government.

Of the 8 independent countries in Southern Africa, 6 have acceded to the 1951 Convention and the 1967 Protocol, 2 (Zambia and Angola) have ratified the 1969 OAU Convention and 1 (Malawi) is a party to none.

5.3 POSTSCRIPT

The 1951 Convention, along with the 1967 Protocol, form an important and formidable part of refugee law. The next chapter will deal with the procedural aspects of determining refugee

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<sup>50</sup> For examples of Human Rights and Botswana and Lesotho, see S. Neff, *op.cit.*, pp.331-347.

status which is set out in the 1951 Convention and the 1967 Protocol. The 1951 Convention and/or the 1967 Protocol do not contain these procedures and States are left to their own experience and discretion. The next chapter will examine the necessary procedures with reference to the domestic situation in the Federal Republic of Germany and the United Kingdom.

## **CHAPTER SIX**

### **Determination of Refugee Status**

## CHAPTER SIX

### DETERMINATION OF REFUGEE STATUS

#### 6.1 INTRODUCTION

The Criteria for the Determination of the Refugee Status must not be confused with the Procedures for the Determination of Refugee Status. The former deals with the definitions, interpretations of terms, cessation clauses, exclusion clauses and special cases; while the latter deals with the procedural aspects of the Determination of Refugee Status. This section will deal with the latter case.

The two main refugee instruments, namely the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, define the refugee and stipulate various provisions. In order for the State parties (to these instruments) to implement these provisions, the refugee, per se, must be identified. The identification of the refugee, although mentioned in the 1951 Convention,<sup>1</sup> is not specifically regulated in any shape or form. The 1951 Convention does not stipulate the procedures (for the State parties) to implement and adopt for the determination of refugee status. The 1951 Convention has politely left it to each of the Contracting States to establish the procedures that it considers most appropriate and reliable, taking into account

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<sup>1</sup> Cf. Article 9.

its constitutional and administrative infrastructures. The procedures adopted by the Contracting States vary purely because the 1951 Convention did not establish actual procedures to determine the status of refugees. Some countries have general procedures for the admission of aliens, whilst in others refugee status is determined under formal procedures specifically established for this purpose. Yet in other countries, refugee status and grant of asylum is determined under informal arrangements or ad hoc for specific purposes.

There was no set of formal procedures which a Contracting State could follow until 1977 when the Executive-Committee of the High Commissioners Programme, at its 28th session in October 1977,<sup>2</sup> recommended procedures which it hoped that governments would implement and follow within their own systems. The Executive-Committee hoped and expressed a desire that all governments would establish similar procedures and "give favourable consideration to UNHCR participation in such procedures in appropriate form". The Executive-Committee recommended the following procedures:

- "i) The competent official (eg. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.

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<sup>2</sup> ORGA, 32nd session, Supplement No.12 (A/31/12/ADD.1), paragraph 53 (6)(e).

- ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- iii) There should be a clearly identified authority - wherever possible a single central authority - with responsibility for examining requests for refugee status and taking a decision in the first instance.
- iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting a case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
- (vi) If the applicant is not recognised he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority. Whether administrative or judicial, according to the prevailing system.
- vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above unless it has been established by that authority that this request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending."

Many Contracting States have now adopted similar measures as to the recommendations made by the Executive Committee. In some countries, the office of the UNHCR can participate in various forms in the procedures for the determination of refugee status; this was because the office of the UNHCR was particularly concerned with the determination of refugee status (asylum and admission) because this was one of the most important stages for an asylum. The participation of the office of the UNHCR occurs under Article 35 of the 1951 Convention, which states:

"Co-operation of the national authorities with the United Nations.

1. The Contracting States undertake to co-operate with the office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this convention."

Paragraph 2 denotes that the Contracting States must make reports on the following and provide them to the UNHCR for reporting to other competent organs of the United Nations:

- "(a) the condition of refugees;
- (b) the implementation of this convention; and
- (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees."

Similar provisions are implemented in Article II of the 1967 Protocol relating to the Status of Refugees.

Before examining the procedures for the determination of refugee status in some detail, it is perhaps advantageous to mention the provisions established by the office of the UNHCR in its Handbook on Procedures and Criteria for Determining Refugee Status.

6.2

THE UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS

The paragraphs of relevance are 189 to 205 inclusive. They state a general provision emphasising the Executive-Committee's

recommendations to ensure that the applicant is provided with "certain essential guarantees".

Paragraphs 189 to 194 basically supplement what has been said above, especially the approval of the Executive-Committee's recommendations (above).

Section B, which denotes "Establishing the facts", the principles and methods are stipulated in the following paragraphs:

Paragraph 195 states:

"The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicants statements."

Paragraph 196 stipulates:

"It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule.

In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means of his disposal to produce the necessary evidence in support of the

application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

Paragraph 197 provides that the requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

In paragraph 198, a person, because of his experience, was in fear of the authority in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.

Paragraph 199 states:

"While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistency and resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiners' responsibility to evaluate such statements in the light of all the circumstances of the case."

Paragraph 200 stipulates that basic information is given by completing a standard questionnaire. Such basic information will not normally be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining the opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicants' statements will be treated as confidential and that he be so informed.

Paragraph 201 explains the risks of taking isolated incidents out of context. The cumulative effect of the applicant's experience must be taken into account.

Paragraph 202 stipulates that the examiner's conclusion on the fact of the case and his personal impression of the applicant will lead to a decision that affects human lives; he must apply the criteria in a spirit of justice and understanding and his judgement shall not, of course, be influenced by the personal consideration that the applicant may be an "undeserving case".

After the asylum-seeker has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. It is extremely difficult for the

applicant to "prove" every part of his case.<sup>3</sup> Therefore, in paragraph 203, the benefit of the doubt must be given to the applicant, although, however, the benefit of the doubt must only be given when all the evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility.

The applicants' or asylum-seekers' statements must be "coherent" and "plausible" and must not run counter to generally known facts - stipulated in paragraph 204.

Quite basically, in paragraph 205, the process of ascertaining and evaluating the facts can be summarised for the applicant (asylum-seeker) and the examiner:

"(a) The applicant should:

- i) Tell the truth and assist the examiner to the full in establishing the facts of the case.
- ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.
- iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons involved in support of his application for refugee status and should answer any questions put to him.

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<sup>3</sup> If this were a requirement, the majority of refugees would not be recognised.

(b) The examiner should:

- i) Ensure that the applicant presents his case as fully as possible and with all available evidence.
- ii) Assess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the object and the subjective elements of the case.
- iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status."

The above procedures are basically a guide for the Contracting States to the 1951 Convention. The UNHCR Handbook also stipulates cases giving rise to special problems in establishing the facts on mentally disturbed persons and unaccompanied minors,<sup>4</sup> both are beyond the scope of this thesis.

In the conclusions of the UNHCR in their Handbook,<sup>5</sup> the office of the High Commissioner made it clear that the guidance of the Handbook was not meant to encompass every situation in which a person may apply for refugee status. Such situations are manifold and depend upon the infinitely varied conditions prevailing in the countries of origin and on the special personal factors relating to the individual applicant. More importantly, in paragraph 222, the explanations given have shown that the determination of refugee status is by no means a

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<sup>4</sup> See paragraphs 206-212 and paragraphs 213-219, respectively.

<sup>5</sup> Paragraphs 220-223 inclusive.

mechanical and routine process. On the contrary, it calls for specialised knowledge, training and experience and - what is more important - an understanding of the particular situation of the applicant and the human factors involved.

### 6.3 THE DETERMINATION PROCESS <sup>6</sup>

The determination process is quite basically the process which an asylum-seeker has to undergo, in order to achieve refugee status and asylum. It is entirely an administrative procedure which begins at the border. This first step is vitally important, because the border official can quite simply refuse the asylum-seeker without even allowing him or her access to the determination procedure. The asylum-seeker, if allowed entry into a country, can then seek to make applications requesting refugee status and asylum. He/she may have to attend many interviews, and even administrative or legal tribunals or courts, in order to satisfy the authorities of his/her plea for refugee status. In other words, he/she has a genuine "well-founded fear of being persecuted".

In most countries there are legal and administrative procedures, hampered by red tape bureaucracy, which are often complex and confusing. Below, the examples of the Federal Republic of Germany and the UK will be highlighted, purely because the former had a tradition of producing refugees and

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<sup>6</sup> See also, Christopher L. Avery, "Refugee Status Decision-Making: The Systems of Ten Countries", SJIL, Vol.19, Issue 2, Summer 1983.

the latter of accepting refugees.

### 6.3.1 Federal Republic of Germany

In the Federal Republic of Germany, the Federal Constitution<sup>7</sup> and the 1982 Law on Asylum Procedures<sup>8</sup> are the principal national legal bases for determining refugee status. Article 16 of the Constitution is extremely vague and virtually guarantees "politically persecuted persons the right to asylum".<sup>9</sup> Many 'economic refugees' took advantage of article 16, some settling, but many were returned to their countries of origin. Many Pakistan and Turkish nationals were deported to their countries of origin.

The German authorities, after realising the upsurge in the number of asylum-seekers requesting refugee status and asylum in West Germany, tightened up the procedural system by adopting a new law on Asylum Procedure, which took effect on 1st August 1982. The numbers requesting refugee status and asylum has now been drastically reduced.<sup>10</sup>

Under the 1982 law on Asylum Procedure, the border-guards may deny the passenger (asylum-seeker) entry if they determine that

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7 Grundgesetz, May 23 1949, article 16 (2)(2).

8 Asylverfahrensgesetz, Bundesgesetzblat, Teil I, August 1 1982.

9 Grundgesetz, op.cit., article 16 (2)(2).

10 Information from the Embassy of the Federal Republic of Germany, London, 1988.

the asylum-seeker has already found protection in another country or that the asylum-seeker was refused refugee status and has submitted no new evidence, whereas prior to this law border-guards were required by law to refer all refugee status applicants to the Aliens Authority (the administrative section of the police) for the consideration of the claim.

When the asylum-seeker is rejected at the border, he is entitled to a summary review by the local Administrative Court<sup>11</sup> and a further review by the Administrative Court of Appeal. However, the Embassy of the Federal Republic of Germany now informs us that asylum-seekers have to conduct their appeals from outside West Germany.

However, if the asylum-seeker is granted entry to the Federal Republic of Germany, he/she will then undergo an interview with a representative of the Aliens Authority, in the area of the asylum-seeker's residence. The Aliens Authority, under the 1982 law on Asylum Procedure may reject the asylum-seeker's application on the same reasons as the border-guards. On rejection, the asylum-seekers can appeal to the Administrative Court for summary review or rejection by the Aliens Authority. The judges of the Administrative Court have a discretion to determine whether such summary review includes a personal appearance by the asylum-seeker before a panel of 5 persons.<sup>12</sup>

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11 A general administrative court of the first instance which hears other cases in addition to refugee status determination.

12 Three are law judges and two are private citizens elected by the local city council.

Obviously, the appearance of the asylum-seeker must be to his/her advantage, but the judges nearly always rule against such appearance. The asylum-seeker may then appeal further for summary review by the Administrative Court of Appeal.

Successful applications, in other words those which the Aliens Authority have not turned away, are then sent to the Federal Agency for the Recognition of Foreign Refugees (FARFR).<sup>13</sup> The FARFR is a decision-making body, heavily influenced by the Government. The Minister of Interior issues regulations and instructions to the FARFR. The Director of the FARFR is appointed by the Minister of the Interior. The recruitment of the officers of FARFR has been made a great deal easier by the eradication of the 'civil-service' appointees. Recruits to the FARFR as interviewers have no refugee law background or special qualifications, which could enable the interviewers to participate in interviews with the asylum-seekers with ease or confidence. The FARFR is required by law to interview the asylum-seeker before rendering a determination. Quite recently, under the 1982 Asylum Procedure Act, a single interviewer and a single decision-maker processes each application, whereas prior to this law each application was considered by three highly experienced officers within the FARFR and they eventually made the decisions.

The FARFR has grown more restrictive in its approach. This is

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<sup>13</sup> The FARFR's headquarters are in Zirndorf, Bavaria and has branches in major cities of West Germany.

because the FARFR manages its own documentation centre which draws upon prior refugee status and asylum decisions by the courts as well as on reports compiled by the Foreign Ministry, the Press and non-governmental organisations. The FARFR officers have been advised to consult their own documentation centre rather than to rely on external sources, such as the Human Rights Commission, the Red Cross or Amnesty International. However, there are some categories of asylum-seekers who are sympathetically looked at, these include Ethiopians, Afghans, Eastern Europeans and Americans, and accordingly they are allowed to stay in West Germany even though they are not granted refugee status.

As stated earlier, the asylum-seeker can appeal to the Administrative Court but the Federal Commissioner for Asylum Affairs may also appeal decisions to grant or deny recognition of refugee status. The Federal Commissioner is appointed by the Minister of the Interior to represent the interests of the Federal Government at the Federal Agency and before the Administrative Courts.

If the FARFR rejects a refugee status claim as "manifestly unfounded", the appeal procedure is somewhat different. The asylum-seeker may appeal the expulsion order to a local Administrative Court judge for summary review. The physical appearance by the asylum-seeker is not usually allowed. This is a disadvantage in itself. The asylum-seeker may appeal summary review rulings denying status to the Administrative

Court of Appeal. Summary review rulings to recognise status may be appealed by the FARFR.

If the FARFR rejects an application for a claim on the grounds other than that the application is manifestly unfounded, or if the manifestly unfounded designation is reversed on appeal, the case or submission will be entitled to full review by an Administrative Court. Many private citizens and the Administrative Court panel have little expertise, interest or skill in refugee status determination. However, the judges in the Administrative Court are genuinely independent of the Government. In fact, the Embassy of the Federal Republic of Germany has reported that some judges never grant asylum to politically left-wing asylum-seekers, but some left-wing judges have granted asylum to left-wing asylum-seekers. This is perhaps all too common in many legal systems of the world. The Administrative court has always requested that the asylum-seeker should appear before the panel and answer the questions put to him/her. This is in comparison to the local Administrative Court.

The asylum-seeker may appeal against a decision to deny recognition of refugee status by an Administrative Court to the Administrative Court of Appeal if the appeal is expressly allowed by the ruling of the Administrative Court or if the Administrative Court of Appeal grants permission. Such permission will only be granted if the case raises "fundamental questions",<sup>14</sup> if the decision is at variance with jurisprudence

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<sup>14</sup> The term "fundamental questions" remains unclear and vague.

of a higher court or if there was a defect in the procedure.

The asylum-seeker may further appeal issues of law to the highest administrative court, the Federal Administrative Court in Berlin. Such an appeal may be taken only if permission has never been granted by either the Administrative Court of Appeal or the Federal Administrative Court.

If a constitutional violation is alleged, there is another way of appealing; the asylum-seeker can, in addition, seek review by the Federal Constitutional Court (the highest constitutional court in the country) in Karlsruhe.

6.3.1.1 Can the office of the UNHCR assist in any shape or form?

The representative of the UNHCR branch office can attend interviews and express an opinion on individual cases. In practice, however, the UNHCR representative can advise clients and their advisors, but the decision or any influence on the government is ultra-vires.

6.3.1.2 What are the time limits for the determination of refugee status?

The duration of the process can take anything from weeks to years. This may produce advantages and disadvantages for the asylum-seeker. Advantage in the sense that at least the asylum-seeker is safe and perhaps receiving assistance from

the social services. The disadvantage, on the other hand, is the uncertainty and the apprehension of what the future holds, with obviously a fear of refoulement to the country or origin from which they escaped.

The Aliens Authority takes approximately two weeks to reach a decision, while the FARFR can take approximately 4 months for the ordinary cases, to in excess of two years or more for complex cases. The judgements by the Administrative Court requires approximately one to two years, while the Federal Administrative Court may require 14 months to reach a decision. The Federal Constitutional Court may also take the same amount of time to reach a determination.

Many applications are still pending, but many thousands have been rejected. Turks and Pakistanis have been deported in their thousands. Rising costs are a worry for the West German Government. The new system, although seeming to expedite the processing of claims, threatens to jeopardize some legitimate claims from genuine asylum-seekers. Certain types of asylum-seekers have been segregated. Many applications from the Eastern European States have been treated with sympathy and favouritism; however, asylum-seekers from Turkey and Pakistan are treated with caution, suspicion and insensitivity. Is asylum and refugee status determination in West Germany becoming more a question of politics than a question of humanitarianism?

6.3.2 The United Kingdom: The Position of Refugee Status in English Law

After a series of legislations aimed at restricting immigration into the UK, the 1971 Immigration Act is the most recent one. There are no direct provisions within the 1971 Immigration Act dealing with refugees or their status. In fact the 1951 Convention and 1967 Protocol provisions are not incorporated in English law (this point is made clear in Chapter Eight). There are, however, immigration rules which border-guards, immigration officers, etc., have to obey. These rules originated from S.3(2) of the Immigration Act 1971 (Chapter 77), revised to 1st January 1983, which states:

"The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the Administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the condition to be attached in different circumstances; ... "

The most recent rules originate in the House of Commons Paper 169,<sup>15</sup> which are sectioned into two parts - Section One: Control on Entry, and Section Two: Control after Entry.

Under Control on Entry, para 16 states:

"Refugees

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<sup>15</sup> Came into effect on 16th February 1983.

16. Where a person is a refugee full account is to be taken of the provision of the Convention and Protocol relating to the Status of Refugees (Cmd 9171 and Cmd 3096). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments."

"Part VII: ASYLUM

73. Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal to leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of Refugees."

Quite simply, paragraph 73 indicates to the Immigration Officer to refer application for refugee status to the Home Office.

An asylum-seeker arriving at a port will make a request in the order of, if he was returned to his country of origin or nationality, he would be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. He would be allowed entry and subsequently allowed to remain within the country.<sup>16</sup>

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<sup>16</sup> However, see the Tamils case in the Court of Appeal and the House of Lords in Chapter Eight.

The rules relating to refugees in Section Two: Control after Entry are as follows:

Paragraph 96 of Part XI: Variation of Leave to Enter or Remain, states:

"Refugees

96. Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugee. Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments."

Paragraph 134 states:

"Asylum

134. A person may apply for asylum in the United Kingdom on the grounds that, if he were required to leave, he would have to go to a country to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any such claim is to be carefully considered in the light of all the relevant circumstances."

In Part XII: Deportation, paragraph 153 states

"Refugees

Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees. Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments."

And paragraph 165 states:

"In accordance with the provisions of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group of political opinion."

Control after entry deals with asylum-seekers within the country and then formally makes an application for refugee status to the Home Office. The asylum-seeker does so, simply by writing to the Home Office and informing them of his claim. Provisions for deportation are also mentioned in the rules. These apply when a formal request has been rejected or refused. The deportation order is very restrictive in the sense that if the Home Office agree that the denied asylum-seeker will be subjected to persecution for reasons of race, religion, nationality, membership of a particular group or political opinion. For UK practice, see Chapter Eight, namely the published article.

6.3.2.1 Does the United Kingdom Have an Increasingly Restrictive Policy Towards the Asylum-Seekers?

British politicians have made many public speeches on how generous and liberal the present government is towards granting refugee status and asylum to asylum-seekers who arrive at these

shores.<sup>17</sup> The fact of the matter is that these public statements are merely rhetorical, made to constitute a form of propaganda towards asylum-seekers. Most of these politicians, backbenchers and Ministers, are de facto in support of further restrictions on asylum-seekers gaining entry into the UK.<sup>18</sup> The UK has imposed visa restrictions on four Commonwealth countries: India, Ghana, Nigeria and Bangladesh, and also on citizens of Pakistan. However, from a recent Home Office Bulletin, it can be seen that these countries rarely produce

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17 Jeremy Hanley MP said "The UK has an honourable record in giving refuge over the years to hundreds of thousands of people who have suffered persecution in their own countries"- Hansard, 3 June 1985. David Waddington MP, Minister at the Home Office, said "We have an enviable record on the treatment of genuine asylum-seekers", Hansard, 18 Feb 1987. Douglas Hurd MP, Home Secretary, said "The Government remains fully committed to their obligations under the United Nations Convention to genuine refugees", Hansard, 3 March 1987. And John Wheeler MP said "The UK has always adopted a generous and liberal policy towards those seeking asylum", Hansard, 16 March 1987.

18 It was Jeremy Hanley who confirmed the Home Secretary's imposition of visa controls on Sri Lankan citizens, the first time such visas had been demanded of citizens of a Commonwealth country. David Waddington was speaking at the time when Immigration Officers had only just been restrained from forcibly removing 64 Tamils after they stripped at Heathrow Airport. Douglas Hurd made many restrictions: inter alia, asylum-seekers would no longer be automatically referred to the UKIAS; MPs could no longer put 'stops' on the removal of asylum-seekers; and, asylum-seekers could no longer expect to be allowed to remain in the UK whilst challenging refusal of entry in the High Court through judicial review. Finally, John Wheeler voted for Douglas Hurd's Immigration (Carriers Liability) Act. This new law imposes fines on transport companies who carry passengers without any visas or documents. Naturally, this Act has had an effect on the transport companies who will now form part of the immigration control machinery. Asylum-seekers can often find it extremely difficult to obtain such documentation in hostile and difficult countries. Article 31 of the 1951 Convention specifically states that a refugee should not be "penalised" for entering another country "illegally". The Carriers Act does this by shifting the penalty to the carrying company.

masses of refugees. Since Douglas Hurd imposed the conditions that asylum-seekers would not be referred to the UKIAS, MPs can no longer stop a removal, and the appeal condition, there have been many examples of asylum applicants being removed to countries that the office of the UNHCR considers to be unsafe.<sup>19</sup> An unknown number who arrive at UK ports have been removed without reference to UKIAS.<sup>20</sup> In addition, many asylum-seekers in the UK were detained indefinitely while their cases were considered on pending deportation. Fear of being returned to the country from which they had fled resulted, during 1987, in one suicide in detention and many self-inflicted injuries.<sup>21</sup>

#### 6.3.2.2 Charter of 1987

Charter '87, a charter for refugees, was a response<sup>22</sup> to the high level of disquiet about the UK's policies towards those who flee from persecution and seek refuge in this country. The Charter was also based on international human rights, setting out the legal rights and safeguards which are urgently needed

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19 For instance, Sri Lanka. Telephone interview with R Hudson, Information Officer with UNHCR, London, on 1 March 1988.

20 Telephone interview with Dr Barnes, Director of UKIAS, 1 March 1988.

21 Telephone interview with Mr Warwick Harris of the British Refugee Council, 1 March 1988.

22 With over 150 signatories, including inter alia Dr Michael Barnes, Louis Blom-Cooper QC, Professor Ian Brownlie, the Rt Revd and Rt Hon Lord Coggan, Professor R Cohen, Sir James Fawcett QC, Professor John Humphrey, R Plender, Lord Scarman PC, Paul Seighart, Ole Volting and Lady Antonia Fraser.

by asylum-seekers. The Charter comprises 6 sections:

**"Section I: Protecting the Human Rights of All Who Seek Asylum**

1. The human rights of all asylum-seekers shall be fully protected and their dignity as persons respected in accordance with the relevant international standards, and in the spirit of Resolution 14 (1967) of the Council of Europe.<sup>23</sup>
2. No-one shall be returned or expelled directly or indirectly (ie. be subjected to "refoulement") to any country where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

**Section II: Just and Human Entry Procedures**

1. All who seek asylum, whether coming directly from their country of origin, or from or through some other country, shall be entitled to a full and fair hearing of their case for asylum within a reasonable time.
2. All who seek asylum shall have the right to legal representation and medical examination by persons of their own choice, and shall be referred within 24 hours to a competent body (eg. the Office of the UN High Commissioner for Refugees or the UK Immigrants' Advisory Service) who will advise and assist them.
3. All who seek asylum shall be informed of their rights immediately upon making application for political asylum.

**Section III: The Right of Appeal**

1. All who seek asylum shall have a right of appeal to a fully impartial and independent body in the case of a negative decision on their application for asylum.
2. In the case of a negative decision, an asylum seeker shall be informed immediately of his right of appeal. He shall not be removed before the appeal is heard.

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<sup>23</sup> Resolution 14 recommends that governments "should act in a particularly liberal and humanitarian spirit to persons who seek asylum on their territory".

3. Appeal procedures shall comply with the notions of fairness set out in Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.<sup>24</sup>

#### Section IV: The Detention of Asylum Seekers

1. Only in the most exceptional circumstances shall an asylum seeker be detained.
2. If there are exceptional circumstances which require an asylum seeker to be placed in detention, he shall be informed in writing of the reason for his detention, and the detention shall be reviewed by an independent judicial authority.

#### Section V: The Social and Economic Rights of Asylum Seekers and Refugees

1. All who seek asylum shall have the right to be provided with the necessities of life including adequate and appropriate accommodation, social security, health care and education.
2. All refugees have the right to appropriate assistance to qualify for and enter employment.

#### Section VI: The Protection of Children

Where children and minors are among those seeking asylum they shall be treated in the spirit of the principles set out in the Declaration of the Rights of the Child proclaimed by the General Assembly of the United Nations (1959).<sup>25</sup>

The Charter was launched on 25th November 1987. It was not a confrontational attack on the present government but an urgent appeal to the Home Secretary and the Home Office to consider

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24 Article 6 states that "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

25 Principle 1 states: "Every child, without any exception whatsoever, shall be entitled to these rights".

what effect their more restrictive practices were having on the men, women and children who were genuinely seeking asylum and an appeal to them to consider alternative ways of acting which those who supported the Charter believed to be more humane.

The Government, through Mr Timothy Renton, Minister of State at the Home Office, stated that they were not prepared to grant the safeguards proposed by Charter '87.

#### 6.3.2.3 The Hostility of the British Press Towards the Asylum-Seekers

The popular British press are fomenting anti-immigration hysteria.<sup>26</sup> A case can be cited which highlights this feeling. A group of lawful visitors were entering the UK in October 1986 immediately prior to the imposition of compulsory visas when The Sun newspaper produced the headline "The Lies, Whoppers, Asians Told at Heathrow".<sup>27</sup> The Daily Express was only slightly less hostile and carried the headline "Asian Flood Swamps Airport" and proceeded to report that "Heathrow Airport was under siege early today after a mass invasion of illegal immigrants trying to beat the deadline for getting into Britain".<sup>28</sup> Of course, what the Daily Express didn't point out was that those coming in were no "illegal immigrants" but legitimate short-stay visitors. The Daily Mail carried a

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26 This was also particularly salient during the 1960s and 1970s at the time of Asian immigration.

27 The Sun, 16 October 1986.

28 Daily Express, 15 October 1986.

similar headline, "Immigrants Paralyse Heathrow".<sup>29</sup>

#### 6.3.2.4 Why was there a Need for a Charter for Refugees? Some Facts<sup>30</sup>

There are at least 12 million refugees in the world today. The vast majority of these find refuge in third world countries. A very small number seek political asylum in the United Kingdom. This is a small number in proportion to the size of the population than in Sweden, Denmark, Switzerland, Austria, France or Norway and smaller than in three countries which are more densely populated than the UK, namely West Germany, Belgium and Holland.

During the period 1980 to 1987 the UK Government has acknowledged that more than 60% of these have a genuine claim for asylum by granting them either full refugee status or "exceptional leave to remain" (see Figure 1). Nearly 80% of those who have sought political asylum in the UK in this period have come from just seven countries (Ethiopia, Ghana, Iran, Iraq, Poland, Sri Lanka and Uganda).<sup>31</sup> The main immigration pressures do not just come from these countries. When a period of violent repression ends, as for instance happened in Uruguay, Argentina and Rhodesia (Zimbabwe), large numbers of

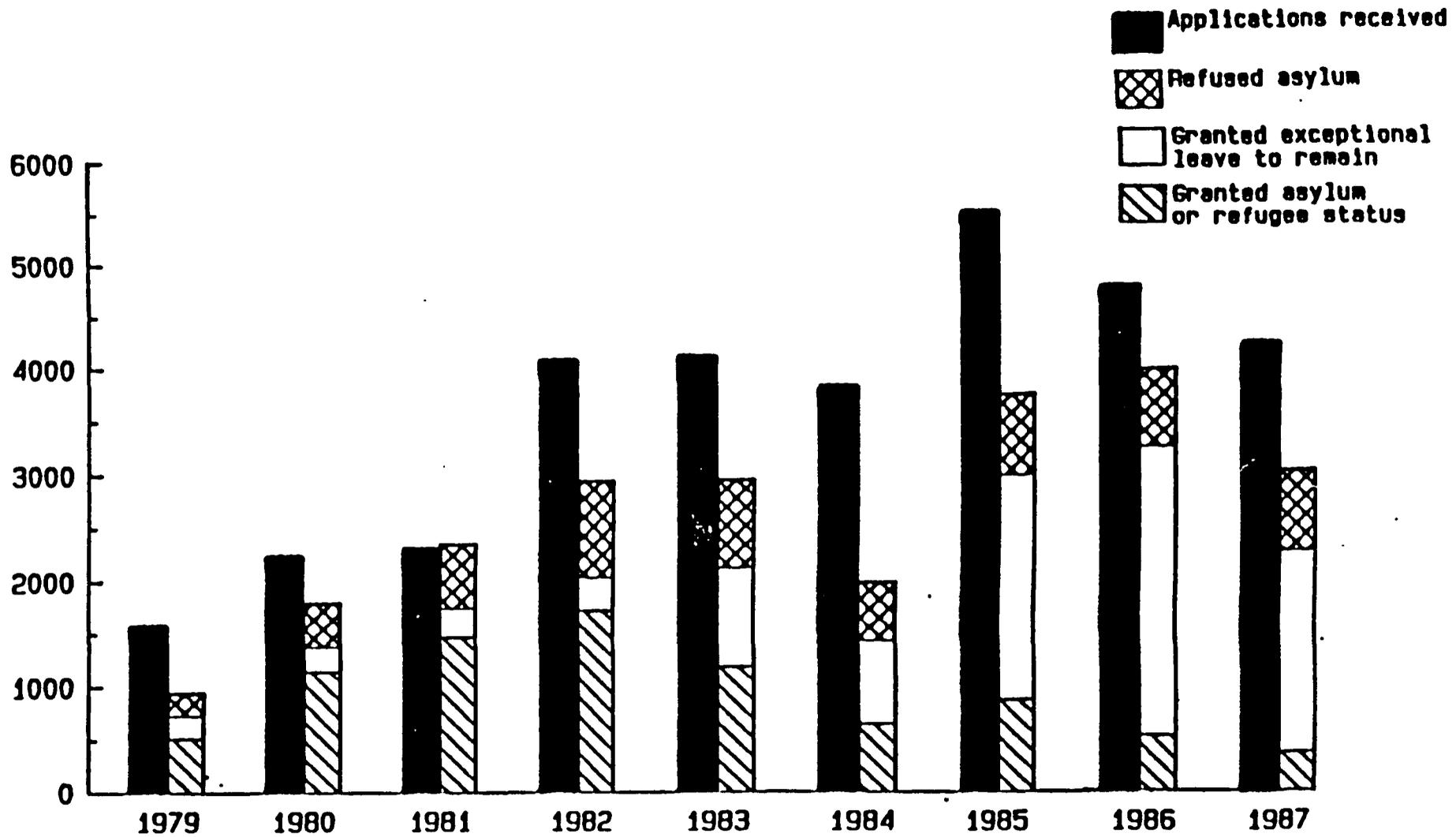
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29 Daily Mail, 15 October 1986.

30 Home Office Statistical Bulletin 1987.

31 Latest figures, for example, illustrate that in 1987 the total number of people who were granted refugee status in 1987 were 378. People from Iran (25%), Rest of World (28%), Uganda (7%), Libya (7%), Somalia (10%), Ghana (11%) and Ethiopia (13%). [Source: Home Office Bulletin, June 1988, ISSN 0143 6384].

**Figure 1 Applications for refugee status or asylum and decisions(1), 1979 to 1987**



(1) Decisions in a particular year do not necessarily relate to applications made in that year.

Source: Home Office statistical bulletin

ISSN 0143 6384, issued on 2nd June 1988. As of April 1989 these were the latest figures available.

Source: Home Office Statistical Bulletin  
 Issued on 2nd June 1988. These are the latest figures available.

refugees return home.

From these facts and figures (produced by the Home Office) it can be seen that people seeking asylum in the UK do not, as has been recently claimed, include large numbers of people seeking to evade immigration controls, nor is there any possibility of this country being "swamped" with refugees.

#### 6.3.2.5 Recent Policy Changes I: Reaching the UK

As a result of the Immigration (Carriers Liability) Act 1987 and the imposition of visas, there has been a steep decline in the number of refugees being able to reach the UK.

There is particular concern about people who arrive in the UK and ask for asylum after spending some time in another country. They may have made only a brief stop-over on a flight destined for the UK or changed flights. Such people are frequently removed to what is alleged to be their country of first asylum, and their applications for asylum in the UK are not even considered. This sometimes results in people being removed to countries which are not signatories to the 1951 Convention or 1967 Protocol and/or to countries where the office of the UNHCR considers they may be in danger of human rights violations, including refoulement.

#### 6.3.2.6 Recent Policy Changes II: Upon Arrival in the UK

The March 1987 policy changes announced by the present government meant that the previously existing 'safety-net' for persons seeking asylum in the UK was cut away: the automatic referral to UKIAS, the involvement of MPs, asylum-seekers cannot stay in the UK, and prolonged detentions for waiting asylum-seekers.

#### 6.3.2.7 Procedures for Determining Refugee Status in the UK

The UK, along with other Western countries, have adopted harsh and hostile measures to deter asylum-seekers. The UK must play an active role in granting refugee status and asylum to the asylum-seekers who arrive here under great distress, worry and anxiety. The UK has a tradition of granting asylum but this tradition has now expired.

On entry into the UK, the asylum-seeker is first met by the immigration officer at the port of entry. There is an initial interview, whereby the immigration policy questions the asylum-seeker in quite some detail. The instructions given to the immigration officer by the Home Office were confidential and secret. These instructions are under a great deal of suspicion but after a public uproar, these instructions will now be available for inspection.

Irrespective of the regular entry or illegal entry (see below),

the asylum-seeker then makes an application for refugee status to the Home Office. After acknowledgement, the asylum-seeker is granted an interview either in London (Lunar House) or at the ports (airport or seaport). The asylum-seekers interviewed at Lunar House are treated quite pleasantly and politely. However, this has not always been the case at ports of entry, experience of which has been gained through accompanying applicants to the Home Office and to various airports, eg. Manchester and Birmingham. At the ports, the asylum-seeker is interviewed, sometimes with the aid of a translator or an interpreter. The interviewer is an immigration officer who on many occasions has proved not really qualified to deal with the situations of asylum-seekers. Third parties are generally not allowed in the interview room, but lawyers and advisors can now sit in the interview room and take notes of the interview.<sup>32</sup> These notes of the interview can be used at a later stage to note and point out any inaccuracies at the interview.<sup>33</sup> Of course, all of this is done with the consent of the immigration officer. Many asylum-seekers, who are not assisted by the advisors or lawyers, can face extremely harsh and lengthy interviews.<sup>34</sup> However, when a third party is present at the interview, the interviews are quite short and polite. After the completion of the interview and the asylum-seeker has left

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- 32 Personal experience of taking notes at Birmingham and Manchester Airports.
- 33 Which often happens, especially when the applicant denies what he has allegedly said.
- 34 From practical experience - many applicants have informed me of this.

the room, many immigration officers will discuss the case with the lawyers or advisors.

It is important to note that the first interview is a very frightening and worrying occasion. Unless the asylum-seeker is reasonably at ease there is more likelihood of confusion, misunderstandings and eventually miscarriage of justice. The asylum-seeker should always be interviewed by a senior immigration officer; from experience, the immigration officer lacks training on refugee law.<sup>35</sup> It would be advantageous if the immigration officer or the interviewing officer could receive background country information prior to the individual interviews.<sup>36</sup>

Some asylum-seekers have to wait up to two years before receiving decisions on their applications. This "pre-asylum" period during which the asylum-seeker is very worrying. In some cases permanent psychiatric disorders have results.<sup>37</sup> Previously, the asylum-seeker, while waiting for the decision, was prohibited from finding asylum. However, because of the external pressures exerted by voluntary agencies, the Home Office have now agreed to permit the asylum-seeker to find

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35 Many immigration officers were unsure about the 1951 Convention and the 1967 Protocol - personal experience at Handsworth Law Centre.

36 Many immigration officers were unsure of the political implications or the background of the applicants' country - from personal experience in Handsworth Law Centre.

37 See Refugee Report 1987, British Refugee Council, p.97.

employment while he/she waits for his/her decision.<sup>38</sup> Meanwhile, the asylum-seeker can claim supplementary benefit from the Department of Health and Social Services, Housing Benefit, along with facilities for free medicines, dental care and glasses.

The decision is communicated to the asylum-seeker through a written statement. If the asylum-seeker has been granted refugee status, then a letter will be sent stating this. If, however, the decision is negative the asylum-seeker has the right to appeal. The appeal procedure is not quite so simple. There are variations on the appeal process, which will be discussed below.

(a) The Appeal Process in the UK

Certain categories of asylum-seekers have no right of appeal against a refusal of refugee status and asylum.

Whether or not a particular case has a right to appeal does not even bear any relation to the merits of his or her case but is dependent entirely on the immigration status of the person at the time of lodging the asylum or refugee status application. This is quite wrong. All asylum-seekers should be granted a

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38 In a letter to the British Refugee Council dated 13 February 1986, David Waddington (Minister of Refugees and Immigration) announced that when an application for refugee status and asylum has been made, but not decided within 6 months, the person may be granted permission to work while the application is still under consideration.

substantive right of appeal against a negative decision. If the appeal is allowed to be heard, it is heard by an adjudicator and three members at a Tribunal.

The appointment of such persons are dictated by S.12 of the 1971 Immigration Act:

"The Immigration Appeal Tribunal and Adjudicators provided for by the Immigration Appeals Act 1969 and shall continue for purpose of this Act, and -

- (a) Members of the Tribunal shall continue to be appointed by the Lord Chancellor and Adjudicators by the Secretary of State.

Clearly, the appointment of the Secretary of State is very political, since one of the parties to the appeal is the Home Office. In many instances the Adjudicators have been very lenient towards the Home Office and quite aggressive towards the asylum-seeker and his representative.<sup>39</sup> The Adjudicator should be appointed by the Lord Chancellor and not by the Secretary of State.

The Adjudicator will only consider the appeal by the asylum-seeker on this refusal, on the following two provisions:

S.19 (1) of the 1971 Immigration Act states:

"...., an adjudicator on an appeal to him ... -

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<sup>39</sup> Personal experience at Birmingham Immigration Appeals on at least three occasions.

- (a) Shall allow the appeal if he considers -
- (i) that the decision or action against which the appeal if brought was not in accordance with the law or with any immigration rules applicable to the case; or
  - (ii) where the decision or action involved the exercise of a discretion by the Secretary of State and officer, that the discretion should have been exercised differently; and
- (b) In any other case, shall dismiss the appeal."

Legal aid is available for advice, assistance and representation at a Adjudication appeal. However, if the case proceeds to the Tribunal, Judicial Review, High Court, Court of Appeal and House of Lords, then no legal aid is available. The asylum-seeker or his assistors will have to pay for the costs of solicitors and barristers.

The acceptance of an appeal made by the asylum-seeker depends on his immigration status at the time he made the application. For example, illegal entrants; overstayers; those recommended for deportation; those who have been refused an extension of stay in another capacity and who then apply for asylum; and passengers who arrive at a port of entry without an entry clearance. This is a limited statutory right of appeal against the refusal of the Secretary of State to grant asylum in the UK. Appeal rights are granted by virtue of Sections 14 to 23 and Schedule 2 of the 1971 Immigration Act which largely re-enacted the provisions of the Appeal Act 1969. There is no special provision for asylum cases. Except in the Adjudication Courts.

Under the current provisions, if, for example, an asylum-seeker makes an application, whilst still having permission to stay in the United Kingdom, for leave to enter or remain as a visitor or student, then there is a full right of appeal by virtue of Section 14 of the Immigration Act 1971. An asylum-seeker can also argue against the decision to refuse refugee status and asylum when appealing an intention to make a deportation order against them by virtue of Section 3 (5)(a) and Section 15 (1)(a) which states:

"A person who is not [a British citizen] shall be liable to deportation from the United Kingdom -

(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or ..."

and,

"Subject to the provision of this part of the Act, a person may appeal to an adjudicator against -

(a) a decision of the Secretary of State to make a deportation order against him by virtue of Section 3 (5) above, or ..."

Paragraph 150 of the House of Commons Paper 169 Immigration Rules makes provisions for this to be considered by an Adjudicator:

"Against the making of a deportation order on the recommendation of a court there is no appeal within the immigration appeal system, but there is a right of appeal to higher court against the recommendation itself. An order may not be made while it is still

open to the person to appeal against the relevant conviction, sentence or recommendation, or while an appeal is pending. Nor is there a right of appeal (except as to the country of destination - see paragraph 152) where a deportation order is made on the ground that the Secretary of State deems the person's deportation to be conducive to the public good, as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature. But such cases are subject to a non-statutory advisory procedure and the person proposed to be deported on that ground will be informed, as far as possible, of the nature of the allegations against him and will be given the opportunity to appear before the advisers and to make representations to them, before they render advice to the Secretary of State."

The right of appeal to an Adjudicator applies to people who have overstayed their leave to remain in the UK by virtue of Section 3 (5)(a) and Section 15 (1)(a) of the 1971 Immigration Act.

Unfortunately, a right of appeal against the decision of the Secretary of State to refuse asylum is not, however, extended to a person deemed to be an "illegal immigrant". Such a person is classified as using deception to obtain entry to the UK by the immigration authorities and the Adjudicators. Here rights of appeal are limited by Section 16 (1)(a) which makes it impossible to appeal a refusal of asylum.

Section 16 (1)(a) of the 1971 Immigration Act states:

"..., where directions are given under this Act for a person's removal from the United Kingdom either -

- (a) on the ground that he is an illegal immigrant or on the ground specifically that he has entered

the United Kingdom in breach of a deportation order, or ... "

The actual right of appeal by an asylum-seeker is also limited by Section 3 (6) of the 1971 Immigration Act:

"..., a person who is not [a British citizen] shall be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with improvement, and on his conviction is recommended for deportation by a court empowered by this Act to do so."

In these circumstances, individuals are most commonly convicted of overstaying or being in breach of landing conditions (normally in employment without permission).

The court may make a recommendation by virtue of Schedule 3, paragraph 2(1) against an individual under the control of the Act following any sort of criminal conviction:

"where a recommendation for deportation made by a court is in force in respect of any person, and that person is neither detained in pursuance of the sentence or order of any court nor for the time being released on bail by any court having power so to release him, he shall, unless the court by which the recommendation is made otherwise directs [or a direction is given under sub-paragraph (1A) below] be detained pending the making of a deportation order in pursuance of the recommendation unless the Secretary of State directs him to be released pending further consideration of his case.

[(1A) where -

- (a) a recommendation for deportation made by a court on conviction of a person is in force in respect of him; and

- (b) he appeals against his conviction or against that recommendation, the powers that the court determining the appeal may exercise include power to direct him to be released without setting aside the recommendation.]”

Under the current Immigration Rules, there are some categories or groups who do not have full appeal rights if refused refugee status or asylum:

- (a) Asylum-seekers who arrive at UK ports with no entry clearance.

Here there is no formal right of appeal to the Immigration appeal authority, although in some cases an application for judicial review may be possible.

- (b) Asylum-seekers who are deemed to be illegal entrants.

- (c) Asylum-seekers who are the subject of a court recommendation for deportation.<sup>40</sup>

In groups (b) and (c) the right of appeal is so restricted that basically advisers inform asylum-seekers that it will be useless to appeal.

- (d) Asylum-seekers who enter the UK while still the subject of a deportation order.

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<sup>40</sup> If the recommendation has been upheld by the Court of Appeal and if such an appeal has been made.

Here, as in groups (b) and (c), the right of appeal is restricted. If the asylum-seeker is found guilty by a court of an offence under the 1971 Immigration Act of overstaying contrary to the provisions of the Immigration Act as in Section 24 (1)(b)(i):

"S.24 (1) A person who is not [a British citizen] shall not be guilty of an offence punishable on summary conviction with a fine of not more than [£200] or with imprisonment for not more than 6 months, or with both, in any of the following cases:-

(b) if, having only a limited leave to enter or remain in the United Kingdom, be knowingly either -

(i) remains beyond the time limited by the leave; or ..."

The court may (if it sees fit) recommend deportation of the asylum-seeker. If a recommendation is made there is no need for the Home Office to inform the individual of a decision to make the order. In ordinary cases, Section 3 (5)(a) and Section 15 (1) provide a right of appeal against this decision. In the instance of a person subject to a recommendation, Section 17 limits the appeal merely to the proposed country or territory to which the person is to be deported. The basis on which the order is made is not subject to appeal.

By Section 17 of the 1971 Immigration Act, any asylum-seeker who claims and applies for asylum and refugee status following a decision to deport on the court recommendation has no right

of appeal to an Adjudicator if the refugee status or asylum is refused. Likewise, Section 16 of the 1971 Immigration Act also applies to an illegal entrant or someone entering the UK while subject to a deportation order.

There is a provision under the House of Commons Paper 169 for the Adjudicator to review a decision of the Home Office or the Secretary of State under Section 3 (5)(a) of the 1971 Immigration Act, taking into consideration the risk of potential violation of human rights and/or persecution as defined by the 1951 Convention.

There is also another problem with category (a) asylum-seekers in their appeal rights. Under Section 13 (1) of the 1971 Immigration Act, it states:

"..., a person who is refused leave to enter the United Kingdom under this Act may appeal to an adjudicator against the decision that he requires leave or against the refusal."

An individual (asylum-seeker) may appeal against a decision to refuse leave to enter the UK provided he holds a current entry clearance or work permit.

The asylum-seeker finds it difficult, if not impossible, to apply for any form of entry clearance at a British Embassy or Consulate. The Immigration Rules have been formulated to make it almost impossible for an asylum-seeker to apply for refugee status and asylum within the UK whilst outside of the UK. So,

if an asylum-seeker arrives at a UK port without entry clearance, there is no right of appeal if an application for asylum and refugee status is refused.

At the actual appeal hearing, the Adjudicator hears and makes record of the evidence (if any) submitted by the appellant and the respondent. He will also hear any witness, if called. The appellant (and witnesses) are subject to examination by a Home Office Presenting Officer and both the appellant's representative and the Presenting Officer make submissions. A written determination of the case is normally provided to all parties within 14/21 days of the hearing. Under the procedural rules there is a provision for oral determination by the Adjudicator but they is rare. Either party to the appeal may apply to appeal against the Adjudicator's determination to the Immigration Tribunal on the grounds of either party being satisfied on a point of law, or use of discretion by the Secretary of State or finding of act.

(b) Regular Entry or Lawful Stay

On a regular entry or lawful stay by the asylum-seeker, the immigration officer has to refer to his/her application to the Home Office. The asylum-seeker cannot be removed from the UK without such a referral. The Immigration Rules provide that when a person is refused entry, he should be given the chance to telephone his/her friends or relatives in the UK before being removed. If an asylum-seeker applies for a refugee

status and asylum and is subsequently refused (application), he/she should be allowed to contact one of the voluntary agencies (Law Centres, Community Councils, Citizen Advice Bureau, and others) dealing with refugees. It is vitally important that an asylum-seeker who has obtained a visa for another purpose, or arrived without a visa, and is subsequently refused entry, makes it very clear to the Immigration Officer that he/she is seeking refugee status and asylum. There can be nothing more absurd than an asylum-seeker not making his case clear to the Immigration Officer and which may result in removal.

(c) Illegal Entrants or Unlawful Stay

Illegal passengers are those who enter the UK and fail to present themselves to the Immigration Office, for example stowaways or seamen (deserters). However, if these illegal passengers claim refugee status and asylum, their application will be dealt with in the way described above. They should not be returned to their country of origin if they are able to show a well-founded fear of persecution.

(d) Temporary Admission

Temporary admission can be granted to an asylum-seeker who is either waiting for a decision or has been refused and is liable for detention. Along with temporary admission, a bail application can also be lodged. The passport is confiscated by

the Immigration Officer and a Temporary Admission (TA) is given to the asylum-seeker. There is a condition to this, that there must be suitable accommodation available and that the asylum-seeker must not go into hiding.

In both of these cases, if successful, the asylum-seeker is released and given a form specifying a specific address at which he/she must reside and given reporting restrictions. It is an offence not to comply with these restrictions and the asylum-seeker can be re-detained.

A person who after entry becomes liable for deportation, either through a court recommendation, by overstaying permitted leave or is alleged to be an illegal entrant, can be detained. A request can be made to the Immigration authorities for temporary release pending a decision on refugee status and asylum claim. The Immigration authorities would have to be satisfied with a suitable address and the fact that the person would not go into hiding. In some instances the person may be requested to report regularly to either the police or the Immigration authorities.

(e) Reporting/Registration with the Police

Asylum-seekers, while having their applications processed, may be required to register with the Police. These persons will be required to pay the appropriate fee and will be issued with a Police Registration Certificate. After registration, there are

a number of legal requirements which have to be fulfilled:

- (a) Any change of address must be notified to the Police within 7 days of moving.
- (b) Any change of name, marital status, nationality, passport or employment must be notified within 8 days. And,
- (c) If a registered person is away from home for more than 2 months either within or outside the UK and returning to the original address, he/she should inform the Police of his proposed absence. A registered person may be required to produce the documents for registration on demand. Failure to comply with any registration requirement is a criminal offence.

(f) Citizenship

Refugees eligible to apply for British citizenship on the same basis as any other person lawfully resident in the UK and fulfilling the necessary requirements under law.<sup>41</sup>

(g) Travel Documents

Prior to a positive decision on an application for asylum, the

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<sup>41</sup> 5 years of residency is required before the refugee can apply for British citizenship either through registration or naturalisation. However, after 31 December 1987 it is available only through naturalisation for a fee of £170.

Home Office is unlikely to issue any form of travel document, other than a one-way document to enable the person to leave the UK. However, after a decision has been reached by the Home Office a person may obtain a Home Office issued travel document. The type of document issued will depend on the type of decision reached by the Home Office. Regardless of the type of travel document, it is up to each individual to comply with the immigration/visa requirements of the countries to which travel is proposed. In order to obtain a Home Office document, national passports must be lodged with the Home Office (see Appendices for an example).

i) **Persons granted asylum with refugee status:**

Asylum-seekers granted refugee status are not permitted to travel on their national passports. Their permission to stay comes in the form of a letter confirming their status. National passports are not stamped with permission to remain. If the refugee wishes to travel he may apply for a UN Convention Travel Document (CTD) (see Appendices). This document is not issued by UNCHR but is issued by the government which has recognised the refugee status. The CTD gives the refugees the right to travel worldwide, except to his country of origin, with the right of return to the issuing country. CTD's are valid for the length of the refugee's stay in the UK and will be revalidated on application, provided further extension of leave to remain is first obtained. Once a refugee has been given permanent leave to remain in the UK, the CTD

will be revalidated for 5 years.

- ii) Asylum-seekers granted entry clearance to come to the UK as refugees who are not in possession of a valid travel document:

Asylum-seekers in this category may be issued with a Declaration of Identity. Application for this should be made at the same time as the visa application. The Declaration of Identity permits the individual to travel directly to the UK and cannot be used for travel after that. A CTD should be applied for after arrival in the UK (see Appendices for an example of CTD).

- iii) Persons recognised as "stateless persons" by the UK authorities:

Persons who are recognised as stateless by the UK authorities are entitled to hold travel documents under the 1954 Convention on Statelessness. Such travel documents are usually granted for the period of validity of the person's permission to stay and for five years once permanent residence has been granted.

- iv) Asylum-seekers who wish to leave the UK permanently prior to a Home Office decision on their asylum and refugee status application and who are not in possession of a national passport:

Asylum-seekers who are accepted for settlement by another country can in the absence of any valid passport or travel

document, be issued with a one-way travel document which is valid for a single journey between the UK and the country of destination. It does not permit re-entry to the UK, without formal authorisation, and such authorisation is very rare. Applications should be made to the Home Office with the evidence that another country is willing to admit the individual asylum-seeker travelling on a one-way document. The actual documentation will be the responsibility of the country of resettlement.

v) **Asylum-seekers permitted to remain exceptionally:**

There is a general "myth" that exceptional leave to remain gives an automatic right to a Home Office travel document. It does not. The asylum-seekers who are permitted to remain exceptionally are expected to maintain the validity of their national passports. If this is not possible, as in most cases, the Home Office will consider issuing a Home Office travel document if the asylum-seeker can show that he or she has made a fairly reasonable attempt to obtain revalidation. If a document is issued, it will be valid in line with current permission to remain. If permanent residence is granted, documents will be valid for 48 months at a time. Home Office travel documents will, like CTD, have a ban on travelling to the asylum-seeker's country of origin where he or she was faced with well-founded fear of persecution. Individuals travelling on national passports who require visas in order to obtain

entry into the UK are advised to obtain a re-entry visa for the UK prior to travel. This will avoid problems at the port of entry when they return.

(h) Renewal of Home Office Issued Documents in the UK and Abroad

i) In the UK

The actual application for extension of validity of documents are made to the Home Office on a form which can be obtained from the Home Office. Documents will require extension of validity at the same time as permission to remain requires extension, unless the form and the fee is sent to the Home Office permission to remain will be extended on the "expired" document, but the document, per se, will not be renewed.

ii) From Abroad

Advisers inform the applicant to apply within the UK. However, if the document is to be received abroad, vital reasons must be given to the nearest British Consul or Embassy. Many Consuls will not have had the experience of this type of request before. In any event, the British Consul has to contact the Home Office through the Foreign and Commonwealth Office, for permission to review. If difficulties occur, the holder of the CTD or a representative in the UK can apply to the Home Office, explaining the problem and the difficulty, giving full details of the documents and why the document needs

reviewing abroad. It is inadvisable to send the CID through the post to the Home Office from abroad.

(i) The Problems Associated with the UK Procedures for Determination of Refugee Status

The Home Office is constantly under criticism from observers because of the delays in processing applications. Another criticism is the confusion on the appeal rights for refusal of asylum and refugee status. Language problems seems to be an increasing criticism against the Home Office. Many interpreters or translators are working for the Immigration authorities and the criticism is that these interpreters/translators are pro-Home Office and anti-asylum seekers. They are usually accused of translating what the Home Office wants to hear and read.<sup>42</sup> Asylum-seekers are often very frightened and nervous in a new environment and culture. The translators and interpreters are often the triggering point of a sceptical response from the interviewing officer.<sup>43</sup> The interviewing officer must have the skill and confidence to speak and translate the interview by themselves without the aid of a translator or interpreter, or at least have sufficient knowledge of the language spoken. Interviewing officers must

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42 From personal experience, the translators have interpreted sentences of Punjabi or Urdu with a completely different meaning. On several occasions I have had to correct the translator at Birmingham and Manchester Airports.

43 From personal experience, the translator seems to be trying to catch the asylum-seeker out with comments such as "I think he is lying" or "I think he is avoiding your question". From experience at Birmingham and Manchester Airports.

be trained with the knowledge of several foreign languages.

Asylum-seekers can usually seek assistance from Members of Parliament as long as the relatives of the asylum-seekers live within the constituency of the Member of Parliament.<sup>44</sup>

Asylum-seekers do not arrive in nice neat packages. Where to apply under the Immigration Act and the Rules are very difficult and complex. They hardly possess physical evidence of persecution or evidence that if they returned to their own country they would be persecuted. The asylum-seekers arrive frightened, sometimes with false passports and documents, in other words, to escape the authorities at all costs. It is normally the fear of their own authorities which makes them escape from their own country. Once inside the UK, experience has shown that many asylum-seekers delay in applying for refugee status and asylum for four possible reasons:-

1. Fear of authority (inherent fear).
2. Fear of stating one's case and the information finding its way back to one's own authorities. Hostile measures may result against the asylum-seekers.<sup>45</sup>
3. General ignorance of the refugee status and asylum

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<sup>44</sup> See "Guidelines on the Handling of Representations by Members of Parliament in Immigration Cases", published by the Home Office, May 1986.

<sup>45</sup> For instance, many Libyan asylum-seekers fear that on making their applications they will be persecuted by Libyan terrorist hit-teams operating within the UK.

procedures.

4. The asylum-seekers are in possession of the hope that the situation in their country of origin may improve, so much so that it may enable the asylum-seeker to eventually return home.

Due to these reasons, individual asylum-seekers fall into many different categories of immigration,<sup>46</sup> as well as those asylum-seekers who have valid permission to be in the UK. When the asylum-seeker applied for refugee status and asylum his claim takes precedence over current immigration status. If, however, the application is refused and there is no right of appeal against refusal of refugee status and asylum, he reverts to his previous immigration status.<sup>47</sup> The only other avenue in this case is further representation to the Home Office (the same authority which made the initial negative decision).

The recognition of a refugee under the ambit of the 1951 Convention and/or 1967 Protocol by the relevant authority will nearly always entitle the person to asylum, refugee status or residence but it need not necessarily do so. Under the UK immigration system, the decision to recognise a person as a refugee is taken at the same time. Asylum with refugee status provides a person with the protection and benefits of the 1951

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46 Illegal entrants, overstayers detained pending removal.

47 This means that the person may have an appeal against a previous Home Office refusal under another category of the Rules; an overstayer has no right of appeal; an illegal can be removed.

Convention.

There are great delays in processing the applications for refugee status and asylum. These delays can last from 6 months to two years. Meanwhile, the asylum-seeker must patiently wait, with all the anxiety this entails. These delays must be shortened. The Home Office needs more staff (trained staff) to deal with refugee status applications.<sup>48</sup>

Immigration officers (interviewing officers) are usually unsympathetic, crude and sarcastic.<sup>49</sup> They hold the attitude that all asylum-seekers are trying to obtain a higher standard of living in the UK.<sup>50</sup> The attitudes of such officers must be changed. Such prejudice at interviews certainly affects the outcome of the decisions made.

Once the asylum-seeker has been granted refugee status and asylum, he/she then becomes a refugee. Refugees are given a letter from the Home Office setting out his or her status. The passports are not stamped; the refugee only has a letter to prove his/her status. Likewise the Police Registration

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- 48 Immigration cases such as extension for leave for visitors, variation of leave, granting indefinite leave to stay, must all be distinguished from refugee status applications.
- 49 From personal experience attending interviews at Birmingham and Manchester Airports. Although there appears to be have been a slight change by 1989.
- 50 From personal experience at Birmingham and Manchester Airports. Comments from immigration officers include "There is nothing much in Bangladesh" and "They don't have motorways ... or washing machines".

Certificate is stamped in the normal way and there is no indication that the person is a refugee. If the refugee is asked to show his proof of status, he or she can only produce the Home Office letter to explain his position and status.

Although the 1983 Immigration Rules reflect the 1951 Convention and/or 1967 Protocol, the majority of the administrative treatment of refugees is not specifically provided for under these rules. As mentioned earlier, there are no provisions for procedures. Indeed, the 1951 Convention and/or 1967 Protocol lays down provisions for the treatment of refugees but does not cover the administrative detail nor procedures for determining refugee status.

These Immigration Rules were criticised in a recent decision of *Kandymeer* (3422) where the Immigration Tribunal stated:

"the immigration rules do not make clear how an asylum or refugee status plea or leave granted on the basis of asylum fits into the immigration framework of the appellate process."

As mentioned above, some immigration officers have been unco-operative, offensive and rude, and in some cases immigration officers have requested the police to call at the homes of asylum-seekers at awkward early hours of the morning. Naturally, an asylum-seeker thus awoken would be nervous, frightened and confused. These reactions are misconstrued by the police as hostility towards them, so arrest becomes a reality. More questioning at the police station places asylum-

seekers in a nightmare situation.<sup>51</sup>

Under the Immigration Procedure Rules, the Secretary of State is required to provide a full account for the reasons of the refusal. In many cases this takes the form of a written statement. The actual quality of this statement is of concern to the representatives and advisers. The statement is a record of the appellant's immigration history in the UK and a report (not a record) of the interview either with an Immigration Officer (at a port or office outside London) or a Home Office official at Lunar House, that takes place to establish the reasons for the asylum application. The statements are frequently inaccurate.<sup>52</sup> It is very common, as personal experience has shown, for appellants at hearings to protest that the comments in the statement represent an incorrect or partial record of their actual comments at the interview.<sup>53</sup>

The interviewing officer is not called to give evidence at the hearing. The presenting officer simply has the report of why

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51 One such instance occurred in Birmingham on 27 April 1986 when an Indian lady was arrested and taken to Handsworth Police Station to be interviewed for 2½ hours and then taken to Birmingham Airport and deported to India! Distraught relatives were not even granted a chance of saying goodbye! This was reported to the Chief Constable who replied that he had received his instructions from the Home Office and that the Home Office were satisfied that if this lady was released she would eventually go into hiding.

52 This is the first point of discussion at immigration appeals, to cast doubt on the statement allegedly made by the appellant.

53 On many occasions at appeals held in Birmingham and Manchester - 27,29 July 1985; 3 August 1985; 17,21-22 September 1985; 19 December 1985.

the decision was not granted as affirmative. Cross-examination, therefore, does not occur.

The appeal procedures for the asylum-seeker would be improved if the applicants were given a copy of the Home Office record of the interview and then to sign it as a correct record.

The appeal system would be improved if the Immigration Officer were to be briefed upon the background, the political, social and religious considerations and factors affecting the case and application.

The source of information, its nature and the way it was applied to the asylum-seeker's case should be disclosed by the Home Office. It is common for the Home Office statement to refer to "inquiries" made by the Secretary of State regarding an asylum-seeker's case. It is common for these inquiries to cause the Secretary of State to find the appellant's fear of persecution to be ill-founded. This source must be disclosed and it should enable this source to be the subject of examination by the appellant's representative and not merely taken on trust by the Adjudicator.

**Problems associated with refusal of applications:<sup>54</sup>**

The Committee of Ministers of the Council of Europe in September 1977 adopted a resolution entitled: "Protection of

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54 See also House of Commons Home Affairs Committee, Race Relations and Immigration Sub-Committee 1986.

the individual in relation to the acts of administrative authority", whilst primarily not dealing with refugees and asylum-seekers included a provision of some note:

"where an administrative act is of such a nature as adversely to affect his rights, liberties or interests the person concerned is informed of the reasons on which it is based."

At the present moment the principles of natural justice do not include the requirement that reasons should be given for a decision, but there is a strong case to be made for the giving of reasons as an important element in administrative justice. There are several areas of law whereby the principle of reasoned decisions is virtually recognised, especially where a right of appeal exists. The Home Office decision-making process is an administrative act; the Home Office will only give statements of reasons for refusal prior to an appeal against a refusal of asylum or refugee status or when an MP has become involved and rarely in other cases.

From personal experience, the reasons given are inadequate and it difficult for an asylum-seeker or his representative to restate an asylum case when the reasons for refusal are not known. A clear statement of reasons could allow the asylum-seeker to approach other countries and would certainly prevent confusion and vagueness.

**"Exceptional leave to remain":<sup>55</sup>**

The use of the phrase "exceptional leave to remain" is an important and valuable discretionary power, which must be exercised by the Home Secretary fairly and equitably, particularly in cases when groups of people or individuals (who do not qualify as refugees under the 1951 Convention and/or 1967 Protocol) are seeking to remain within this country. The recent House of Lords ruling on the Tamils is a reflection of the attitude of the Government as well as the high-level judiciary. The British Government is very reluctant to disclose the conditions for granting "exceptional leave to remain".<sup>56</sup> It is entirely up to the Home Office, which decides whether the asylum-seeker should be granted this "leave" or not. The decisions to grant this leave are heavily influenced by British Foreign Policy and the relationships it maintains with other countries. A sympathetic approach is often granted to those who leave communist countries or places of military dictatorship. The term is basically a safety net for people the Government wants to admit, such as dissidents, persons escaping harsh governments or simply persecution. There is no requirement here that a person be suffering from a "fear of

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55 The numbers which were granted "exceptional leave to remain" were 238, 278, 311, 939, 779, 2121, 2713 and 1891 for the annual periods 1980 to 1987 respectively. Applications received for refugee status or asylum were 2352, 2425, 4223, 4296, 3869, 5444, 4811 and 4508 for the same periods. In 1987, total number of people who were refused asylum but granted "exceptional leave to remain" was 1,891, comprising Sri Lanka (43%), Iran (17%), Rest of the World (13%), Ethiopia (8%), Ghana (6%), Iraq (5%), Somalia (4%) and Uganda (4%). [Source: Home Office Statistical Bulletin, op.cit., June 1988.]

56 Telephone conversation to Mr Harrison, Home Office, 13 July 1987.

well-founded persecution". Also, persons holding passports which makes it compulsory for the UK to accept them can also be allowed to seek legal status within the UK.

In 1981 the decision to grant Poles "exceptional leave to remain" was made within 48 hours of the declaration of martial law. Three Soviet dissidents were granted "exceptional leave to remain" within 24 hours of their arrival at Heathrow Airport.

The Home Office can grant "exceptional leave to remain" outside the Immigration Rules. This discretion is applied in a number of ways:-

1. Individuals are allowed to remain because of their particular circumstances.
2. To allow nationals of a particular country to remain on a temporary humanitarian basis because of events in their country of origin (for instance, Afghans, Lebanese, Iranians, Ugandans and Poles).
3. To allow a specific number of a particular group entry to the UK (for instance, Ugandan Asians).

The first category leads to indefinite leave to remain after four years if the circumstances remain unchanged but the discretion lies with the Home Office. The Home Office would consider granting refugees four years' leave at the outset, instead of one year followed by three as at present. Category

(2) does not lead to settlement. Perhaps the main concern in this category is how long the "temporary" status can last. Also, at what stage does it become "permanent". It seems that if chaos, war, persecution or repression prevent a person from returning to his country for a number of years (as in the case of the Afghan refugees) that they should be granted residency here and that if and when the situation in their own country changes, the choice of whether to go or stay is that of the individual.

#### 6.4

#### POSTSCRIPT

An asylum-seeker, once he has reached the borders or frontier of the refugee State can be refused entry and subsequently returned to his country of origin or the country where he faced threats to life or persecution. This process of returning asylum-seekers is termed refoulement. This concept has caused concern to the international community as a whole in that asylum-seekers should not be refouled irrespective of their satisfying the refugee conventions and laws. This concept will be examined in depth in the next chapter, emphasising custom and treaty in international law.

## **CHAPTER SEVEN**

### **Non-Refoulement**

## CHAPTER SEVEN

### NON-REFOULEMENT

#### 7.1 NON-REFOULEMENT IN TREATY

One important form of protection for the refugee or the asylum-seeker is the principle of non-refoulement which is not to return or expel the refugee or the asylum-seeker to a country where he is likely to suffer persecution or violation of human rights.

Traces of non-refoulement can be found as far back as the 17th Century<sup>1</sup> but the actual codification and formulation of this

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<sup>1</sup> Hugo Grotius stated in his work "De Jure belli ac Pacis Libri Tres" that, "... when the justice of their case is being investigated, the suppliants are to be protected ...", Vol.ii (translation by Francis W. Kelsey, Book I, Ch.XXI, s.vi, p.533, Clarendon Press, Oxford, 1965. The "suppliants" were stipulated to be aliens and refugees. Grotius further observed that, "... a permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary to avoid strifes", *ibid*, Ch.II, s.xvi, p.201. Note the interesting similarity to Article 31(1) of the 1951 Convention relating to the Status of Refugees, *infra*. Emmerich de Vattel dealt at length with the concept of admission of immigrants and refugees. He stipulated that the State may not refuse asylum to a refugee on mere foolish fears or unreasonable fears and that, "... it should be regulated by never losing sight of the charity and sympathy which are due to the unfortunate ...", *Le droit des gens on principes de al loi naturelle; appliques a la conduite et aux affaires des Nations et des Souverains*, i-iii, 1619, iii, 92, s.231. The "unfortunate" was stipulated to be the refugee or the asylum-seeker. Vattel expressed the view that no nation may, without good reason, refuse, "... even a perpetual residence to a man who has been driven from his country", *ibid*. Vattel further expressed that the banished or exiled person had a natural right to live somewhere, *ibid*, s.229. However, Vattel did state exemptions from the general

principle did not take place until after the First World War. In 1933, at the Convention relating to the International Status of Refugees of 30 June 1933,<sup>2</sup> the principle of non-refoulement was implemented as:

"Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsion or non-admittance at the frontier (refoulement) ... It undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin ..." <sup>3</sup>

Similarly, in 1938, Article 5(3a) of the Convention concerning the Status of Refugees coming from Germany, adopted on 10th February 1938,<sup>4</sup> stated:

"The High Contracting Parties undertake not to reconduct refugees to German territory unless they have been warned and have refused, without just cause, to make the necessary arrangements to proceed to another territory or to take advantage of the arrangements made for them with that object."

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rule that a fleeing person may be given shelter and refuge. These exemptions were based on the view that, "... every nation has the right to refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it serious trouble", *ibid.*, s.230. Cf. these exemptions to Article 33(2) of the 1951 Convention relating to the Status of Refugees, *infra*. The Edict of Potsdam (1685), gave substance to these views and similar laws in other countries. The Edict of Potsdam was enacted for the benefit of French Huguenots. Friedrich Wilhelm, the Great Elector, Marquis of Brandenburg, issued his Edict of Potsdam whereby his French brethren of the same faith were given every opportunity to settle themselves in his territory. This was an open and clear invitation for refugees to come and establish themselves in Germany.

2 159 LNTS 3663.

3 *Ibid.*, Article 3.

4 192 LNTS 4461.

This provision is apparently subject to the provisions of paragraphs (1) and (2) of Article 5. According to the latter paragraph, refugees may not be subjected by the authorities to measures of expulsion or recommendation unless such measures are dictated by reasons of national security or public order. Although the 1933 and the 1938 Conventions contained provisions for prohibition of expulsion or return (see Chapter Two), the principle of non-refoulement did not precisely focus on the actual meaning of refoulement until 1951 when the 1951 Convention relating to the Status of Refugees was adopted.

#### 7.1.1 Text

Article 33 of the 1951 Convention stipulates

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

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

#### 7.1.2 Analysis

The draft of the Ad Hoc Committee on Statelessness and Related

Problems<sup>5</sup> contained the first paragraph only. In the second session of the Committee,<sup>6</sup> some question was raised as to the possibility of exceptions to the Article (as now contained in paragraph 2), but the Ad Hoc Committee felt strongly that the principle expressed was so fundamental and that it should not be impaired.<sup>7</sup> The Conference of Plenipotentiaries (Conference)<sup>8</sup> disagreed with the Ad Hoc Committee primarily on the ground that the international situation had changed since the Ad Hoc Committee met and that it was necessary to include exceptions to the rule of Article 33.<sup>9</sup>

Paragraph 1 of Article 33 is a corollary to Article 31(1) which states:

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."<sup>10</sup>

As a matter of fact, it could be stated that Article 31(1) is

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- 5 1st session, UN Doc E/1618; and 2nd session, UN Doc E/1850 (Article 8).
- 6 Ibid.
- 7 Ibid., para 35.
- 8 UN Doc A/Conf. SR16.
- 9 Ibid.
- 10 See Grotius' comments, supra.

the result of Article 33(1) if the 1951 Convention recognises the basic right of a refugee to "enjoy" asylum in case of danger to life or freedom; it cannot impose penalties for exercising this right. The word "enjoy" is used to denote that it refers only to persons who have escaped to another country and not to would-be escapees who are at the frontier.

In forming Article 33, the Ad Hoc Committee was guided by the consideration that the turning back of a refugee to the frontier of a country where his life or freedom was threatened on account of his race or similar grounds would be tantamount to delivering him into the hands of his persecutors.<sup>11</sup>

The Contracting States undertake not to expel or "return" ("refouler") a refugee to the frontier of a country (whether his own or any other) where his life or freedom would be threatened on the grounds enumerated in paragraph 1 of Article 33. As is evident from the wording of this paragraph, the territories to which expulsion is prohibited are not only those whence the refugee fled but any territory in which a threat to his life or security would exist. At the Conference of Plenipotentiaries, there was no unanimity on the actual extent of the threat. The President of the Conference considered that no expulsion to a country could be allowed if it meant a threat of subsequent forcible return to the country of origin. The President continued that the relative importance of the various considerations involved was a matter which would have to be

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<sup>11</sup> UN Doc. 1618, comments to Article 28. See also SR.40, p.33.

decided by the State concerned.<sup>12</sup>

Article 31(1) speaks of territories where the refugee or the asylum-seeker's life or freedom would be threatened on grounds enumerated there, which are identical with those enumerated in Article 1, insofar as the meaning of the threat is concerned (as does Article 31) it must be assumed that it uses this word in the same sense and mode as does Article 31. More elaboration on Article 31 follows below.

The Ad Hoc Committee made it pretty well clear and succinct that Article 32 relating to non-refoulement did not imply that a refugee or asylum-seeker must in all cases be admitted to the country where he or she seeks entry.<sup>13</sup> Query: what is the meaning of "expulsion" and "return" within the travaux préparatoires? The Study on Statelessness defined "expulsion" as the:

"... juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country." <sup>14</sup>

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12 A/Conf. SR.16, p.10. However, compare Article 38 of the 1951 Convention in Chapter Three, if it is meant to give the State a final say.

13 UN Doc. E/1618, comments to Article 28 (non-refoulement).

14 Ibid.

The Ad Hoc Committee substituted the word "Reconduction"<sup>15</sup> (which is equivalent to "refoulement") for the word "return", as being:

"... the mere physical act of ejecting from the national security a person residing therein who has gained entry or is residing regularly or irregularly."<sup>16</sup>

The Ad Hoc Committee did agree that "refoulement" existing in countries such as France and Belgium means either deportation as a police measure or non-admission at the frontier or border, because the presence of the particular person in the country is considered undesirable, while "expulsion" related predominantly to refugees and asylum-seekers who have committed some criminal act or offence. The fact that Article 33 does not deal with admission, it appears that in most countries there exists only one action, which is expulsion, while, say, in France and Belgium "return" would be equivalent to "refoulement". At the Conference of Plenipotentiaries (Conference) there was no definite agreement on the meaning of the word "return". The Representative of Switzerland understood the word as applying to refugees who "had entered a country but were not yet

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15 The term "conduction" means "to lead, guide, to escort" in the Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1984. The term "refoulement" is stronger in its tone than the word "reconduct". Refoulement implies firmness, harshness without feeling or care of the dangers which exist in the asylum-seekers State of origin. Reconduct, on the other hand, is a pleasant word which implies return. The Ad Hoc Committee were very cautious in using the word "reconduction" and therefore substituted it for the word "return". See also Kerr v Illinois.

16 Ibid.

residents there".<sup>17</sup> On the same word, the representative of Denmark stated that it was "mainly of a demand for return by another State, in other words something like extradition."<sup>18</sup>

Article 33 relates to refugees and asylum-seekers who have gained entry into the territory of a Contracting State (legally or illegally) but not to refugees who seek entrance into this territory. In other words, Article 33 lays down the firm principle that once a refugee has obtained asylum (legally or illegally) from persecution or violation of human rights, he cannot be deprived of it by ordering him to leave for, or by forcibly returning him to, the place where he was threatened with fear of persecution or persecution; or by sending them to another place where the threat exists but that no Contracting State is prevented from refusing entry in this territory to refugees or asylum-seekers at the frontier.<sup>19</sup>

Article 3 of the 1933 Convention relating to the International Status of Refugees used the expression "refoulement" to denote "non-admittance at the frontier" but referred to such refugees only as had been authorised to reside regularly in the country. Thus, "non-admittance" could only refer to refugees who had left the country for some time and wished to return thereto.

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17 UN Doc. A/Conf. SR.16, p.6.

18 Ibid., p.10.

19 In other words, if a refugee has succeeded in eluding the frontier police or guards, he is safe; if he has not, it is his misfortune.

The Conference was aware that the 1951 Convention would not deal with the admission of refugees and asylum-seekers into countries of asylum or with the circumstances in which a State may refuse asylum.<sup>20</sup> The Conference explicitly made it clear and known that the possibility of mass migration is not covered by Article 33 of the 1951 Convention.<sup>21</sup> The Ad Hoc Committee agreed that to delete the chapter on admission would be a good proposition, that the 1951 Convention should not deal with the right of asylum.<sup>22</sup>

Article 33 of the 1951 Convention is less favourable than the provision of Article 3(3) of the 1933 Convention which stipulated that the Contracting States "undertake(s) in any case not to refuse entry to refugees at the frontiers of their country of origin". It is, however, more favourable than Article 5 of the 1938 Convention.

Mass expulsion in any context violates an important principle of international and/or municipal law. States are fully aware of this but history has revealed to us the many instances of mass expulsions, as can be seen in Chapter Two.<sup>23</sup> Contemporary

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20 UN Doc. A/Conf. SR.19, p.18. UN Doc. A/Conf. SR.20, p.7.

21 Ibid., SR.35, p.21.

22 Ibid., SR.20, para 54. See also Chapter Eight.

23 Expulsion of Jews from Spain in 1492 and from Bohemia in 1744; the expulsion of 20,000 Protestants from Salzburg in 1731; the expulsion of 150,000 Moslems from Spain in 1610; the racial expulsion of Armenians; and 50,000 Dutch citizens from Indonesia in 1957. For further reflections on mass expulsions, see Alfred M. de Zayas, "International law and mass population transfers", *HILJ*, Vol.16, 1975, pp.207-258.

examples of the 40,000 Asians being expelled from Uganda are all too common knowledge. There is, however, one case which should be highlighted. The end of the Second World War brought about a dramatic transfer and expulsion of millions of Germans from Eastern Europe to the West.<sup>24</sup> Germans had been massacred in Eastern Europe, including women and children. There were not many men because they had been away involved in the war, thus leaving the expulsion of mainly women and children. The West paid little or no attention to the sufferings of these refugees. They had lost their homes, possessions and many of their relatives in Eastern Europe.<sup>25</sup> Ships carrying these refugees were sunk.<sup>26</sup> The expulsion of these Germans was never given much press coverage. Most Americans and Britains do not even know that there was an expulsion at all. Mass transfers should not be made and, if so (if one State insists), then these transfers should be made under "humane" conditions and States should not commit atrocities against the civilian population who because of their misfortune were present at a particular time.

Paragraph 2 of Article 33 of the 1951 Convention is an exception to the rule of paragraph 1 permitting expulsion or

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- 24 See Alfred M. de Zayas, Nemesis at Potsdam, the Anglo-American and the Expulsion of the Germans, Routledge & Kegan Paul, London, 1979.
- 25 For instance East Prussia, Nemmersdorf, Goldap, Gumbinnen and Dresden.
- 26 The Wilhelm Gusthoff, the General von Steuben and the Goya who sank on 30 January 1945, 10 February 1945 and 16 April 1945, respectively.

return of certain categories of refugees to the country of danger, persecution and violation of human rights. "Reasonable grounds" are sufficient in the case of "security risks" because of the political nature of the risk and the impossibility of having it stated in more definite terms. The Representative of Britain explained "reasonable grounds" as leaving it:

"... to the States to determine whether there were sufficient grounds for regarding any refugee as a danger to the security of the country and whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay." 27

As to the second category of "dangerous persons", they comprise only cases of a final judicial decision in particularly serious crimes. The Representative of France stated that the French text speaks of:

"crime ou delit (crime or delict) but the English word 'crime' was considered to cover both 'crime' and 'delit'." 28

The Representative of Britain added:

"... what a 'particularly serious crime' is will depend on the interpretation of these words in the various States in accordance with their Criminal Code." 29

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27 Ibid., SR.16, p.8.

28 Ibid., SR.16, pp.14-15.

29 Ibid., SR.16, p.16.

In cases of serious crime, instead of punishment in the usual manner, "expulsion" may be ordered, if appropriate and necessary, to the frontiers of the country where the life or freedom of the asylum-seeker or refugee will be under threat. Article 33 refers to crime which need not have been committed in the country of asylum or refuge; it must be remembered, however, that serious crimes committed outside that country deprive the criminal of the right to be considered as a refugee<sup>30</sup> and therefore deprive him automatically of the rights, privileges and guarantees established in the 1951 Convention and/or 1967 Protocol. The French-United Kingdom amendment to Article 28 of the draft<sup>31</sup> specifically referred to crimes, "in that country,"<sup>32</sup> in other words, the one in which the refugee was residing". The Representative of Sweden's amendment which proposed to exempt from paragraph 1, refugees who, "would constitute a danger to national security and public order"<sup>33</sup> was deemed to include refugees who were found to have been fugitives from justice in their own country.<sup>34</sup> The Representative of Britain considered that the version adopted during the first reading referred to crimes committed in the country of refuge.<sup>35</sup> There is a difference between the wording

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30 Article 1F(b) of the 1951 Convention, in Chapter Three.

31 A/Conf. 2/69.

32 Ibid.

33 A/Conf. 2/70.

34 A/Conf. SR.16, p.9.

35 Ibid., SR.24, p.5.

of Article 1 F(b)<sup>36</sup> and Article 33, concerning common criminals and offenders. Article 1 F(b) of the 1951 Convention requires only that there be serious reasons for considering that the person has committed a serious non-political crime, while Article 33 cannot be applied unless he has been found guilty of such a crime by a final decision of the court. Obviously, if a person cannot be considered a refugee he cannot enjoy the protection of Article 33; it would, therefore, be quite sufficient to uncover sufficient evidence to consider that he has committed a serious crime outside the country of refuge or asylum, to deprive him of his status as a refugee. However, to expel him, such discovered evidence would not be sufficient under Article 33 but, on the other hand, he could not enjoy the benefits of Article 33 and might theoretically be expelled anyhow. The refugee would gain protection under Article 33, if he had committed crimes in the country of asylum or refuge or elsewhere after his admission thereto, since Article 1 F(b) does not refer to such crimes. To conform with its wording, Article 33 is to be integrated in the sense that only convicted criminals, regardless of the place where the crime was committed, could be expelled, and that the deprivation of a status of a refugee would not by itself be a reason justifying expulsion.

Article 33(2) must be read in connection with Articles 31 and 32; in other words, expulsion and return under paragraph 2 are

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<sup>36</sup> "he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".

conditioned under the obligation of the State to grant the refugee a reasonable period of time and all necessary facilities to obtain admission into another country. Only if the refugee fails to gain admission into another country may expulsion or return to the country of peril take place.<sup>37</sup>

The 1951 Convention does not deal with extradition. The Representative of France requested that the summary record of the meeting should state that Article 33 was without prejudice to the right of extradition.<sup>38</sup> One question which may arise, however, as to the relative significance of the 1951 Convention and a treaty of extradition between two Contracting States. Under Article 1 F(b) a person otherwise qualifying as a refugee who has committed a non-serious, non-political crime, would not forfeit his right to be considered a refugee and could therefore not be expelled to the country whence he fled. Between the State of asylum or refuge and that State, however, there may exist an extradition treaty providing for the extradition in such instances. Under the general principles of international law, this Convention would have precedence over earlier extradition treaties, unless of course the States entered a reservation to Article 33 stipulating that their obligations under previous treaties were to be maintained. Should, however, extradition treaties be concluded after the 1951 Convention, it would be useful to reserve explicitly the

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37 A/Conf. SR.16, p.13; A/Conf. SR.24, pp.9ff; and A/Conf. SR.35, p.21.

38 Ibid.

validity of Articles 31-33 to safeguard their future application. The Representative of Britain thought that the provision of expulsion,

"... in no way affected the procedure of extradition and that extradition still be covered by the provisions of bilateral treaties." 39

The same would be true of municipal law relating to extradition if this view was correct. A lively discussion took place on the relationship between extradition and expulsion at the Conference, but no decision was taken. Extradition is a separate and a complete subject of international law which is beyond the scope of this thesis.

As mentioned earlier, Article 33 must be read in conjunction with Articles 31 and 32 of the 1951 Convention. So at this stage, it is advantageous to mention the text and travaux préparatoires of Articles 31 and 32 respectively.

### 7.1.3 Text

Article 31 of the 1951 Convention (Refugees Unlawfully in the Country of Refuge) states:

"1. The Contracting States shall not impose penalties on account of their illegal entry or presence on refugees coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or at present in their territory

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39 Ibid., SR.24, p.10.

without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

#### 7.1.4 Analysis

Earlier Conventions did not contain provision relating to Article 31. It was inspired by the aspect of enjoying asylum and the necessity of distributing the burden of refugees amongst States.

The Article was adopted by the Conference in the same wording as drafted by the Ad Hoc Committee. Paragraph 1 of Article 31 refers to two categories of refugees:-

1. Those who are present in the territory of a Contracting State, but have no authorisation to stay there;
2. Refugees who enter illegally such a territory.

The former group may be sub-divided into:-

- (i) persons who had a dated residence permit but were unable to depart from the country within this period; and,
- (ii) persons who entered and resided illegally in the country before the 1951 Convention came into force for the

particular country.

In both instances several prerequisites are necessary:-

- (a) The person must have entered or will enter the Contracting State in question, directly from the country of persecution. The draft of the Ad Hoc Committee did not contain this restriction. It was introduced on the basis of a French proposal.<sup>40</sup> The place from which the refugee came need not be his home country or the country of his permanent residence, it is sufficient that his life or freedom were threatened there. This was made quite clear when the words "coming direct from the country of origin" which was proposed by the Representative of France, with the words "coming directly from a territory", which was suggested by the President of the Conference.

His life or liberty must either have been actually threatened or he must have a "well-founded fear" that this may happen, on the basis of any kind persecution enumerated in Article 1, provided that persecution is due to events which occurred before 1 January 1951. This was the interpretation put on the inclusion of the words "in the sense of Article 1" by the Representative of France, who stated explicitly that as a country of second reception (ie. from other countries) France would not bind herself except as to events occurring before 1 January 1951.<sup>41</sup> The Representative of France stated that:

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40 A/Conf. 2/62.

41 A/Conf. SR.35, p.19.

"He had in mind cases in which a refugee in the sense of Article 1 found it necessary to cross illegally the border to a third country (ie. neither to his home country nor that of his first refuge) as a result of events occurring after 1 January 1951." 42

The meaning of the words "was threatened in the sense of Article 1" which, as seen previously, includes both actual victims of persecution or those who can show "good reason" why they fear persecution.

There was a consensus in the Ad Hoc Committee that a voluntary act was required,<sup>43</sup> in other words that the refugee must present himself, of his own accord, to the competent authorities without delay (as soon as possible) after his illegal entry. What was meant by "without delay"? The Representative of Belgium in the Ad Hoc Committee spoke of a very brief stay of "three to four days".<sup>44</sup> He also understood Article 31 not to apply to refugees who, "gained access to the territory of a State after authorisation was refused".<sup>45</sup>

The refugee should show good cause for his illegal entry as residence. The words "good cause" did not adequately describe the requirement. The French text speaks of "raisons reconnues valables" (reasons recognised as valid) by the State of entry.

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42 Ibid., SR.35, p.18.

43 Ibid., SR.40, p.7.

44 Ibid., SR.40, p.4.

45 Ibid.

What reasons for illegal entry (in addition to the other requirements - flight from persecution or fear of persecution) will be demanded to free the refugee from penalties is largely dependent on the authorities who are examining the specific case. In the Conference, these words were given a wide interpretation and commentary, but the view expressed was that refugees would have to show that they were unable to obtain or find asylum in any other country than the one in which they took asylum, more so in a country adjacent to the country of origin (due to persecution, fear of persecution and/or violation of human rights).<sup>46</sup> This interpretation was not maintained<sup>47</sup> because every State could and can claim that the refugee would have tried another country first and thus, in most instances, Article 31 will no longer be observed. "Good cause" for illegal entry must be stipulated if the asylum-seeker or refugee could not have entered legally in a country in time to avoid persecution unless, of course, the refugee or asylum-seeker chose an obviously distant or otherwise "inaccessible" or "overcrowded" country for no good reason. The President of the Conference put it thus:

"... no penalty was justified if the refugee could prove that his entry was due to the fact that his life or freedom would otherwise have been in jeopardy."<sup>48</sup>

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46 UN Doc. A/Conf. SR.14, p.11.

47 Ibid., SR.35, p.11

48 Ibid., SR.35, p.13.

The above interpretation was in accord with the proceedings at the Conference. The French amendment was adopted, at a certain stage, which provided that:

"... Article 31 referred to such refugee only who being unable to find asylum even temporarily in a country other than one in which (his) life or freedom would be threatened enters ... without authorisation." 49

The present wording omits this specific requirement.

Paragraph 1 of Article 31 of the 1951 Convention does not stipulate an obligation to keep the asylum-seeker or refugee or to regularise him, nor does it contain a restriction against expelling him but only prevents it from imposing on the asylum-seeker or refugee "penalties" resulting from the unlawful crossing of a border or frontier, for illegal entry or actual illegal presence. The Representative of Canada and Britain made it clear that "penalties" did not include expulsion.<sup>50</sup> The refugee or asylum-seeker remains "unlawfully" in the country as long as his status is not regulated and regularised and he does not enjoy any of the privileges and benefits of the 1951 Convention except those for which lawful presence is not required.

Paragraph 2 of Article 31 of the 1951 Convention imposes on the State an obligation not to restrict the freedom of movement of

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49 Ibid., SR.14, p.13.

50 SR.13, pp.12-14.

the "illegal" refugee or the asylum seeker beyond what is "necessary" and just. The 1951 Convention and/or the 1967 Protocol does not specify for what purposes the restrictions are necessary. The Ad Hoc Committee had in mind restrictions required to cover considerations of security or special circumstances, for instance, sudden influx of masses or any other reason which might necessitate restriction on the movement of refugees.<sup>51</sup> It will depend on the specific nature of the refugee and the condition prevailing in the country whether the restrictions may consist of detention or imprisonment in camps. The President of the Conference actually queried whether a State could keep an illegal refugee in custody or detention, but no answer was given by the whole of the Conference.<sup>52</sup> The Ad Hoc Committee stated that ending these restrictions would not be straightforward in certain cases; formally, once the position of the "illegal" refugee is regularised, he is then "lawfully in the country" and will enjoy the benefits of Article 26 of the 1951 Convention.<sup>53</sup> But it still remains to be decided as to the interpretation of "regularised". The Ad Hoc Committee did answer this query, the Ad Hoc Committee said that "regularised" meant "acceptance of a refugee for permanent settlement" and not the mere issue of a document prior to a final decision as to the duration of his stay.<sup>54</sup> It does seem that this interpretation is unnecessarily

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51 Ibid., SR.14, p.16.

52 Ibid., SR.14, p.15.

53 See 1951 Convention section, in Chapter Three.

54 A/Conf. 2/SR.14, p.16.

restrictive because of the wording of Article 26, which deal with refugees "lawfully in the country". More so, in the case where the refugee or asylum-seeker obtains admission to another country. The 1951 Convention considers that in such a case the "illegal" presence will be of a temporary nature and subsequently ought not to be a cause for restricting the freedom of movement of the refugee or the asylum-seeker.

As mentioned above, Article 31 of the 1951 Convention does not impose an obligation upon the Contracting State to keep the illegal refugee. The refugee, however, must be granted a fairly reasonable period and all necessary facilities to obtain admission into another country. What is the "reasonable period"? It is one which under existing circumstances is sufficient for a person without nationality and possessing given qualifications (skills, age, personality), who earnestly makes all possible efforts. The "necessary facilities" will as a rule exclude confinement in a camp or prison or in remote isolated places and require the State to permit the refugee to travel and to communicate with the outside world and such bodies or organisations as are likely to assist him in obtaining admission into a country. But, in practice, the evidence of confinement to camps, prisons or remote places is all too common.<sup>55</sup>

What happens to a refugee who is neither legalised in the country of asylum or refuge nor able to secure admission to

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<sup>55</sup> See Chapter Ten for recent examples.

another country within a "reasonable period"? Article 31 of the 1951 Convention gives no conclusive answer to this question. The 1933 Convention was more straightforward in this respect. It provided in Article 3(3) for the right of a Contracting State to "apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security and public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisation and visas permitting them to proceed to another country". This provision was predicted on the presumption that there may be no possibility of expelling a refugee because a State has no right to return a refugee without a visa to any country other than the country of his nationality, origin, or lawful resident. Cases in which return to other countries was effected were considered illegal.

Thus, expulsion is impossible if there is no country which is willing to accept that refugees, while expulsion or refoulement to the country of his former nationality or residence (which may be willing to accept him), where his life or freedom would be in grave danger, is prohibited in most cases under Article 33 of the 1951 Convention. If expulsion is ordered or refoulement effected, the refugee would have to live in a vacuum of land or in outer space or to be thrown back and forth from one country to another. Unfortunately, neither the 1938 Convention nor the 1951 Convention and/or 1967 Protocol took over the rule of the 1933 Convention, thus effectively leaving

it to the discretion of the Contracting States to decide how expulsion can be effected. If it cannot, the State concerned is authorised to imply and apply such restrictions as are necessary in the specific case.

#### 7.1.5 Text

Article 32 of the 1951 Convention (Expulsion) states:

"1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

#### 7.1.6 Analysis

Under international law, every State is, in principle, competent to expel at any moment any alien who has been admitted into its territory. It does not matter whether the alien is there on a temporary basis or has settled down for business or professional purposes.

Paragraph I of Article 32 deals with the expulsion of refugees

lawfully in the country, which means that no such safeguards exist in favour of refugees unlawfully in the territory of the State, except those set up in Article 31(2) and Article 33. In other words, while, as a rule, refugees lawfully in a country may not be expelled except on the grounds and in the manner prescribed in Article 32, illegal refugees may be expelled without such grounds, and without the guarantee of paragraph 2, except insofar as Article 33(1) applies and insofar as Article 31 requires the Contracting States to grant illegals sufficient time and facilities to obtain admission into another country, once the facilities have been granted and the reasonable period has expired, expulsion (except to a dangerous area) may be ordered on the basis of a legal or an administrative decision and the procedure established for such cases at the entire discretion of every Contracting State.<sup>56</sup>

The absolute prohibition of the expulsion of refugee or asylum-seekers lawfully in the country means that once a refugee or asylum-seeker has been admitted and legalised, he is, therefore, entitled to stay there indefinitely and can forfeit this right only by becoming a national security risk or by disturbing public order and having these grounds established in accordance with the procedures as stated in paragraph 2. It cannot be expulsion if a refugee who was admitted to a Contracting State on a temporary admission with travel documents issued by another Contracting State, is refused

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<sup>56</sup> This exception is already to be found in the 1928 Arrangement and the 1933 and 1938 Convention.

permission to stay there beyond the authorised period. In the United Kingdom, a refugee may be granted temporary admission for a certain time period. Even during this time period, the refugee is considered as an unlawful refugee with no legal rights to appeal. Overstay of his time period will result in automatic expulsion by the police or immigration authorities. Technically, he would be a refugee "unlawfully" in the country although he would not fall into the category of "illegal" refugees of whom Article 31 treats.

The interpretation of "national security and public order" is the same as in Article 28 of the 1951 Convention.<sup>57</sup> There was some dissatisfaction in the Ad Hoc Committee and the Conference about the vagueness of the term "public order" and the different interpretations given to the term "in different countries", because of the existing tangents in the social systems or municipal laws.<sup>58</sup> The Ad Hoc Committee felt that it was necessary to take into account the meaning which this term had formed and acquired in certain legal systems and jurisprudence.

The Ad Hoc Committee expressed a view that deportation of aliens who had been convicted of certain serious crimes, would be allowed under Article 32<sup>59</sup> if such crimes are considered in

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57 Supra.

58 For a discussion of this expression and its meaning in French and common law, see Document E/L.68 (a paper submitted to the ECOSOC by the UN Secretariat in connection with the draft Covenant on Human Rights) and E/CN.4/528, pp.71-76.

59 SR.3, p.15.

that country as violations of "public order" and a threat to "national security". The Conference felt that specification of grounds for deportation must be left to the jurisdiction of the State concerned.<sup>60</sup> The domestic legal systems would take care of the implementation and enforcement of the laws. On the other hand, "public order" in particular, would not, in view of the Ad Hoc Committee, permit the deportation of aliens on "social grounds", such as "indigence or illness or disability". On certain occasions, the British Government accepted the expression "ordre public" in international treaties but its representative made an unchallenged reservation that it was deemed to include matters relating to crime and public morals.<sup>61</sup> On the issue of "disability, indigence and/or illness",<sup>62</sup> one should compare the statements by the French, Canadian and British representatives who summed up the discussion in the Conference as:

"... making it clear that the words 'public order' could not be construed as including mere indigency ..."<sup>63</sup>

Such a reservation appeared advisable because in many countries, destitute aliens are without formalities, arrested by the police and refouled to the frontier. Deportation on the

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60 SR.14, p.18.

61 SR.14, p.18.

62 UN Doc. E/1850, para 29.

63 SR.15, p.8. See also Resolution 309(XI)B of the ECOSOC and E/AC.32/SR.20, para 75 and E/AC.32/SR.40, pp.23 & 28.

basis of indigence would conflict with Article 23 of the 1951 Convention.<sup>64</sup>

Paragraph 2 of Article 32 of the 1951 Convention contains guarantees in case of permitted expulsion. One is the requirement of a decision reached in accordance with due process of law, which implies not only a decision given by the court but also administrative procedures which also can give decisions provided in the municipal legal systems of the Contracting States.<sup>65</sup> The "process of law" means in substance only that in no case may a decision be reached except as provided for in the law in force in the given country. This is expressed in the French text which deals with (a):

"... decision rendre conformément à la procédure prévue par la loi." <sup>66</sup>

The next procedural guarantee is that the refugee or asylum-seeker who is accused of being a violator of national security or public order must, in all circumstances, be given the necessary facilities to submit evidence that the accusation is unfounded, that there is an error in identification or any other evidence which is required to prosecute him. The Representative of Canada stated:

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64 Supra.

65 See, for instance, SR.15, pp.8-9 and E/AC.32/SR.40, p.15.

66 Translated: a decision reached in conformity with the procedure prescribed by law.

"He must furthermore be granted the right to appeal to and be represented by a counsel before the authority which, under domestic law, is either called upon to hear such appeals or is the body superior to the one which has made the decision; if the decision is made by authorities from whose decision no appeal is permitted, a new hearing instead of appeal must be provided." 67

The authority in question may designate officials to hear the presentation, however these guarantees may be obviated by "compelling reasons of national security", for instance, when a decision must be arrived at in the interests of national security in a relatively short time as does not permit the authority to allow the refugee the necessary time to collect evidence or to transport him to the required place, or where a hearing may be prejudiced to the interests of national security.<sup>68</sup> Since paragraph 2 speaks of "compelling" reasons, they must really be of a very serious nature and the exemption to sentence one cannot be applied save very sparingly and in very unusual cases.

Paragraph 3 of Article 32 of the 1951 Convention stipulates the status of the refugee after a final decision of expulsion has already been taken. The Conference agreed that a refugee would not be expelled, "while his case was sub judice".<sup>69</sup> Paragraph 3 does not allow the State to proceed to actual expulsion at once but enjoins it to grant him sufficient time

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67 SR.15, p.13.

68 For instance, in case of espionage or terrorism.

69 SR.15, p.16.

to find a place to go to. Although paragraph 3 of Article 32 does not stipulate so, it must be assumed that the refugee must also be granted the necessary facilities prescribed in Article 31(2), because without such facilities no admission into another country can be obtained. The second sentence of paragraph 3 is less liberal than Article 31(2)'s first sentence. The Representative of Belgium stated that:

"... paragraph 3 speaks of measures as 'they may deem necessary',<sup>70</sup> while Article 31(2) mentions 'which are necessary'." <sup>71</sup>

The difference and distinction is in the subjective appraisal of the measures. In the case of Article 31, they must appear to be necessary to an objective observer. In that of Article 32, it suffices if the competent authorities consider them to be required. But even so, they cannot be of such nature as to make it impossible for the refugee to secure admission elsewhere because the 1951 Convention and/or 1967 Protocol consider expulsion a measure to be taken if the refugee or asylum-seeker is unable to leave the country on his own initiative.

7.2 THE RELATIONSHIP BETWEEN REFUGEE DEFINED UNDER ARTICLE 1 OF THE 1951 CONVENTION AND NON-REFOULEMENT IN ARTICLE 33

The legislative history of the 1951 Convention clearly

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70 In French: "qu'ils jugeront opportune".

71 In French: "qui sont necessaires".

indicates that all persons who are determined to be refugees under Article 1 are also protected from refoulement under Article 33. The definition of Article I of the 1951 Convention is examined in great depth in Chapter Three.

Throughout the discussions in the Ad Hoc Committee and at the Conference of Plenipotentiaries, it was clear that the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the 1951 Convention.

Thus, for example, when debating whether persons who had committed acts contrary to the principles of the United Nations should benefit from protection under Article 33, the delegate from the United States pointed out that such persons were already excluded from the scope of Article 1 and therefore also from Article 33.<sup>72</sup> A more detailed discussion on the scope of Article 33 took place at the Second Session of the Ad Hoc Committee where the delegate of the United Kingdom questioned if provisions ought not to be introduced to permit the authorities to expel a refugee who was inciting disorder. The delegate of the United States responded that delegates "would not wish to impair the principle of non-refoulement" and that "it would be highly undesirable to suggest in the text of that Article that there might be cases, even if highly exceptional cases, where a man might be sentenced to death or persecution" (my emphasis). The French delegate, on his part, "considered

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72 UN Doc. E/Ac.32/SR.20, p.5.

that any possibility, even in exceptional circumstances, of a genuine refugee, that was to say, a person coming under the well-pondered definitions contained in Article 1, being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purpose of the Convention". He went on to state that:

"reference to the definition of 'refugee' in Article 1 would suffice to show how psychological factors had been taken into account even in a legal text. To take such factors into consideration in a definition, on the one hand, and to allow for the possibility, even in exceptional circumstances, of returning a refugee to his country of origin on the other, were obviously quite contradictory".<sup>73</sup>

As a result of these various interventions, it was decided not to amend the text of the Article.

At the subsequent Conference of Plenipotentiaries in 1951 when the present Article 33 was first discussed, the Swedish delegate stated that his Government's amendment, which would have introduced the words "membership of a particular social group"<sup>74</sup> as one of the criteria, should be discussed in relation to Article 1 since it was intimately linked with that Article. Subsequently, the Swedish delegate pointed out that the words "membership of a particular social group" should be inserted before the words "or political opinion" also in Article 31 to bring it into conformity with Article 1 A(2).<sup>75</sup>

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73 UN Doc. E/AC.32/SR.40, pp.30-34.

74 UN Doc. A/Conf.2/SR.35, pp.20-21.

75 Ibid.

Thus, the criteria of Article 33 were assimilated to those of Article 1 and not vice-versa.

The non-refoulement rule was therefore clearly designed to benefit the refugee, defined as a person who, in the sense of Article 1, had a well-founded fear of being persecuted on grounds of race, religion, nationality, membership of a particular social group or political opinion. The rule was considered so fundamental that no Contracting State to the 1951 Convention is allowed to make a reservation towards this Article (Article 42(1) of the 1951 Convention). As was seen from the debate which took place when the Article was drafted, the "psychological" element of Article 1 - the subjective element of the refugee definition - was considered as included in Article 33 although not explicitly referred to in the text of that Article.

The wording of Article 33 in no way minimises the significance of the subjective element in the refugee definition.

The words "where his life or freedom would be threatened" were employed in the memorandum submitted by the Secretary General to the Ad Hoc Committee on Statelessness and Related Problems,<sup>76</sup> and came to be used in both Articles 33 and 31 (Article entitled "Refugees unlawfully in the country of refuge" where the terms "where his life or freedom was threatened" was used). In the travaux préparatoires to Article

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76 UN Doc. 3E/AC.32/2, p.45.

31,<sup>77</sup> the words "country of origin", "territories where their life or freedom would be threatened" and "country in which he is persecuted" were used interchangeably thereby indicating that there was no intention to introduce criteria more restrictive than that of "well-founded fear of persecution" as that expression was used in Article 1.<sup>78</sup> This view is also confirmed by the specific reference to Article 1 in Article 33, viz. "where their life or freedom was threatened in the sense of Article 1".

The words "where his life or freedom was threatened" were expressly introduced into Article 31 to replace the words "country of origin" so that this provision would apply in respect of any country where persecution was feared. The French representative had originally proposed to replace the words "country of origin" with the words "country in which he is persecuted". This proposal was not accepted, however, by the delegate of the United Kingdom who stated that he could not vote for the French amendment, "because the Conference had already accepted the definition of the term 'refugee' given in Article 1. There might also be cases where a refugee left a country after narrowly escaping persecution but without having actually been persecuted. Such a case would not be covered by the French amendment".<sup>79</sup>

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77 See Article 31 of the 1951 Convention in this chapter.

78 UN Doc. A/Conf.2/SR.35, p.18.

79 UN Doc. A/Conf.2/SR.35, p.19.

In his commentary on Article 33, the Secretary-General stated that "the turning back of a refugee to the frontier of the country where his life or liberty is threatened on account of his race, religion, nationality or political opinion, if such opinions are not in conflict with the principles set forth in the United Nations Charter, would be tantamount to delivering him into the hands of his persecutors".<sup>80</sup> The report of the Ad Hoc Committee on Statelessness and Related Problems contained an identically worded commentary on Article 33 and added that "in the present text reference is made not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened for the reasons mentioned".<sup>81</sup> Moreover, the expression "threat to life or freedom" was used to illustrate persecution in the sense of Article 1. During the debate in the Ad Hoc Committee the delegate from the United Kingdom stated that threat to freedom was a relative term and might not involve severe risks.<sup>82</sup> The expression "threat to life or freedom" was used to indicate "well-founded fear of persecution" and that the latter expression is not only composed of an objective element, but also of a subjective element.

The UK policy, as stated in the Immigration Rules, as mentioned in Chapters Six and Eight respectively, also supports the understanding of Article 33.

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80 UN Doc. E/AC.32/2, p.46.

81 UN Doc. E/1618, E/AC.32/5. p.61.

82 UN Doc. E/AC.32/SR.20, p.14.

Rule 165 of the Immigration Rules states that:

"In accordance with the provisions of the Convention and Protocol relating to the Status of Refugees, a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion."

Although the above rule is in the context of deportation, it implies that the United Kingdom's understanding of Article 33 is that a person who is recognised as a refugee over Article 1 cannot be returned to a country where he fears persecution.

### 7.3 APPLICATIONS OF NON-REFOULEMENT

The principle of non-refoulement may be described as a legal obligation for the Contracting States of the 1951 Convention and/or 1967 Protocol, to "non-expulsion" or "non-return". The emphasis is on the words "expulsion" and "return" to the country where his life or freedom would be threatened on account of his race, religion, nationality, membership of social or political opinion. The refugee or asylum-seeker must not be expelled or refouled to a country where he will be persecuted or have his or her family's human violated by the State authorities. The term "refugee" is used, implying that the asylum-seeker has been formally recognised as a "refugee" and in fact hold the status of a refugee in accordance with the 1951 Convention; in other words, he has fulfilled the conditions required in Article 1 of the 1951 Convention.

However, if the asylum-seeker is not recognised as a "refugee" in the treaty sense, then the protective Articles of 31, 32 and 33 respectively will not apply. Similarly, if the country of refuge is not a State Party to the 1951 Convention, then it is not under a legal obligation to provide protection under Articles 31, 32 and 33 respectively. If the country of refuge is a non-party to the 1951 Convention or 1967 Protocol, then only humanitarian reasons and rights will prevail and the asylum-seeker is under the mercy of the State of refuge.

One can place a great deal of emphasis on the actual physical assertion of the refugee or asylum-seeker on the territory of the State; this is a necessary prerequisite to the claiming of the 1951 Convention and 1967 Protocol. The Ad Hoc Committee did not state the exact meaning of when the territory or border has been penetrated. Does this mean the actual physical breach of the border line or territory?

The provisions of Article 33 of the 1951 Convention do not contain a duty of non-rejection at the frontier or border. In certain circumstances, the Contracting State can reject the asylum-seekers who have yet not entered the territory of the State and still not violate the 1951 Convention. So the query is, whether asylum-seekers (not yet recognised "refugees") can be rejected at the borders or frontiers, so long as the borders or territory-line have not been physically breached? According to the 1951 Convention and 1967 Protocol, there is no specific provision forbidding rejection at the frontiers or borders,

although such a provision was included in the 1933 Convention,  
Article 3:

"Each of the Contracting Parties ... undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin."

The drafting of the 1951 Convention reflected an existing European situation in which the majority of the refugees were welcomed into Europe and the United States, as mentioned in Chapters Two and Three. The Allied States insisted that the refugees were granted refuge and asylum, and protection from persecution and violation of human rights. While the communist States argued that the Allied States had granted asylum to refugees because they wanted cheap labour and persons who could be trained to become spies. The communist bloc insisted that refugees should not be granted asylum and refuge and they should be repatriated to their countries of origin. The Western States encouraged each other to accept asylum-seekers and to try to assimilate them. The French Representative in the Ad Hoc Committee considered "assimilation" to mean:

"... the intermediate stage between the establishment of a refugee on a particular territory and his naturalisation." 83

While the Representative of Britain stated that the word "assimilation" is not used:

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83 SR.39, p.28.

"... in the usual meaning of loss of the specific identity of the persons involved but in the sense of integration into the economic, social and cultural life of the country." <sup>84</sup>

However, the situation is greatly different. The European States are reluctant to receive refugees and have implemented every severe and strict policies of non-admission of asylum-seekers, while the Third World countries have still the greatest burden of refugees within their territories. A great number of refugees are racially, culturally, economically or politically different and since most of the countries of refuge or asylum are from the Third World and often their own standard of living and accommodation is poor, they certainly cannot cope with masses of refugees flowing into their territories.

So, rejection at the border seems to be one possible solution, in a way avoiding expenses and internal difficulties which may occur.<sup>85</sup> One must bear in mind that Article 33 of the 1951 Convention does not refer to admission of refugees or asylum-seekers, but merely refers to the benefits available for asylum-seekers and refugees once they have entered or penetrated the borders or territory of the State of refuge.

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84 SR.39, p.30.

85 For instance, Malaysia has a complex racial balance between the Moslems, Christians and Hindus (including Buddhists). Influx of refugees may tilt this balance and because of this balance Malaysia actually rejected Chinese (Buddhist) boat people in 1981.

On a practical matter, patrolling of the border by the authorities can be of significant importance. Entry into some countries (where the border is difficult to patrol) can be relatively easy,<sup>86</sup> while areas of seclusion are difficult to penetrate by refugees or asylum-seekers. It seems ironic that asylum-seekers who illegally entered the countries, can have access to Article 31, 32 and 33 of the 1951 Convention, while the refugees or asylum-seekers who properly inform the border authority of their intention to enter, may be rejected and turned away. The illegal entrant seems to be in a more advantageous position than the legal entrant, although there is nothing in the records to show that this is the case.

The words of Article 33 of the 1951 Convention are inconclusive as to whether or not non-rejection at the frontier or border is included within the non-refoulement provision, the exclusion of non-rejection seems to have been a costly omission.<sup>87</sup> If the provision of Article 33 (non-refoulement) does not include "non-rejection at the border or frontier", rejection would be legally possible in that if an asylum-seeker who approaches the border guards or police is turned away or rejected at the border. But if the border or frontier is difficult to maintain with sufficient personnel or because of the physical nature of the border terrain, then the asylum-seeker could effectively enter the territory of the country of

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86 For instance, the USA-Mexico border.

87 See, however, Prakash Sinha, Asylum and International Law, Martinus Nijhoff, The Hague, 1971, Chap.3.

refuge and once the guards or police realize that the asylum-seeker was illegally inside the State, then prima-facie, expulsion or deportation would be difficult as long as the asylum-seeker's status was not yet determined. However, there is nothing preventing the authorities capturing the asylum-seeker and accordingly ejecting him outside the borders. So, the presence of border guards and officials is crucial to the treatment of refugees and their claims.

So, as a recommendation, Article 33 of the 1951 Convention should contain a provision in the words of "non-rejection at the border or territory", if the concept of non-refoulement is to be given maximum competence and respect.<sup>88</sup>

There are very few countries which contain physical barriers on borders,<sup>89</sup> which makes it fairly easy for the asylum-seeker to penetrate the territory even by one metre for him to accede to the rule of non-refoulement. However, this penetration of one metre will correspond to the asylum-seeker "entering" the territory. The penetration of the territory may also include:

- (i) At the territorial waters or shoreline of the country of asylum (if the refugee is on board a vessel); and,
- (ii) At the airspace (if the refugee is on board an aircraft).

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<sup>88</sup> Cf. the OAU Convention, in Chapter Five.

<sup>89</sup> Although the UK, for example, has the barrier of the sea surrounding the island.

(i) At the Territorial Waters or Shoreline of the Country of Asylum (if the refugee is on board a vessel)

The position of the 'boat people' is legalised in Chapter Eight; however, in more recent years the position of "boat people", or refugees who were fleeing persecution or other disasters aboard boats which were hardly sea-worthy and poorly equipped for sea crossings, was that they not only faced dangers whilst at sea but also subsequently refoulement at the borders or territory of a State of asylum. The "boat people's" position has indeed been of grave concern to the international community and the UNHCR. The question here can be split into two parts. Firstly, what are the right of boat people whilst on the High Seas? And, secondly, can a State reject the boat-people at the shoreline or border and literally throw them back to face drowning or piracy? The High Seas are not subject to the exercise of sovereignty by any State and ships are liable to the explicit jurisdiction of the flag State except in exceptional circumstances. The States have a common dominator, ie. the express freedom of the High Seas. Asylum-seekers will usually be denied flag-State protection. Clearly, if asylum-seekers are escaping a persecuting government, the country of origin is hardly going to extend its protection over ships carrying asylum-seekers on the High Seas.

Considerations of humanity, against torture, cruelty, and inhumane and degrading treatment, are taken into account by the authorities of States of refuge. But in reality the boat

people are without protection of the law and on many occasions port authorities in some States have disregarded the human rights issue. On recent occasions, in South East Asia, boat people have been turned away and towed out back to sea. The port authorities have argued that the asylum-seekers constitute a "threat" and that use of force to prevent the boat people landing is, to my mind, a gross violation of human rights.

There is indeed a temptation to say that the use of force may be used if it prevents attempted incursion of "illegal immigrants" from becoming a danger to the State. However, nowadays, distinction between a "refugee" and an "illegal immigrant" is not so easy. "Refugees" without valid travel documents and visas could be termed "illegal immigrants", but in general terms no force should be used by the port authorities irrespective of whether the passenger is a "refugee" or an "illegal immigrant".

Bilateral agreements can exist; in other words, a flag State may allow the authorities of another State to intercept and capture vessels for reasons of suspicion of drug trafficking and smuggling.<sup>90</sup> But one can assume that most of the boat people have fled from persecution or violation of human rights and it seems highly unlikely that they would be carrying drugs.<sup>91</sup>

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90 For instance, the US and Haita.

91 On the other hand, there is nothing stopping the drug barons from planting bags of drugs on boats for the dealers to receive on disembarkation.

On occasions, asylum-seekers fleeing on the High Seas have not actually reached territorial waters before they have been sent back to sea by government authorities, coastguards or by hostile fishermen. Boat people are unable to claim any penalties or issues and the rejection of these people at coastal frontiers will generally constitute refoulement. Two types of consequences may appear, firstly if the craft is unseaworthy and dangerously overloaded with passengers, storms may break endangering both craft and lives, and, secondly, once out at sea in international waters, the risk of piracy is great. The results can be horrific, pirates have raped and abused women and girls, whilst men have been tortured and all generally subjected to violations of human rights - ironically, the very type of violations from which these people have been attempting to flee in the first place.

One important factor is that refoulement takes place not at the maritime frontier, which most commonly and for many purposes is taken to refer to the boundary between coastal States' territorial waters and the High Seas, but simply at or near the shoreline. If a distressed vessel is seeking to land and disembark, or if its passengers are in distress, customary international law requires coastal States to grant safe haven to the vessel and its passengers, at least until the causal conditions of the distress are relieved, and then the vessel

and its passengers can be allowed to resume their journey.<sup>92</sup> The ancient rule of custom does not concern itself with asylum-seekers and it applies ex proprio vigore<sup>93</sup> without regard to the possible applicability simultaneously of the rule of non-refoulement. The principle of non-refoulement may be applicable if the passengers of the vessel in distress are indeed asylum-seekers; if that is the case the coastal State should grant them permission to land and at least temporary refuge should be provided.

What would be the case, once the conditions of distress are relieved, if the vessel and its asylum-seekers were then expelled and forced out to sea again (with provision for health and safety of its passengers) and with a guarantee of the vessel not sailing back to the country of origin and persecution? The refuge State can argue that it had provided temporary refuge and that once the conditions of distress were overcome and surpassed, then it was quite proper to return the asylum-seekers to the High Seas, as long as there was reassurance that the vessel would not return to the country of persecution, which seems obvious. The boat people can then try to find another State which will grant them refuge or asylum.

If the boats carrying asylum-seekers fly a flag of a third

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92 For documentation on this point of customary international law, see McDougal and Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea, p.110.

93 See, for example, Creole Arbitration, Churchill and Lowe, The Law of the Sea, Manchester University Press, 1983, pp.46-51.

State, then that vessel can land or board in the territorial waters of the flag State. However, unlike the situation existing at land frontiers, the coastal States can physically expel boats and vessels by towing them into the High Seas without having to obtain the permission or consent of another territorial sovereign. Article 33 of the 1951 Convention clearly lacks provision relating to boat loads of asylum-seekers and this Article should be extended to cover expulsion.

The British Government has recently set up "centres" just off the British shoreline, to hold refugees for a period of time until their applications could be formally assessed. These "centres" have been old ferries (which have been condemned by the Leader of the Opposition as being "worse than the detention centres").<sup>94</sup> One writer has suggested that:

"... receiving and holding centres for the refugees should be set up in the territory of some generous State to which vessels carrying asylum-seekers can proceed to discharge their human cargo."<sup>95</sup>

The financing of such centres could be borne by the international community and perhaps supervised by the UNHCR. It is interesting to compare the British centre to the centres mentioned by Professor Feliciano.

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94 Neil Kinnock, Nine O'Clock News, BBC TV, 23 April 1987.

95 Professor Feliciano, "The Principle of Non-Refoulement: A note on international legal protection of refugees and displaced persons", *PLJ*, Vol.57, December 1982, 4th Quarter, p.602.

(ii) Airports and Airspace

The application of the principle of non-refoulement should be analogous to the non-rejection at land frontiers. On the subject of airspace, can the asylum-seeker on board an aircraft claim the benefit of non-refoulement once the plane has penetrated the airspace of the State of refuge?

Although airspaces have been the centre of disputes,<sup>96</sup> authorities tend to consider airports as points of entry. An airport is one place where immigration, customs and other checks take place in accordance with the Chicago Convention.<sup>97</sup> However, in literal terms, breach of airspace<sup>98</sup> is an analogy of penetration of border or frontier. But many of the nations are State Parties to the 1944 Chicago Convention on International Civil Aviation, and universally agree that for points of custom and immigration, airports are sufficient as the point of entry into a country. It does seem strange that if foreign aircraft enter airspace (without permission)

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96 Violation of airspace can cause military action, eg. the Korean 747 shot down by Soviet airforce planes.

97 Immigration officials and customs are based here. In accordance with the Chicago Convention 1944 on International Civil Aviation, Article 10 states: "... every aircraft which enters the territory of Contracting State shall, if the regulation of that State so requires, land at an airport designated by that State for the purpose of customs and other examination". For our purpose, we shall consider airports to be sufficient points of entry.

98 Generally see, D.H.N. Johnson, Rights of Air Space, Manchester University Press, 1965.

belonging to another State, serious measures can be taken.<sup>99</sup> The latter State can take whatever measures it deems necessary for the defence of its territory and people.<sup>100</sup>

Many governments are now insisting that the asylum-seekers who wish to seek asylum, must possess visas. The British Government has recently passed an Act imposing £1,000 fines on aircraft who bring passengers into airports without travel documents or visas.<sup>101</sup> However, in practical terms, how can an asylum-seeker obtain a visa, where physically it would be difficult to reach the appropriate Embassy or High Commission.<sup>102</sup> The dilemma will continue if aircraft are not prepared to carry asylum-seekers without visas due to the fear of heavy fines which the receiving countries can impose. It is interesting to note that most European States and some Middle Eastern States are very keen to impose fines, but the States which face most immigrants do not. These European and Middle Eastern States are the ones with insignificant refugee problems.

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99 For instance, Afghan planes entered Pakistan airspace and after several warnings, two F-16 war-planes shot down four Afghan strike attack aircraft on 15th August 1986.

100 Diplomatic protests, military and, in general, international pressure through the United Nations General Assembly.

101 The Immigration (Carriers Liability) Act 1987. See also the closed session of the Airline Conference in Chapter Eight.

102 For instance, the Tamils trying to reach Columbia, are unable to do so because of 17 army check posts, through which they have to pass - a certain impossibility.

The basic function of the non-refoulement principle is to place the asylum-seeker in a position in which he can formally apply for asylum either in the first country of refuge or in some other country. If the asylum-seeker is refouled to his country of origin, then no claim for refuge or asylum can be made. The principle of non-refoulement requires the country of refuge to at least grant the asylum-seeker temporary refuge while other solutions are being discussed and organised. So, in effect, the principle of non-refoulement does import a minimum humanitarian duty on the State of refuge.

It is perhaps appropriate to mention that the 1951 Convention does not contain a provision specifically dealing with admission. The final Act<sup>103</sup> of the Conference which adopted the Convention contained a recommendation to the effect that governments continue to receive refugees within their territories.

The Representative of Venezuela stated that:

"... bone fide receiving of refugees is the

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103 189 UNTS, No.2545 Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2-25 July 1951. The text reads:

"The Conference Recommends that governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement".

Ibid., p.148. The Conference voted 17 for, 3 against, with 3 abstentions.

predominant factor in the true spirit of international co-operation, which was required ..."<sup>104</sup>

No other comments were received on the Final Act and no further suggestions were recorded in the travaux préparatoires. Although the Conference agreed that governments should continue to receive refugees, and to keep them within their territories until their status had been assessed. The Representative of Canada stated:

"... the persons requesting asylum should be permitted to remain in the country for as long as it takes to determine whether they are considered refugees."<sup>105</sup>

In practical terms, an asylum-seeker may be subjected to an everlasting process and treatment, namely in procedural terms from non-refoulement to admission and subsequently asylum.<sup>106</sup> The main theme is not to return the asylum-seeker or the refugee and once this has been carried out then other benefits

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104 SR.16, para 35.

105 SR.18, para 21.

106 If the person is a refugee within Article 1 of the 1951 Convention and if the State of asylum is a party to the 1951 Convention.

such as temporary admission<sup>107</sup> and application for asylum can take place.

#### 7.4 ARTICLE 42 AND ITS IMPORTANCE TO THE PRINCIPLE OF NON-REFOULEMENT

##### 7.4.1 Text

Article 42 of the 1951 Convention (Reservation) states:

"1. At the time of signature, ratification or accession, any State may make reservation to articles of the Convention other than to Article ... 33 ... inclusive."

##### 7.4.2 Analysis

Article 42(1)<sup>108</sup> allows reservations to articles of the 1951 Convention, but certain articles are so fundamental that, if they are not accepted by a State, the 1951 Convention could not fulfil its purpose. One such article is Article 33. No reservation is allowed on Article 33, but reservations are allowed on Articles 31 and 32 of the 1951 Convention. There

<sup>107</sup> Though Goodwin-Gill states that the concept is vague. About its status, he states: "Temporary refuge is the logical and necessary corollary in this otherwise incomplete regime ... it has been the subject of little enquiry". See Goodwin-Gill, "Entry and Exclusion of Refugees: Transnational Legal Problems of Refugees", p.306. See also, Coles, "The International Protection of Refugees: Legal aspects of the large scale influx of refugees", Paper presented to the Asian Round Table on Problems in International Protection of Refugees and Displaced Persons", Manila, April 15-19, 1980.

<sup>108</sup> For travaux préparatoires to the whole of Article 42, see Chapter Three.

was nothing conclusive in the travaux préparatoires relating to Articles 42 and 33.

It seems that State Parties to the 1951 Convention and the 1967 Protocol were unprepared to include in the Convention any article on admission, as opposed to non-return of refugees. In State practice, a sharp distinction has never been drawn between return, expulsion and rejection at the border.

On the issue of the asylum-seeker entering the territory lawfully or unlawfully, Weis<sup>109</sup> states that if the principle of non-refoulement was interpreted so as to allow the return of those refugees who present themselves at the frontier or border, then the extent to which a refugee is protected against return to a country in which he fears persecution would depend upon the fortuitous circumstances whether he has succeeded in penetrating the territory of a Contracting State.

On practical matters, most countries do admit refugees and oblige the principle of non-refoulement,<sup>110</sup> although, on occasions, some States do restrict entry of refugees in the matter of public interest, in cases of mass influx of

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109 Cf. Weis, "Territorial Asylum", IJIL, Vol.6, p.183. Weis on a report of Asylum to European Refugees: Explanatory memorandum, para 17, European Consultative Association, 17th session, December 1986.

110 Hofmann, Introductory Report to the 5th Working Session of the Asylum, Refugee Law Colloquium at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 11-13 Sept 1985.

refugees<sup>111</sup> and the public order and safety of the State in general.

Has State practice broadened the scope of Article 33 of the 1951 Convention? Goodwin-Gill believes so. He states:

"... it has confirmed the duty of non-refoulement extends beyond expulsion and return and applies to measures such as rejection at the frontier and even extradition." <sup>112</sup>

However, State practice is not really an indication of formulation of a particular principle. Many States have implemented Article 33 of the 1951 Convention within their own domestic legal systems, while others have not, even though they may be signatory parties to the 1951 Convention. The scope of application of Article 33 has certainly been broadened. State practice does indicate that the protection of non-refoulement has been availed to refugees who do not form within the 1951 Convention, in other words, non-conventional refugees.<sup>113</sup> The more elaborated definition with the OAU Convention is a suitable example of the broadening of the scope of Article 33.

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111 Ibid., National Reports (Argentina, Australia, Belgium, Denmark, France, The Netherlands, Nigeria, Norway, Poland, Portugal, UK, Federal Republic of Germany, Sweden and Switzerland).

112 See Goodwin-Gill, "Non-refoulement and the New Asylum-Seekers", VJIL, Vol.25, No.4, 1986, p.901.

113 Examples being Ethiopia, Sudan and Chad, inter-alia.

7.5 IS THE PRINCIPLE OF NON-REFOULEMENT INDEPENDENT FROM THE FORMAL DETERMINATION OF REFUGEE STATUS BY A STATE

If a State (A) returns or refoules foreign nationals to a country (B) which is known to produce quantities of refugees or possesses a poor human rights record, then State (A) would have to justify its actions in the circumstances prevailing in the country of origin. The burden of proof will fall upon State (A), since it was the one which drew up plans and programmes for involuntary return and if any harm should occur to the foreign nationals, State (A) would be directly responsible. Should State (A) be responsible for its officials or the administrative system which breached a duty of non-refoulement? The answer is yes, the State is indeed responsible<sup>114</sup> on breach of duty of non-refoulement and the State will be liable for compensation, though not compelled to do so.

7.6 NON-REFOULEMENT AND OTHER INTERNATIONAL INSTRUMENTS

7.6.1 African Continent

Article II of the OAU Convention<sup>115</sup> deals in general terms with the question of asylum, but Article II.1 states:

"Member States of the OAU shall use their endeavours consistent with their respective legislations to receive refugees and to secure the settlement of

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114 Cf. Vicarious Liability of Employees.

115 Text 14 UNTS 691: OAU Convention governing the specific aspects of refugee problems in Africa.

these refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."

The locus standi of this provision positively and explicitly encourages parties which are signatory bodies to the OAU Convention to receive refugees and to secure settlement.

Article II.2 of the OAU Convention states:

"The grant of asylum is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State."

This provision (expounded in an earlier section) provides that the granting of asylum, in other words, allowing the asylum-seekers or refugees to penetrate or enter the territory of a Member State, shall not be regarded as an unfriendly or hostile act. This provision can affect States which possess bilateral agreements linked through treaties or conventions, for instance, if one government has persecuted a group of people and this has resulted in a flight of that group of people to the borders of a neighbour State (the treaty party) and the refuge State decides to grant asylum, then de facto, the relationship between the two governments or States should not be affected and certainly the State of origin should not treat the granting of asylum as an unfriendly act (see Asylum section).

Article I.3 of the OAU Convention provides that:

"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2." 116

This important provision imposes on Contracting States both an unqualified obligation of non-refoulement and an obligation of non-rejection at the frontier. This is definitely a much better drafted provision because it contains the important term "non-rejection at the border or frontier" contrary to the 1951 Convention which fails to implement these wordings.

Article II.4 of the OAU Convention states:

"Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member States may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member States granting asylum."

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116 Article I.1 states : "For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group (social) 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". Article I.2 states: "The term 'refugee' shall apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

This provision ameliorates the situation of a State, which finds the obligation to grant asylum unduly onerous, by imposing an obligation on all the Contracting States to co-operate "in the spirit of African solidarity" and "international co-operation" with Member States which are experiencing difficulties. Once again, the 1951 Convention lacks a similar provision within the articles. The 1969 OAU Convention is complimentary of the 1951 Convention and 1967 Protocol, in that they recognise paragraphs 9 and 10, respectively, of the OAU Convention Preamble which states:

"Recognising that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment."

and

"10. ... Calling upon Member States of the Organisation who had not already done so to accede to the United Nations Convention in 1951 and to the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa."

This is interesting, in that even if the State Parties to the OAU Convention have not yet acceded, they are to apply the provisions of the 1951 Convention and the 1967 Protocol, a kind of "safety net" for refugees in order to uphold the basic civil and human rights belonging to the refugees and that these rights are not misused or abused on the excuse of non-accession of a State to the OAU Convention.

It is worthwhile to state that the definition of the "refugee" in the OAU Convention is wider than the 1951 Convention. Article I.2 of the OAU Convention<sup>117</sup> expands the traditional refugee definition to include those compelled to leave their country of origin on account of "external aggression, occupation, foreign domination, or events seriously disturbing public order". The African problems are different, in that from the 1950s there had been, largely as a result of the presence of after-effects of colonial regimes, troubles, wars, drought, famine, and Acts of God, resulting in masses of people being displaced and not fulfilling the 1951 Convention definition, even as extended by the 1967 Protocol and basically the provisions of Article II of the OAU Convention, is binding on States which are parties to the OAU Convention, as are the other articles, including the provision of non-refoulement. The provision of non-refoulement within the OAU Convention as a regional instrument dealing with the refugee problem in a thorough and complete manner.

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117 Ibid.

## 7.6.2 American Continent

In the American Convention on Human Rights 1969,<sup>118</sup> Article 22 (Freedom of Movement and Residence) in paragraph 7 forms the basis of protection for refugees. Article 22(7) stipulates:

"Every person has the right to seek and be granted asylum in a foreign territory in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offences or related common crimes."

But Article 22(8) imposes a strict obligation of non-

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<sup>118</sup> The Convention, also called the Pact of San José, was signed by the OAS Member States on 22 November 1969 in San José. The Pact of San José contains the following:

Preamble, Part I: Article 1 (Obligation to Respect Rights); Article 2 (Domestic Legal Effect); Article 3 (Right to Juridical Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); Article 6 (Freedom from Slavery); Article 7 (Right to Personal Liberty); Article 8 (Right to a Fair Trial); Article 9 (Freedom from Ex Post Facto Laws); Article 10 (Right to Compensation); Article 11 (Right to Privacy); Article 12 (Freedom of Conscience and Religion); Article 13 (Freedom of Thought); Article 14 (Right to Reply); Article 15 (Right to Assembly); Article 16 (Freedom of Association); Article 17 (Right of the Family); Article 18 (Right to a Name); Article 19 (Right of a Child); Article 20 (Right of Nationality); Article 21 (Right of a Property); Article 22 (Freedom of Movement and Residence); Article 23 (Right to Participate in Government); Article 24 (Right to Equal Protection); Article 25 (Right to Judicial Protection); Article 26 (Progressive Development); Article 27 (Suspension of Guarantees); Article 28 (Federal Clause); Article 29 (Restrictions regarding Interpretation); Article 30 (Scope of Restriction); Article 31 (Recognition of Other Rights); Article 32 (Relationship between Duties and Rights). Part II: Article 3 (The following organs are to have competence: Inter-American Commission on Human Rights (Commission) and Inter-American Court of Human Rights (Court). [my emphasis])

Text in International Legal Materials 99, reproduced from OAS, Official Records, OEA/Ser.K/xvi/i.i, Doc.65/Rev/Corr.i of 7 Jan 1970.

refoulement on Contracting States:

"In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions."

There is no specific mention of expulsion in this provision and non-rejection or non-refoulement are not catered for, but Article 22(9) does state the following provision: "The Collective Expulsion of Aliens is Prohibited". But, in fact, Article 22(7) combined with Article 22(8) of the American Convention, does provide a basis of protection for refugees or aliens against refoulement. The American Convention on Human Rights is of a binding nature upon States which are parties to it.

7.6.3 European Continent

In Europe, the Committee of Ministers of the Council of Europe<sup>119</sup> in 1967 adopted and recommended an important

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119 The Statute of Council of Europe was signed in London by the governments of Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom, on 5 May 1949. This Statute came into force on 3 August 1949.

Article I states the Council's aim as being: "to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are common heritage and facilitating their economic and social progress. This aim shall be pursued ... by discussion of questions of common concern and by agreements and common actions."

resolution, namely Resolution (67)14, which states that Member Governments should be guided by the following principles:

"2. They should, in the same spirit, ensure that no-one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion." 120

This resolution explicitly includes terms of "refusal of admission" or "rejection at the frontier" as an integral part of the non-refoulement principle. There is a provision for exceptions to be made if this is necessary to safeguard national security or protect the community from serious danger. The term "... or any other measure which would have the result of compelling him to return to ..." indicates a very wide provision which is commendable and gratifying. However, this resolution is NOT binding on States that are party to the Council of Europe and the resolution is merely recommendatory. Perhaps future drafters could use the structure and contents of this resolution as guidelines for the provisions of the principle of non-refoulement.

#### 7.6.4 Asian Continent

In the Asian Continent, recommendations were adopted by the

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120 Resolution on Asylum to Persons in Danger of Persecution, Principle 2, reprinted in the 1967 European Yearbook, pp.349-351.

Afro-Asian Legal Consultative Committee in Bangkok in 1966 on how the refugees were to be treated. In "Principles concerning Treatment of Refugees", the function of the Committee under statute was advisory only and the view which was agreed on was that it was the government which was to decide on how to put these recommendations into effect. The Committee was an intergovernmental organisation established in 1956 with its headquarters in Delhi, India. The States involved were: Burma, Ceylon, Egypt, Ghana, India, Indonesia, Iraq, Iran, Japan, Jordan, Kenya, Kuwait, Malaya, Nepal, Nigeria, Pakistan, Philippines, Sierra Leone, Syria and Thailand.

The principles which the Afro-Asian Committee adhered to became known as the "Bangkok Principles". They provided a slightly wider definition of a "refugee" compared to the 1951 Convention.<sup>121</sup>

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121 In Article I, the term "colour" was included as one of the grounds which may give rise to a well-founded fear of persecution. Article II indicates how the refugee status is regulated and how the loss of that status is regulated. Article II simply states:

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

Comparison of Article 3 of the UN Declaration on Territorial Asylum with Article III.3 and Article III.4 of the Bangkok Principles shows them to be similar. The entire discretion whether a State can grant asylum to a refugee or asylum-seeker, is left for the State. However, once again, when comparing Article 33 of the 1951 Convention, which contains the principle of non-refoulement, we note that in Article III.3 of the Bangkok Principles the express term "non-rejection at the frontier" is mentioned. Even Article II.4 of the Bangkok Principles requires the granting of temporary asylum in certain cases. Article VIII provides:

"1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not expel the refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

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

The provision of Article VIII.1 states that A State shall not expel a refugee except on grounds of "national or public interest". Article VIII of the Bangkok Principles differs from Articles 32 and 33 of the 1951 Convention, particularly by replacing the reasons justifying expulsion, namely "grounds of national interest or public order" by "national or public

interest or on the ground of violation of conditions of asylum". (There was a debate in the Afro-Asian Legal Consultative Committee and the Representatives of Ceylon, Ghana and Japan expressed the view that the wording should be somewhat strengthened to increase the protection of refugees. The Afro-Asian Legal Consultative Committee did not adopt these views due to the time pressure under which the Committee was working). This assumes that the refugee has entered the territory and the principle of non-refoulement applies except in the above two cases. However, Article VIII.3 suggests no such exceptions to deportations or returning refugees to a State where lives will be threatened by persecution. Article VIII.3 seems, prima-facie, more stringent than Article 33 of the 1951 Convention. Article VIII.3 seems to contain an absolute rule of non-refoulement of the refugee, especially in the terminology which uses phrases such as " a refugee shall not be deported or returned to a place where he would suffer persecution". Similar to the Council of Europe, the Bangkok Principles are NOT binding.

#### 7.6.5 Caracas Convention on Territorial Asylum (1954) <sup>122</sup>

The Caracas Convention adopted similar provisions to the Bangkok Principles, especially Article 3 which states:

"No State is under the obligation to surrender to

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<sup>122</sup> Signed in Caracas on 28 March 1954 at the Tenth International American Conference. Text: OAS Official Record, OEA/Sec.X/I, Treaty Series 24.

another State, or to expel from its own territory, persons persecuted for political reasons or offences."

Article 3 of the Caracas Convention is not as strong as Article VIII.3 of the Bangkok Principles; nevertheless it does recommend that States should not expel or surrender refugees. No exemptions are stated, although one can see that the word "obligation" is used in preference to, say, "shall" (as was the case in the 1951 Convention and Bangkok Principles). There is a limitation, namely the reference to "persons persecuted for political reasons or offences", no mention here of broader reasons for fleeing, such as violation of human rights or even persecution.<sup>123</sup>

#### 7.6.6 Agreement Relating to Refugee Seamen

This Agreement was made at the Hague on 23 November 1957.<sup>124</sup>

Article 10 is of special concern to us. It states:

"No refugee seaman shall be forced as far as it is in the power of the contracting parties, to stay on board a ship which is bound for a port, or is due to sail through waters, where he has well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion."

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<sup>123</sup> See Article 4 concerning the right of extradition not being applicable to persons of political offences, reasons or motives.

<sup>124</sup> 506 UNTS 125. The Governments of Belgium, Denmark, France, West Germany, UK, N.Ireland, Netherlands, Norway and Sweden were represented.

The "refugee seaman" is defined in Article I of this Agreement as:

- "(a) Convention shall apply to the Convention relating to the Status of Refugees of 28 July 1951;
- (b) the term "refugee seaman" shall apply to any person who, being a refugee according to the definition of Article I of the Convention ..."

The position of the "refugee seaman" is similar to the refugee who presents himself at the border seeking refuge.

Article 10 implies a quasi-principle of non-refoulement. The refugee seaman is not to be forced to stay on board a vessel which is either sailing to a port or through waters where there may be danger for the refugee seaman. In other words, the refugee seaman is not to be refouled to a place where his life may be threatened.

#### 7.6.7 The European Convention on Human Rights 125

Article 3 of the European Convention on Human Rights stipulates: "No one shall be subject to torture or inhumane or degrading treatment or punishment". Article 3 guarantees a fundamental right which will be infringed if the person was returned to a country where he risks torture or inhuman or

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125 Text ETS No.5. See also Protocol No.4, 1963. Also, Plender, "Problems raised by certain aspects of the present situation of refugees from the standpoint of the European Convention on Human Rights", Strasbourg, 1954.

degrading treatment,<sup>126</sup> as stressed by the explanatory memorandum in Recommendation No.R(84)1.

The European Commission of Human Rights (Commission) stipulated that:

"Under certain circumstances the repeated expulsion of a foreigner without identity papers or travel documents and where state of origin is unknown or refuses to accept him could raise a problem under Article 3 of the Convention which prohibits inhumane or degrading treatment."<sup>127</sup>

The Commission implied that although the refouling State may not be breaching the 1951 Convention and/or 1967 Protocol, it would and could entail a breach of the European Convention on Human Rights. The Commission has further stated that:

"L'expulsion d'un étranger peut, dans certaines condition exceptionnelles, constituer un traitement inhumain ou dégradant au sens de l'Article 3."<sup>128</sup>

In cases of refouling fugitives or refugees, the Commission has constantly reaffirmed that the expulsion or extradition of a person may raise the issues under Article 3 where there are

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- 126 See J.E.S. Fawcett, The Application of the European Convention on Human Rights, Clarendon Press, Oxford, 1987, pp.41-53.
- 127 Application No.8100/77, X v Federal Republic of Germany and No.7162/76, Giama v Belgium, XXIII Yearbook, 1980, p.428.
- 128 984/61: Recueil 6. Non-expulsion is expressly mentioned within Article 3 of the 4th Protocol and collective expulsion is prohibited within Article 4 of the same Protocol to the European Convention on Human Rights. See the Non-Refoulement in International Law section for definitions of these articles.

serious reasons to believe that the fugitive will be subjected to treatment contrary to that Article at the country of destination.<sup>129</sup> In the Amerkrane case, the Commission found violation of Article 3 in view of their assessment that there was a serious risk of life; that the Commission took into account the fugitive's conduct in the Contracting State for the purpose of determining whether it is consistent with that of a genuine refugee.<sup>130</sup>

The 1951 Convention and/or 1967 Protocol do not guarantee for each refugee a right to a judicial determination of his claim. The European Commission on Human Rights provides, in effect, that anyone claiming that his rights and freedom as set forth in this Convention are violated shall have an effective remedy before a national authority. So, when a refugee is detained and his detention is a breach of Article 5(1)f of the Convention, he is entitled to a speedy determination of his claim by a court. It would be strange if a person were not even entitled to an "effective remedy" when complaining that he is to be removed, deported or extradited by a State or territory in which he claims that he will suffer inhuman or degrading treatment.

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129 Becker v Denmark, 4 DR, 1976, p.205. And Application No.1802/63, X v Federal Republic of Germany, VI Yearbook, 1963, p.462.

130 Application No.7216/75, X v Federal Republic of Germany. See also the recent case of Soering v United Kingdom, Application No.14038/88 in European Commission of Human Rights, 198th session, DH(88)10 held on 7 to 11 November 1988, p.14.

7.6.8 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985) <sup>131</sup>

This very recent Convention has expressly catered for the principle of non-refoulement within Article 3:

"1. No State Party shall expel, return (refoule) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

This provision is of great interest, especially since it was a specific convention relating to torture and inhuman or degrading treatment or punishment, especially since it prohibits the refoulement of persons to where they would face torture or, in other words, violations of human rights.

Article 3(2) of the Torture Convention indicates to the competent authorities to take into account all considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights.

This Convention is now in force,<sup>132</sup> for the commentary of the travaux préparatoires, along with the commentary, Rodley is

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<sup>131</sup> 7th European Human Rights Report, pp.325-340.

<sup>132</sup> Came into force on 26th June 1987 as a result of ratification by Denmark. States either ratified or acceded: Afghanistan, Argentina, Belize, Bulgaria, Byelorussian SSR, Cameroon, Denmark, Egypt, France, Hungary, Mexico, Norway, Philippines, Senegal, Mexico, Switzerland, Uganda, Ukrainian SSR, USSR, and Uruguay. Adopted by GA on 10th December 1984.

quite succinct.<sup>133</sup>

Many treaties, declarations and resolutions contain the principle of non-refoulement - universal, general or regional. The Contracting States have to adhere to this principle if it is binding upon them. However, there is a limitation as to full application of the principle of non-refoulement. Not all States of the United Nations are legally bound to implement this principle, so, due to this deficiency, it leads us to look at the principle of non-refoulement and Customary International Law. To see whether non-refoulement is implemented in Customary International Law.

7.7

#### NON-REFOULEMENT IN CUSTOMARY INTERNATIONAL LAW

The position of the principle of non-refoulement as part of customary international law, is far from conclusive. A guideline was presented by the International Law Commission for a principle of international law to become a part of customary international law. This guideline outlined that the principle must be found in various texts of international instruments, UN General Assembly Resolutions, State practice and international conferences.

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<sup>133</sup> Rodley, The Treatment of Prisoners under International Law, UNESCO/Clarendon Press, London, 1987. See also J. Herman Burgers and Hans Danelin's International Studies in Human Rights Series, Martinus Nijhoff, Dordrecht, 1989.

7.7.1 The Final Act of the United Nations Conference on the Status of Stateless Persons

Some evidence of customary law is found in the final act of the UN Conference on the Status of Stateless Persons, which was adopted on 28th September 1954,<sup>134</sup> paragraph 4 states:

"The Conference,

Being of the opinion that Article 33 of the 1951 Convention is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, nationality, membership of a particular social group or political opinion.

Has not found it necessary to include in the Convention relating to the Status of Stateless Persons on article equivalent to Article 33 of the Convention relating to the Status of Refugees of 1951".

The Economic and Social Council, on 26 April 1954 at its 17th session, decided that a second Conference of Plenipotentiaries should be convened to revise in the light of the provisions of the Convention relating to the Status of Refugees of 28 July 1951 and of the observations made by Governments on the draft Protocol relating to the Status of Stateless Persons prepared by an Ad Hoc Committee of the Economic and Social Council in 1950.<sup>135</sup> Paragraph 4 was unanimously adopted, with the Representative of Australia stating:

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134 360 UNTS 117. Conference decided 12:8:3 abstentions (with 5 observers).

135 By Resolution 526 A(XVII). UN OR of the Economic and Social Council, 17th Session, Supplement No.1 (E/2596), p.12.

"... this paragraph is of the highest importance ... we cannot add further comments than those already adopted in the first conference of plenipotentiaries ..." 136

And the Representative of Belgium added:

"Article 33 of the Convention relating to the Status of Refugees of 1951 was an important and a crucial part of the refugee problem ... and that it is not necessary to include in the present conference." 137

The President of the Conference (Representative of Denmark) made no other comments but added that the Representative of Australia was in total agreement with his remark.<sup>138</sup> No further comments were recorded by the Ad Hoc Committee on the question of the Travel Document for Stateless Persons and the Style Committee.

The Convention relating to the Status of Stateless Persons,<sup>139</sup> done at New York on 28 September 1954, did not contain any provision relating to non-refoulement, as was unanimously agreed by the Conference, although Article 31 of the Convention relating to the Status of Stateless Persons did relate to expulsion of stateless persons.

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136 Un Doc E/Conf.17/13.

137 Ibid., 17/16.

138 Ibid., 17/19.

139 Came into force on 6 June 1960. Adopted 19:0:2 abstentions.

The fear of persecution or persecution is an essential element of refugee status. However, this is not the case for "stateless persons". The term "stateless persons" was defined by the Convention relating to the Status of Stateless Persons as: "A person who is not considered a national by a State under the operation of its law" (Article 1). The question of so-called de facto stateless persons, ie. of persons who possess a nationality but do not enjoy the protection of the State of nationality nor of any other State, gave rise to much discussion at the Conference of Plenipotentiaries which drafted and adopted the Convention relating to the Status of Stateless Persons. The Representative of Belgium proposed the inclusion of:

"... persons who invoke reasons recognised as valid by the State in which they are resident for renouncing the protection of the country of which they are nationals in the definition of the term 'stateless persons'". 140

#### 7.7.2 Non-Refoulement and the United Nations

The UN Declaration on Territorial Asylum of 1967<sup>141</sup> concluded by stating that while the principle of non-refoulement is universally recognised, the danger of refoulement could be ore readily avoided if the State concerned has accepted a formal legal obligation defined in the international instrument. This

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140 UN Doc.E/Conf.17/2.3. See also, Weis, "The Convention Relating to the Status of Stateless Persons", ICLO, Vol.10, 1961, pp.255-264.

141 A/Res/2312(XXII).

underlines the importance of further accessions to the 1951 Convention and to the 1967 Protocol. States that have not yet acceded to these instruments should nevertheless apply the principle of non-refoulement in view of its universal acceptance and humanitarian importance.<sup>142</sup>

Like the regional treaties, the United Nations has provided fuller support to the principle of non-refoulement. The Declaration on Territorial Asylum was adopted by the General Assembly of the United Nations on 14 December 1967.<sup>143</sup> Article 3(i) of the Declaration is of important ambit and it specifically provides for non-rejection at the border or frontier, asserting the principle of non-refoulement at the border or territory frontier. Article 3(i) states:

"No person referred to in Article 1, paragraph 1,<sup>144</sup> shall be subjected to measures such as rejection at the frontier or if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be

142 Ibid.

143 Resolution 2312 (XXII).

144 Article 1(i) of the Declaration on Territorial Asylum (Resolution 2312 (XXII) states:

"Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States."

In above reference to Article 14 of the Universal Declaration of Human Rights, the Article states: "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be involved in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". See Chapter Eight.

subjected to persecution."

Although Article 3(i) of the Declaration provides a comprehensive provision relating to non-refoulement there are certain exceptions formulated in the form of paragraph 2 of Article 3 of the Declaration. It provides:

"Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as is the case of a mass influx of persons."

These words, unlike those contained in Article 33 of the 1951 Convention, do not seem to be directed at the individual asylum-seeker or refugee. In that sense, it may provide a wider state of exceptions. However, Article 33 of the 1951 Convention was adopted on the understanding that it may not be absolutely binding in the case of a contingency such as a mass influx of persons.<sup>145</sup>

Article 3(ii) of the UN Declaration on Territorial Asylum seems to suggest that the individual will not be refouled, but the group masses may be so if they are a threat to national security or for safeguarding the local population.

The United Nations Declaration on Territorial Asylum stipulates the exceptions in Article 3(iii) as:

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<sup>145</sup> See analysis to Article 33 of the 1951 Convention in this chapter.

"Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional or otherwise, of going to another State."

This provision clearly states that if the exception is to be utilised the State of asylum or refuge can in fact grant the refugee a distinct possibility of going to another State provided, of course, the other State is willing and prepared to accept this refugee(s).

### 7.7.3 Executive Committee of the UNHCR

The recommendations of the Executive Committee of the UNHCR can also play an important part on the assessment of the principle of non-refoulement as a rule of customary international law.

The Executive Committee of the High Commissioners Programme is a body composed of 41 Member States, 43 observer States, UN bodies, intergovernmental organisations, non-governmental organisations, and organisations such as the African National Congress (ANC), PAC and South West Africa Peoples Organisation (SWAPO). It is of vital importance in the formation of customary law, to note the resolutions passed by this Committee on the subject matters.

One of the most important resolutions adopted in 1977<sup>146</sup> was No.6 (XXVIII) "Non-Refoulement" recalling:

"(a) ... that the fundamental humanitarian principle of non-refoulement has found expression in various international instruments at universal and regional levels and is generally accepted by States;"

and

"(b) Expressed deep concern at the information given by the High Commissioner that while the principle of non-refoulement is in practice, widely observed this principle has in certain cases been disregarded.

(c) Reaffirms the fundamental importance of the principle of non-refoulement both at the border and within the territory of a State, of a person who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised as refugees."

The Executive Committee has adopted this important resolution on the principle of non-refoulement, in paragraph (a) acknowledging that the principle of non-refoulement is universally adopted in various treaties and instruments, reaffirming that the principle is almost a rule of customary international law. But paragraph (b) indicates that although the principle of non-refoulement is respected, there have been some instances where this principle has been disregarded in practice (indicating a hinderance to the principle becoming a

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<sup>146</sup> 28th Session Conclusion endorsed by the Executive Committee of the High Commissioner's Programme, upon the recommendation of the Sub-Committee of the Whole on the International Protection of Refugees.

rule of customary law).<sup>147</sup> The Executive Committee called for the strengthening of the High Commissioner's protection function, and that "... continuing violation of the principle of non-refoulement was noted with particular concern ..."<sup>148</sup>

Paragraph (c) is highly important. It states, firstly, that no asylum-seeker shall be returned or rejected at the border or within the territory of a State; and, secondly, it does not matter whether the refugee is formally recognised or not. Many asylum-seekers are not formally recognised as refugees and, unfortunately, this seems to be a loophole in which States can refoule asylum-seekers. The Executive Committee has obviously noted this loophole and hence inserted in the last line. The Executive Committee have on several occasions<sup>149</sup> referred to

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147 The Executive Committee actually stated this at the 38th session in Geneva from 5-12 October 1987, p.13 of the report submitted to the UNHCR.

148 Ibid.

149 No.8 (XXVIII) (United Nations General Assembly Doc. No.12A(A/32/12 Add.1). Determination of Refugee Status: No.8 (XXVIII) UN Documents General Assembly No.(A/32/12 Add.1). Determination of Refugee Status.

(i) "... He (competent official) should be required to act in accordance with the principle of non-refoulement ..."

(ii) No.14 (XXX) (UN General Assembly Document No.12/A(A/34/12/Add.1) General, the Executive Committed noted: "... with concern that refugees had been rejected at the frontier or had been returned to territories where they had reasons to fear persecution in disregard of the principle of non-refoulement ..."

(iii) No.15 (XXX) (Ibid.), Refugees with Asylum Country. The Executive Committee considered that States should be guided by the following considerations: General Principle:

"(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of recognised principle of non-

refoulement;"

(iv) Conclusions adopted by the Executive Committee on International Protection of Refugees (UN General Assembly Document No.12A(A/35/12 Add), No.16 (XXXI) generally expressed serious concern that: "... the fundamental principle of non-refoulement has been disregarded ..."

(v) No.17 (XXXI) in Problems of Extradition affecting refugees. The Executive Committee reaffirmed: "... the fundamental character of the generally recognised principle of "non-refoulement".

(vi) No.19 (XXXI) on Temporary Refuge, the Executive Committee reaffirmed the essential need for: "... humanitarian legal principle of "non-refoulement" to be scrupulously observed ..."

(vii) No.21 (XXXII) General (contained in UN General Assembly Document No.12A (A/36/12 Add.1). The Executive Committee: "(f) Noted with particular concern that in certain areas refugees have been refused asylum, have been rejected at the frontier or subjected to measures of expulsion or forceable return in disregard of the fundamental principle of "non-refoulement".

(viii) No.22 (XXXII), the Executive Committee adopted an Admission and "Non-refoulement". "2. In all cases the fundamental principle of "non-refoulement" including non-rejection at the frontier must be scrupulously observed".

(ix) No.25 (XXXIII) Contained in UN General Assembly Doc.No.12A (A37/12 Add.1) General, the Executive Committee reaffirmed the: "... importance of the basic principle of international protection and in particular the principle of "non-refoulement" which was progressively acquiring the character of a peremptory rule of international law".

(x) No.29 (XXXIV) General. Contained in UN General Assembly Doc.No.12A(A/38/12 Add.1), the Executive Committee: "(c) noted with satisfaction that many States in different areas of the world and, in particular, in developing countries faced with serious economic problems have continued to apply recognised international humanitarian standards for the treatment of refugees and to respect the principle of "non-refoulement".

(xi) No.33 (XXXV) General. Contained in UN General Assembly Doc.No.12A(A/39/12 Add.1), the Executive Committee noted: "... with concern that in different parts of the world the fundamental principle of "non-refoulement" has been violated".

(xii) No.36 (XXVI) General. Contained in UN General Assembly Doc.No.12A (A/40/12/Add.1), the Executive Committee noted:

the principle of non-refoulement indicating the importance attached to the principle.

#### 7.7.4 Non-Refoulement and UN General Assembly Resolutions

By the term "usage" in State practice, the International Law Commission included the practice of international organisations.<sup>150</sup> Records of the cumulative practice of international organisations may be regarded as evidence of customary international law. The United Nations, in particular, has an influence on the possible development of non-refoulement into customary law. The United Nations does involve itself in the creation of specific treaty commitments and resolutions, although not binding, along with the recommendations which may at least form the foundation of State practice from which development into a customary law may occur.

The early UN General Assembly resolutions did not mention the principle of non-refoulement in any shape or form,<sup>151</sup> because after World War II had ended, refugees were by and large granted asylum and the idea of refoulement was totally non-existent. However, as the number of asylum-seekers increased,

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"... with serious concern that despite the development in observing the principle of "non-refoulement", there were still cases where asylum-seekers were refouled ..."

<sup>150</sup> Yearbook ILC (II), 1950, op.cit., pp.368-372.

<sup>151</sup> Res. 3454 (XXX), Official Records of the General Assembly, 30th session, supplement no.34 (A/10034) and Res.31/35, Official Record of the General Assembly, 31st session, supplement no.39 (A131/39).

economic burdens began to weigh heavily on the developing countries and unfortunately the asylum-seekers were refouled because of these burdens.

The UN General Assembly subsequently debated and eventually highlighted the principle of non-refoulement. In several resolutions, the UN urged governments:

"... to provide international protection and the need for governments to continue to co-operate fully with his office in order to facilitate the effective exercise of this function, in particular, by according to and implementing the relevant international and regional refugee instruments and by scrupulously observing the principle of asylum and non-refoulement."

These resolutions include, inter alia,:

40/118(1);<sup>152</sup>      39/140(2);<sup>153</sup>      37/195(4);<sup>154</sup>  
 37/195;<sup>155</sup>      36/125;<sup>156</sup>      34/60;<sup>157</sup>  
 32/67.<sup>158</sup>

The importance of these resolutions was indicated when the

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- 152 Official Records of the General Assembly, 40th session, Supplement No.12 (A/40/12).
- 153 Ibid., 39th session, Supp. No.12 (A/40/12).
- 154 Ibid., 38th session, Supp. No.12 (A/38/12 and Corr.1).
- 155 Ibid., 37th session, Supp. No.12 (A/37/12).
- 156 Ibid., 36th session, A/36/12/Add.1.
- 157 Ibid., 34th session, Supp. No.46 (A/34/46).
- 158 Ibid., 32nd session, Supp. No.45 (A32/45).

drafts of these resolutions were adopted without a vote by the Third Committee, and eventually recommended to the General Assembly. The General Assembly then adopted these resolutions without a vote.

The United Nations General Assembly has "deplored" the fact that refugees were refouled on two separate occasions: in Resolution 33/26<sup>159</sup> and 37/195,<sup>160</sup> the General Assembly acknowledged the fact that refugees were often faced with the threat of refoulement and further acknowledged that such refugees should be protected against such measures (refoulement).

#### 7.7.4.1 Some observations

(1) Resolution 35/41<sup>161</sup> excludes the common use of the word "scrupulously" and simply urges Governments to "observe" the principle and problem of non-refoulement.

(2) There are only two UN General Assembly resolutions (33/26

159 Ibid., 33rd session, Supp. No.45 (A/33/45). Adopted without a vote.

160 Ibid., 37th session, Supp. No.12 (A/37/12). Adopted without a vote.

161 Ibid., 35th session, Supp. No.12 (A35/12). The General Assembly urged: "... Governments to intensify their support for activities which the High Commission is carrying out in accordance with the relevant resolution of the General Assembly and the Economic and Social Council, especially by: (a) Facilitating these efforts in the field of international protection by observing the problem of asylum and non-refoulement relating to refugees". This resolution was adopted without a vote.

and 37/195) which deplore the fact that refugees often faced the threat of refoulement.

- (3) Only two resolutions out of eleven deplore the fact that refugees are often faced with refoulement.
- (4) Resolutions 40/118, 39/140, 38/121, 37/195, 36/125, 34/60 and 32/67 proved that governments should "scrupulously" observe the principle of non-refoulement.
- (5) The word "observe" is used somewhat loosely. There is no explicit or forcible assertion to make the principle of non-refoulement mandatory and obligatory. There is also no direct or forcible (see later) wording which would make the governments and States implement and enforce the principle of non-refoulement.
- (6) Strong wording should have been used to illustrate the seriousness and gravity of the situation. The resolutions should contain wordings to the effect that the General Assembly should condemn States who refoules asylum-seekers and refugees, and should implement provisions in the nature of each State shall or must implement the principle of non-refoulement.

In conclusion, the UN resolutions do not amount to a binding

custom on non-refoulement but only recommendations.<sup>162</sup>

7.8

ARTICLE 33 AND CUSTOMARY LAW

Could Article 33 of the 1951 Convention be treated as a norm-creating provision which has constituted the foundation of or has generated a rule which, while only conventional in its origins, has since passed into the general CORPUS of international law? It is now accepted as such by the "opinio-juris", so as to have become binding even for countries which have never, and will not, become parties to the 1951 Convention. This seems possible and does occur from time to time, constituting one of the recognised methods by which rules of customary international law may be formed. But, at the same time, this result is not to be regarded lightly as having been attained. Can Article 33 of the 1951 Convention become a rule of customary international law? It seems possible, as long as it has a fundamentally norm creating character and, as the ICJ indicated, it: "could be regarded as forming the basis of a general rule of law".<sup>163</sup> If this is so, then a passage of only a short period of time is not necessarily a bar to what was originally a purely conventional rule. A further requirement would be within the period in question, even though it may be short. This is competently and well satisfied by Article 33 of the 1951 Convention. State

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<sup>162</sup> See UN Resolution section, supra, for a discussion on whether the UN resolutions are binding or not.

<sup>163</sup> ICJ Report, 1969, p.42.

practice<sup>164</sup> should have occurred in such a way to show a general recognition that a rule of law or legal obligation is involved.

The ICJ in the North Sea Continental Shelf Case, mentioned "rule of law" or "legal obligation", but looking at the 1951 Convention, it can be noted that the obligations are not drafted in norm-creating terms but rather of contractual undertakings, for instance, Articles 31 and 32. Comparing this, one can note later instruments which are law-making, for example, Article II.3 in the Bangkok Principles and the 1969 OAU Convention. These latter instruments indicate the wider law-making potential, since the obligation is no longer limited by reference to a contracting party. This does support the principle of non-refoulement gradually becoming and being accepted as a rule of general principles. The ICJ, stated an important point in acknowledging customary law. Reservation to an article, although it might not of itself prevent the contents of the article being eventually received as general law,<sup>165</sup> it does add a "drag" factor towards the eventual formulation of the article as general law. The court would deny: "... to the provisions of Article ... the same norm creating character as ...".<sup>166</sup> This could be attributed to those articles to which no reservation can be made. The 1951

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164 Including that of States whose interests are specially affected.

165 ICJ, Report 4, 1969, p.42.

166 Ibid.

Convention does not allow reservation to, inter alia, Article 33. This would co-ordinate with the court's latter view in the North Sea Continental Shelf Case, hence my emphasising that it could possibly end up as a law-making potential or general international law per se.

State practice can be used as an international indicator to assess whether a principle or rule is a part of customary international law. State practice in relation to the principle of non-refoulement is uncertain and not free from complexity. Some States have adopted the principle of non-refoulement within their domestic regulations and laws while others have not. This indicates that perhaps there is not much "custom" in evidence. However, it is advantageous for the reader to know some systems which have adopted the principle of non-refoulement and some which have not. Several countries have been chosen at random with no political motive.

7.8.1 Examples of Countries Incorporating the Principle of 'Non-Refoulement'

- (i) Italy.<sup>167</sup>
- (ii) Switzerland.<sup>168</sup>

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<sup>167</sup> When East Europeans request asylum at the Italian border, the border authorities immediately send them to a reception centre in Latina, where they remain during the processing of their claim. However, the border authorities have complete discretion whether or not to grant the East Europeans asylum. Italy recognises the principle of non-refoulement as a general principle of international law. In practice, asylum-seekers from non-European countries are seldom turned away at the border. If certain groups engage in terrorist activities whilst on Italian soil, then the Italians may well resort to expulsion. However, Law No.943 on the employment of foreigners not nationals of the EEC countries took effect on 27 January 1987. Under the new law, any foreigners entering Italy illegally before 27 January 1987 could gain a work and residence permit if they presented themselves to the authorities by 27 June 1987. In order to substantiate their date of arrival, they had to provide documentary evidence. Anyone failing to take advantage of this opportunity was liable to deportation upon expiration of the amnesty.

Further legislation has been promised which will indirectly lift Italy's geographical reservation to the 1951 Convention and establish comprehensive asylum law for the first time in the country's history.

<sup>168</sup> The principle of non-refoulement is adopted in Article 45 of the law on Asylum 1979 (Sammlung der Eidgenossischein Gesetze) (AS), but Swiss law requires that the border guards hold asylum-seekers from adjacent countries to Switzerland in a transit hall while consultation takes place with the Federal Office of Police in Berne, which is the central decision-making authority. In doubtful cases, representatives of the Federal Police interview asylum-seekers, by phone in some instances. In normal circumstances, the representatives and the border guards discuss the cases (although no records are kept of these meetings). The Federal Police Office may refuse entry if there is no evidence that the applicant will be exposed to danger if returned to his country of origin. Although the principle of non-refoulement is respected, the Swiss Section of Amnesty International have some cases of refoulement of refugees simply on the decision of the border guards (see Amnesty International Report 1987, p.31).

(iii) Nicaragua.169

7.8.2 Examples of Countries Not Incorporating the Principle of 'Non-Refoulement'

(i) Egypt.170

169 Nicaragua has received a new constitution, active from 1st January 1987 and within this constitution, Article 42 is of special significance and reference in relation to the principle of non-refoulement.

Article 42 states: "En Nicaragua se garantiza el derecho de asilo a los perseguidos por luchar en pro de la democracia, la paz justa cf, los derechos humanos, la ley determinara 'la candicion' de asilado o convenios internacionates ratifica dos par Nicaragua. En caseo acordora la expulsion de un asilado, nunca podra enviarsele al pais donde fuese perseguido".

This Article guarantees the right to give asylum to all those who are being persecuted for fighting for democracy, peace and human rights. The law will determine refugee status, according to the international agreements ratified by Nicaragua. In case the expulsion of a refugee was agreed, the refugee would never (my emphasis) be sent back to the country where he was persecuted. Clearly, Nicaragua is observing the principle of non-refoulement and has adopted a well-thought out article.

170 Egypt has ratified the 1951 Convention and the national authorities can refuse asylum and temporary refuge for reasons which resort to their exclusive and sovereign concern and which excludes the normal implementation of the right of asylum under the international refugee instrument to which Egypt has adhered to. Such a negative decision is expected to have a consequence, the immediate expulsion of the refugee. In such circumstances, the UNHCR, under its protection mandate, verifies that the refugee is not refouled to his country of origin (an eventuality which is excluded by the Egyptian authorities under the clause of non-refoulement).

However, on expulsion or refoulement, the UNHCR can identify another intermediary solution, ie. another place of temporary asylum. Experience has shown and proved that even if such other intermediary solutions can be found, some delay (up to one month) is anyway necessary to make arrangements for travel and admission in another country. Hence it does not provide a satisfactory answer to the decision of immediate expulsion and even for that reduced time it would need some residence regularisation which would appear incompatible with the rejection of asylum.

- (ii) Japan.171
- (iii) Malaysia.172

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- 171 Japan is among many South-East Asian countries which is not a signatory party to the 1951 Convention and 1967 Protocol. So the subjective matter of refugee is always referred to ordinary immigration and deportation procedures. Although it is interesting to note that Japan does respect and adhere to customary international law relating to political refugees (Article 98(2) of the Japanese Constitution) and recognises Article 14 of the Universal Declaration of Human Rights, relating to enjoyment of asylum from persecution under the legislation (Immigration Control Order Law No.126 of 1952 and Law No. 268 of 1952 (as amended), Articles 3 & 4(5)). Although special permission may be granted under Article 4(I)(16) of the Immigration Control Order, refugees arriving without visas have been prevented from landing; only persons entering as students, tourists or diplomats may be allowed entry. This seems a peculiar law, especially as many refugees would certainly not want to enter Japan as tourists or diplomats. Refugees arriving on boats may be denied entry to Japan and can be refouled (under Articles 57(2), 58 & 59, *ibid.*). If the State feels that refugees may be a burden on the State (non-political refugees), then these asylum-seekers will be denied entry. In 1981, approximately 450 asylum-seekers were denied entry and refouled, and subsequently 75 of these asylum-seekers perished through drowning, starvation and pirate attacks. (These were Laotian refugees from Thailand. See UN Doc. A/AC 96/595. Figures are only approximate since there is conflict between the official UNHCR figures and official Japanese figures).
- 172 Malaysia, along with Indonesia, the Philippines, Singapore and Thailand, each adduced various objections to local integration. Malaysia in 1975 declined to allow refugees to settle locally (those fleeing from Kampuchea, Laos and Vietnam) and in 1979 Malaysia announced that it would permit no more landings, threatening to tow boat-loads of asylum-seekers to sea and shoot any which attempt to return on sight. Subsequently the Malaysian Foreign Office announced it would not shoot boat-people, but numerous boats were still turned out to sea, with resulting loss of life - in actual fact, refoulement had taken place. At the 12th ASEAN Foreign Ministers Meeting in Bali, Indonesia on 28-30 June 1979, the Malaysian Foreign Minister stated: "... several South-East Asian nations have made repeated assertions that they have no legal obligation to refugees arriving at or crossing their borders, making the point that refugee status is granted as a humanitarian gesture only, not as a result of any duty owed under customary international law". He further stated: "... if we accept refugees, we face internal hardship and if we refuse, we face hardship from the international community".

7.9

FURTHER REFLECTIONS ON 'NON-REFOULEMENT IN CONFERENCES

In regional conferences, the principle of non-refoulement is almost invariably discussed, but two crucial questions arise from international conferences: Who participates at these conferences and What significance is there in endorsing the principle of non-refoulement as a part of customary international law? There have been many regional conferences but listed below are what have been the most prominent in terms of the number of States which participated in them:

- (a) The Arusha Conference in 1979<sup>173</sup> discussed many refugee situations in Africa. The President of the Conference, President Nyerere of Tanzania, in his opening statement, stated that there has been a general acceptance of the principle of non-refoulement and "that this principle should be observed to a great extent". He further stated "that the principle of non-refoulement is a basic humanitarian law".<sup>174</sup>

The Conference concluded that a provision be made whereby the protection of individuals by virtue of the principle of non-refoulement be ensured.<sup>175</sup>

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173 UN Doc. A/AC 96/549 and see the report in summary form in UN Doc. A/AC 96/Inf.158, p.9. (Seven African States participated at this Conference).

174 Ibid., p.10.

175 Ibid., p.14.

- (b) A Meeting on Refugees and Displaced Persons in South-East Asia, which was convened by the United Nations General-Secretary. The meeting was only attended by five nations from South-East Asia, but concluded that: "the general principle of non-refoulement was endorsed".<sup>176</sup>
- (c) The Cartagena Declaration on Refugees was unanimously adopted in 1984 by the representatives of ten Latin American Governments: Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela, and contains guidelines for States in that region which are faced with mass influxes of refugees. This Declaration reaffirmed the fundamental nature of the principle of non-refoulement and lays down minimum standards for the admission and treatment of refugees. The representatives of these countries who recognised the Cartagena Colloquium nevertheless recognised that the international legal instruments applying to the grant of asylums - including the 1951 Convention, the 1967 Protocol and various regional treaties and conventions on extradition and asylum - did not foresee situations involving large inflows of refugees. Cartagena thus became the first step to filling a vacuum between the Central American reality and existing refugee instruments, between actual practice by refugee-receiving countries in the region and an over-political and somewhat narrow legal

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<sup>176</sup> Held in Geneva on 20-21 July 1979. See UN Doc. A/34/627, p.6. Five South-East Asian States participated, with UNHCR as an observer.

notion of asylum.<sup>177</sup>

- (d) The Second International Conference on Assistance to Refugees in Africa (ICARA II) was held in Geneva on 9-11 July 1984.<sup>178</sup> ICARA II was different and unique from other international conferences by its exclusive humanitarian character. Over 100 countries and 140 inter-governmental and non-organisations attended the Conference. The Chairman of the OAU, Mr Mengistu Haile-Mariam, stated at the Conference:

" ... where there is a spirit of good neighbourliness and mutual co-operation, the principle of non-refoulement must be observed ..."<sup>179</sup>

- (e) The "First Conference of the Asian Forum of Parliamentarians on Population and Development" was held in New Delhi on 17-20 February 1986. Twenty-five countries from the Asian and Pacific regions took part.<sup>180</sup> The Conference adopted, inter alia, the following, submitted by the Representative of Japan (Takashi Sato):

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177 At its session of 14 November 1986 in Guatemala, the OAS General Assembly repeated that the Cartagena Declaration should be implemented, especially in the observance of the principle of non-refoulement.

178 Presided over by Leo Tindemans, Belgian Minister for Foreign Affairs.

179 UN Doc. A.35/327, p.8. This Conference refrained from political quarrels and concentrated on the problem of refugees.

180 Conference was chaired by Indra Ghandi.

" ... all countries should respect and adhere to the principle of non-refoulement ..."

However, the countries were not legally obliged to respect and adhere to the principle of non-refoulement. It was surprising to note this adoption, since all of the participating States were from South-East Asia and Asia itself, and most of them had not observed the principle of non-refoulement. The wording regarding "respect" and "adhere" seem contradictory; on the one hand, "respect" had no real or legal interpretation whereas, on the other hand, "adhere" seems to imply explicit assumption of acknowledgement and acceptance of the recommendation. However, the important issue remains, namely, the principle of non-refoulement was accepted and adopted.

In Geneva from on 6-13 October 1986, the Executive Committee at its 37th session:

"noted with concern ... forcible return to their country of origin in disregard of the principle of non-refoulement."

The principle of non-refoulement was further endorsed at the Round Table Conference held on 28 April 1986 under the auspices of the UNHCR,<sup>181</sup> and also in "Consultation on the arrivals of

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181 Some 14 nations participated.

asylum-seekers in Europe".<sup>182</sup>

It is interesting to note what the ~~new~~ Director of Division of Refugee Law and Doctrine,<sup>183</sup> Mr Ghassan Arnaout, had to say on the aspect of refoulement of asylum-seekers at the 37th session of the Executive Committee. He stated:

"... what is, therefore, essential, is that these persons not be sent back to where their life and their physical integrity are threatened and that they must be treated humanely until circumstances make it possible for them to return to their countries of origin ...".<sup>184</sup>

And likewise at the 38th session, Arnaout stated that "preventing refoulement was one of the aims of the Office of the UNHCR".<sup>185</sup>

Generally speaking, the principle of non-refoulement has only been mentioned at various regional conferences. The word "observe" is greatly used and there is no legal obligation upon participating States to "implement" the principle of non-refoulement. International conferences have very little significance upon endorsing a principle or rule as a part of customary law. This is especially so in the case of non-

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182 Held in Geneva on 28-31 May 1980. See UN Doc. HCR/120,23/80, p.51.

183 Excerpts of the UNHCR Magazine, No.35, November 1986.

184 Ibid.

185 Excerpts from The UNHCR Magazine, "Refugee", No.47, November 1987, p.12.

refoulement. Conferences are only recommendations and not legally binding upon participating States. Conferences only indicate that the participating States are aware of the principle of non-refoulement and that is all.<sup>186</sup>

#### 7.10 AN OVERVIEW

Out of twelve million refugees in the world,<sup>187</sup> only a small proportion of these people are fleeing their homeland and fulfil the conditions and criteria established within Article 1 of the 1951 Convention,<sup>188</sup> as seen in Chapter Three. The vast proportion of asylum-seekers, refugees or displaced persons are unprotected by treaty law. These so-called "refugees" are seeking protection from conditions of natural disaster, civil wars, armed violence, State intervention and, in general, violations of human rights. So, it is fair to assume that the number of people fleeing from natural disasters, armed violence, civil wars, violence, etc., are exceeding those who are fleeing due to fear of persecution due to race, religion, nationality, membership of social group or political opinion. So what would be the relation of these people in connection with the principle of "non-refoulement", since, as stated earlier, they are not protected by conventional law?

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186 An exception may be the UNHCR Executive Committee which decide upon the policies of the UNHCR.

187 See J.P. Hocké in UN Chronicle, Feb 1987, p.114.

188 "A well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion", Article 1 (A(21) 189 UNTS 137).

Many commentators have taken the view that the principle of "non-refoulement" is a rule of customary law.<sup>189</sup> However, there are many defects in this view.

It is interesting to note that many Asian States have not become signatory parties to the 1951 Convention or 1967 Protocol and there is an absence of "Eastern" communist States to signatory members of these two instruments. Quite clearly, there is only regional agreement to these instruments and not a general one.<sup>190</sup> A similar situation is noted within the Executive Committee which, although comprising over 40 States, still distinctly lacks Asian and Eastern States on the voting committee. They are present as observers but have no effect on the voting issues and procedures.

The UNHCR Executive Committee has issued powers to the Office of the UNHCR, namely, to protect non-conventional refugees (or de facto refugees) under the extended mandate, but this cannot be considered as opinio juris of States or indeed State practice of participating States.

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189 Goodwin-Gill, *op.cit.*, pp.97-8, although Professor Feliciano claims not as a general customary law but only regional, *op.cit.*, p.608. See also P. Hyndman, "Asylum and Non-Refoulement", *PLJ*, Vol.57, 1982, p.63.

190 American, European and African States are mostly signatory to the instruments.

### 7.10.1 Temporary Refuge in Customary International Law

Temporary refuge can be defined as follows:

"a customary norm which prohibits a State from forcibly repatriating foreign nationals who find themselves in its territory after having fled generalised violence and other threats to their lives and securities caused by internal armed conflict within their own State." 191

Can temporary refuge be afforded to those asylum-seekers not fulfilling the conditions of the 1951 Convention and 1967 Protocol and also carry with it a right of rejection at the border or frontier?

There does not seem to be a clear answer to these two questions. Temporary refuge is by and large accepted by most States, but signatory States can argue quite simply that if the asylum-seeker does not fulfil the definition in the two main refugee instruments, then the State can reject or refoule the asylum-seekers to places where they may face persecution or personal hardship. However, non-signatory States can, on "humanitarian grounds", allow refugees to settle until a suitable and satisfactory solution is found. For instance, the issuance of 1,500 visas for immigration to victims of the earthquake and violent eruptions in the Azores<sup>192</sup> and donation of food and assistance to refugees fleeing from neighbouring

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191 Perluss and Hartman, "Temporary Refuge: Emergence of a Customary Norm", VJIL, Vol.26, p.554.

192 Act of 2nd September 1958, Pub.L. No.85-892, 72 Stat.1712.

countries to Sudan and Ethiopia.<sup>193</sup> For Asia and Africa the term "temporary" is used very casually, for instance, the casual use of the word in statements in the media,<sup>194</sup> but for Europe the term is hardly used and the word "permanence" is preferred.<sup>195</sup> Iran and Pakistan had admitted over 5 million refugees on the basis of the refugees presenting themselves at the borders where physically it would have been impossible to return them to Afghanistan. In these circumstances, the granting of "temporary asylum" seems to have been the ideal answer, that is, they are not to be returned<sup>196</sup> until and unless the situation in Afghanistan improves, and until such time, Iran and Pakistan are burdened with the Afghan refugees.

Many States have not developed legal rules or regulations to deal with "humanitarian refugees". For instance, the practice of South Pacific States regarding Vietnamese and Cambodian boat-people<sup>197</sup> and the United States have adopted a similar attitude and policy not to admit certain categories<sup>198</sup> of civilians trying to enter United State's territory.

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- 193 The West collected funds.
- 194 "Refugees moving temporarily across the borders", BBC TV, Nine O'Clock News, 3 July 1986.
- 195 "Refugees ... moving ... permanently to ...", News at Ten, ITV, 21 January 1987.
- 196 The refugees themselves will not return until the Soviet forces have left Afghanistan.
- 197 See Chooi Fong, "Some legal aspects of the search for admission into other States of persons leaving the Indo-Chinese Peninsula in small boats", *BYIL*, 53, 1981.
- 198 From El-Salvador and Guatemala.

A fairly new State practice has emerged, especially in South-East Asian countries, where temporary refuge will only be granted if the State of asylum or refuge was "absolutely convinced" that a third State would take the burden eventually. For instance, Thailand stated that it would continue to alleviate the plight of Indochinese displaced persons "as long as other countries continue to honour their commitment and fully share the burdens".<sup>199</sup> It seems that States are disguising the issue of non-refoulement by placing equal emphasis on neighbouring States to accept refugees. It seems that refugees in "temporary refuge" are always on uncertain ground, not knowing when they will be returned. It also seems that the status of temporary refuge is similar to a "cooling-off period" for States to think about expulsion, return or rejection of refugees or asylum-seekers. States which allow temporary refuge have to be sure of the magnitude of the task.<sup>200</sup>

7.10.2 Non-Refoulement and Torture, Inhuman or Degrading Treatment and Internal Conflicts

The peremptory rule of customary international law requires persons not to be subjected to torture or to cruel, inhuman or degrading treatment. Torture and its universal prohibition is

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<sup>199</sup> Mr Angkanarak, leader of the Thai delegation at the ICEM Council Special Session in May 1979.

<sup>200</sup> Returning some 3 million Afghan refugees will not be an easy task for the Pakistani authorities.

witnessed in various regional and global treaties and international organisations, including many resolutions in the UN, Council of Europe, OAS and OAU. In fact, it has recently been held that torture constitutes a violation of international law in (Filartiga v Pena-Irala).<sup>201</sup> However, unlike the prohibition of torture, the principle of non-refoulement in its applicability is not universal. There are exceptions to non-refoulement within Article 33(2) as to when a person can be refouled, but in the torture convention no such exceptions are noted. In other words, persons can be refouled conditionally but persons cannot be refouled unconditionally in the torture convention.

On 9 December 1975,<sup>202</sup> the General Assembly Resolution 3452 was adopted without a vote; the General Assembly not only condemned torture but for the first time defined both "torture",<sup>203</sup> and "cruel, inhuman or degrading treatment or punishment". As stated earlier, there is a provision in the European Convention on Human Rights (European Convention) relating to

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201 630 F.2d, pp.882-885. See also Rodley, The Treatment of Prisoners in International Law, op.cit., for further explication of torture.

202 UN Doc. A/10034, 1975.

203 Torture means any act by which pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed or intimidating him or other persons. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

torture and inhuman or degrading treatment, positioned in Article 3.

The European Convention does not contain a general right of admission to a certain country nor the right of asylum and Article 4 of Protocol IV prohibits only the "collective expulsion of aliens". The refusal of admission or non-refoulement constitutes inhuman treatment in accordance with Article 3 of the European Convention.<sup>204</sup> For instance, the head of household or a relative may be refouled, thus splitting the family and resulting in inhuman or degrading treatment.<sup>205</sup> There is only protection in the form of Article 8 of the European Convention (family life). The children of a family whose father or mother has been refouled will certainly consider themselves to have been subjected to cruel, inhuman or degrading treatment.

But what about torture? If a refugee is expelled or refouled to a place where he will certainly face torture, even perhaps resulting in death, will the State responsible for refouling also be held responsible for resulting deaths? It would seem so, irrespective of the expelling State being a party to the European or any other regional convention. Each case will have to be looked at with the European Court and Commission deciding, and with the onus on the refugee, before he/she is

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204 Applicant 984/61, Xv Belgium Coll.6, 1961, p.39. Applicant 7612/76, Dv Belgium, Council of Europe Press Release C(78)54, 15 Dec 1978.

205 Application No.7729/76, Agee v United Kingdom, 7 DR, 1976, 164.

refouled, to provide strong evidence against non-return to the country where he/she may face torture.<sup>206</sup>

The European Commission on Human Rights stated that the Contracting States had agreed to restrict the free exercise of States' rights under international law, including the right to control the entry and exit of foreigners. However, the Commission was cautious, stating:

" ... Consequently, the expulsion or extradition of an individual could in certain exceptional cases prove to be a breach of the convention and particularly of Article 3, whilst there are serious reasons to believe that he could be subjected to such a treatment prohibited by the said Article 3 in the State to which he must be sent."<sup>207</sup>

The Commission further stipulated that no State may extradite, expel or refuse permission, or repatriate aliens to a country where he may face severe violations of basic human rights amounting to torture or inhuman or degrading treatment.<sup>208</sup> However, to reach the inhuman stage, it must first reach a certain "stage of gravity causing considerable mental or physical suffering".<sup>209</sup>

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206 But there is uncertainty as to what proof is needed. In Rajamane v Secretary of State, 8 November 1984, the adjudicator held that violence in Sri Lanka did not amount to "well-founded fear of persecution" and effectively no traces of torture or persecution could be found. A somewhat strange decision in the light of violations of human rights in Sri Lanka, reported by Amnesty International Press Release No.31, 1984, pp.5-6.

207 X v FRG European Commission on Human Rights, Dec. and Rep., 1974, 73,75.

208 Ibid. For extradition in relation to the European Convention on Human Rights, see Fawcett, op.cit., pp.51-53, 119-120.

209 Ibid.

There must be a danger to the refouled or the expelled refugee that he will face torture or degrading or inhuman treatment; consequently, there must be a direct danger and must have substantial grounds for fearing such treatment. There is one problem, that is for the refugees who flee from civil war or internal upheaval where the violence is not directed towards them personally. Similarly, one could argue that violation of human rights or internal turmoil, if not directed personally against refouled refugees, will not be considered sufficient to furnish evidence of a concrete danger of inhuman or degrading treatment.<sup>210</sup> For instance, many political asylum-seekers fled Pakistan, mainly to Europe, in 1979 following the death of Zulfiqar Bhutto. But the Commission held that there was no serious reason to believe that the persons concerned would be subjected to inhuman treatment and consequently their requests for political asylum were rejected and they had to return to Pakistan.<sup>211</sup>

Article 3 of the UN Convention on Torture, like Article 3 of the European Convention, may give some form of protection where no other protection is available and Article 3 of the European Convention may embrace a right of temporary refuge when rejection at the border or refoulement would amount to inhuman

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210 X v Sweden, No.9105/80 European Commission on Human Rights, I, and X&Y v UK, No.8897/80, European Commission on Human Rights, 12 March 1980.

211 X v UK, No.8081/77, European Commission on Human Rights, 12 December 1979.

treatment. There is a limitation to Article 3 of the UN Torture Convention - that non-refoulement is only to apply where the subject may face torture if refouled. The Article is limited only to the subjection of torture.

Basically, the individual should not have to prove that he will suffer danger if refouled; it should be up to the State which refoules the asylum-seeker or the refugee to prove that there is no danger to the individual concerned.

Can refoulement be used in exceptional cases? Only in cases to prevent a greater mishap or evil. The extreme nature of the case must be conveyed and it must be shown that there is no other alternative but to return and, secondly, that such refoulement or return is necessary to avert some greater evil. For instance, internal conflict or civil war will affect refugees (danger to life and property). The facts of the case must be involved and must be appropriate for any legal review. One can say that if refoulement is to be applied, then the danger must be of an unusual or horrifying kind.

States are usually reluctant to grant asylum to people who have fled from internal conflicts such as civil unrest and violence.<sup>212</sup> Although there are no specific provisions relating to internal conflicts within the main refugee instruments, States can grant temporary refuge to these people who flee from such conditions. Temporary refuge can involve

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<sup>212</sup> For instance, in Lebanon, El Salvador, and the Philippines.

basic human rights such as housing and education and that there is still a hope that these refugees will return voluntarily as a permanent solution. As long as the causal factors remain, these refugees should not be refouled, even if there are no provisions within the municipal legislative system. But exceptions should be thought of, such as refugees who are a threat to "national security" and "community". Refugees escaping from general violence and danger must be given the benefit and not be looked upon as those who have left purely for personal convenience. There are some international instruments which take into account not only military personnel, but also the sick, wounded and the shipwrecked,<sup>213</sup> and also international instruments for people caught up in conflict or fleeing from conflict.<sup>214</sup>

There are three points which should be made. Firstly, people fleeing from torture, inhuman or degrading treatment, civil unrest or internal conflict, should be admitted when they present themselves at the frontiers or borders. Secondly, these people should, at the very least, be granted temporary refuge and be treated in accordance with human rights

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213 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field: 12 August 1949, 6 UST 3114, TIAS No.3362; 75 UNTS 31.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War: 12 August 1949, 6 UST 3516, TIAS No.3365; 75 UNTS 87.

214 Geneva Convention Relative to the Protection of Civilian Persons in Time of War: 12 August 1949, 6 UST 3516, TIAS No.3365; 75 UNTS 87. See also Protocol Additional to the Geneva Conventions: United Nation Document A/32/144 Annex 1.

principles. And, thirdly, no asylum-seeker should be returned or refouled at any border, if he or she faces threat of torture or cruel, inhuman or degrading treatment, civil war, persecution, foreign domination, natural disasters, drought or famine, from the country of origin.

There appears to be a general acceptance of the principle of non-refoulement on torture. In general terms, the principle of non-refoulement is in a limitative form in the conventions, treaties, declarations or resolutions. Similar non-refoulement in customary international law does not appear to be in a form of universal application. It can be said that the principle of non-refoulement only forms a part of the principle of international law.

Finally, some human rights are considered more important than others. Should States consider the priority of human rights before considering refoulement of asylum-seekers or refugees. Are States free to choose the priority of human rights?<sup>215</sup> It seems that all basic values of human rights should be respected irrespective of their priorities.

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215 See US Priority of Human Rights: Restatement, Second Foreign Relations of the US (Rev.) Tentative Draft 1, p.xii, 1980. The list is: Relation of International Law to US Law; Persons in International Law; International Agreements; Jurisdiction and Judgement; Law of the Sea; Protection of Persons (Natural and Juridical); Selected Law of Economic Relations; and Remedies for Violation of International Law. See also, discussion by Professor Meron in AJIL, Vol.80, No.1, January 1986, p.1.

7.11 POSTSCRIPT

The concept of non-refoulement and asylum are interwoven. Asylum forms a formidable part of refugee law. The safety of the refugee depends on whether he/she is granted asylum or not. Asylum will be examined in the next chapter with particular emphasis on the actual definition of asylum, international co-operation, solidarity, asylum in international law and the casework on the eligibility for asylum in the USA and the UK.

## **CHAPTER EIGHT**

### **Asylum**

## CHAPTER EIGHT

### ASYLUM

#### 8.1 INTRODUCTION

The word asylum is derived from the Greek word "asylon" and the Latin word "asylum". It effectively means a sanctuary, a place where a person who is pursued takes refuge. In a historical perspective,<sup>1</sup> asylum was a religious and sometimes a civil institution in which people fleeing from persecution, prosecution, animals and the ferocity of nature, could enjoy protection, shelter and sanctity. Entry to these places was barred to the chasing relevant authorities. In the late 16th and early 17th Centuries, the distinction<sup>2</sup> between political and ordinary offences was made, and eventually it was held that asylum could only be granted to those who were fleeing from political or religious persecution. Actually, up to the end of the 1800s and early 1900s, movement between States was virtually totally restricted. The problem of asylum did not present itself as one of admission but whether the fugitive should be surrendered to another State once he had entered the territory.<sup>3</sup> The emergence of grave persecutions<sup>4</sup> in countries

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1 See Prakash Sinha, Asylum and International Law, op.cit, pp.5-49.

2 Because "asylum" was frequently enjoyed by common criminals and a widespread practice of surrendering persons wanted for crimes and fugitives from justice to another State authority.

3 The emergence of extradition was clearly established.

of origin and to try to secure admission to other States. Basically, asylum can denote two types of refuge: firstly, diplomatic asylum (in embassies, consuls and high commissions), and, secondly, territorial asylum (asylum granted by a State within its territory). Diplomatic asylum is beyond the scope of this thesis.

In 1948, the Human Rights Commission of the United Nations, on the proposal of the Representative of France, adopted the draft United Nations Declaration of Human Rights, which contained a provision relating to asylum:

"Article 14:

(1) Everyone has the right to seek and to be granted asylum from persecution.

(2) This right may not be invoked in the case of prosecution genuinely arising from non-political crime or acts contrary to the purposes and principles of the United Nations."

The Representative of the United Kingdom (Mrs Corbet) wanted to amend the first paragraph to read:

"Everyone has the right to seek and to enjoy asylum in other countries from persecution."

The reasons behind the amendment were firstly that this amendment made it quite clear that the individual did not have an automatic right to be granted asylum,<sup>5</sup> and, secondly, the

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<sup>4</sup> Due to political and social changes and gradual restriction of movement of persons between States.

<sup>5</sup> UN Document A/C. 3/SR 121, pp.4-6.

general consensus was that governments found that granting a right of asylum which could ultimately be claimed would not only impinge on their sovereignty (whether he receive the asylum-seeker or not), but which might cause "havoc" in terms of movement between States, especially in times of mass population transfers due to conflicts, persecution or other reasons. After 10 years of debate in the Human Rights Commission and the General Assembly,<sup>6</sup> the Declaration on Territorial Asylum was eventually adopted.<sup>7</sup>

The amended Article 14 was also implemented in an important human rights instrument, namely the Universal Declaration on Human Rights.<sup>8</sup> These Declarations have one major disadvantage, namely, they are not legally binding on States but they are fundamental prerequisites to the existence of any rule on asylum.

#### 8.1.1 The Bellagio Draft

After consultation with a number of international lawyers and jurists in 1970, the Carnegie Endowment for International Peace in agreement with the United Nations High Commissioner for Refugees, convened a "Colloquium on Territorial Asylum and

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<sup>6</sup> 3rd and 6th Committees, respectively.

<sup>7</sup> By a unanimous vote, GA Resolution 2312 (XXII) of 14 December 1967.

<sup>8</sup> The UDHR was adopted with no opposing votes, while Article 14 was adopted by 44 votes for, 6 against, and 2 abstentions. See UNGA, 3rd session, 3rd Committee, 1948, and A/Res 217.

Protection of Refugees in International Law" at Villa Serbelloni, Bellagio, Italy in 1971. A number of eminent and distinguished lawyers were invited and as a result, three articles were prepared which included the grant of asylum, non-refoulement and international solidarity. A working group was formed to prepare a draft which became known as the Bellagio Draft. The High Commissioner for Refugees submitted this Draft to the Executive Committee of his programme and through the Economic and Social Council to the General Assembly. The 3rd Committee of the General Assembly in 1972 requested the High Commissioner to consult with governments and to report on the matter to the Assembly at its next session. In the 1973 session, the Chairman of the 3rd Committee asked the High Commissioner to continue consultations with governments regarding asylum. Ninety governments commented, thirty on the Bellagio Draft. Seventy-five governments were in favour of strengthening the law relating to asylum (territorial). The Representative of the United Kingdom stated:

"... much of the purpose of the proposed new instrument would be achieved if the 1951 Convention relating to the status of refugees were more widely and fully implemented ... however, it did not wish its attitude to be negative and that it would not oppose the convening of a conference of plenipotentiaries ..."<sup>9</sup>

In 1974, the General Assembly in the 29th session established a Group of Experts on the Draft Convention.

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<sup>9</sup> UN Doc. A/AC.96/508/Add.1, para 5.

### 8.1.2 The Group of Experts <sup>10</sup>

The Group of Experts met in Geneva on 28 April to 9 May 1975 and agreed by a majority<sup>11</sup> to the following article:

"Article 1: Each Contracting State acting in the exercise of its sovereign rights, shall use its best endeavours in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention."

This provision differed slightly from the Bellagio Text and was an attraction of right of States to refuse or grant asylum to the asylum-seeker and the humanitarian duty to grant asylum.

Article 4 was adopted when an asylum-seeker:

"... at the frontier or in the territory of a Contracting State shall be admitted provisionally to or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by the competent authority."

### 8.1.3 The Conference of Plenipotentiaries

The General Assembly in consultation with the UNHCR requested the Secretary-General to convene a conference of plenipotentiaries on territorial asylum from 10 January to 4

<sup>10</sup> Composed of 27 States on a basis of equitable geographical distribution. The costs were to be met from voluntary funds of the High Commissioner - General Assembly Res.2372 (XXIX) of 10 December 1974. However, compare this to the usual method of financing from the general budget of the UN, as is the usual case.

<sup>11</sup> Objection raised and recorded by the Soviet and Ukrainian experts.

February 1977 to consider and adopt a Convention on Territorial Asylum.<sup>12</sup> The Secretary-General made available the report, which was produced by the Group of Experts, to any Member State for any comments, observations and criticisms they wished to make before the conference.

At the conference, there were some discrepancies as to the rules of procedures of the conference<sup>13</sup> but on the actual issue of asylum, most representatives agreed that it was certainly necessary to combine the discretion of the State to grant asylum to the asylum-seeker with the humanitarian interest and value that asylum should be granted to those who fled persecution.

Three issues became prominent at the Conference:

- i) There was a tendency to go further than the consolidated text and to establish a "duty to grant asylum". The Representative of Germany proposed that a subjective right is addressed when granting asylum.<sup>14</sup>

12 The cost of holding such a conference would be met by voluntary contributions and subsequently authorised the High Commissioner to seek such funds. See M. Mitic, "The United Nations Conference on Territorial Asylum", *RIA*, Vol.28, No.647, 1977, pp.14-25.

13 Discrepancies included: number of States forming the Drafting Committee and the actual composition; whether the Drafting Committee membership should be open-ended; and the role of the no-governmental organisations in the conference. See Rules of Procedure, UN Doc. A/Conf.78/9. Rule 47: The non-governmental organisations could only make written statements and not oral ones (UN Doc. A/Conf.78/SR.7, para 8. Cf. Conference on the Status of Refugees, where ngo's could make oral statements (Rules of Procedure, UN.Doc.A/Conf.2/3/Res.1, Rule 27(3)).

14 UN Doc. A/Conf.78/7, Art.1.

ii) The Representatives of Italy, Austria, Colombia, France and Costa Rica all suggested a duty to grant asylum. Many representatives favoured the wording in the consolidated text: "Each Contracting State shall use its best endeavours to grant asylum ..." This wording, according to many representatives, established the right balance between the conflicting interests of the State and the asylum-seeker.

iii) The Representatives of Pakistan, Syrian Arab Republic, Argentina, Rumania, Iran, Egypt, Jordan and Cuba considered that the above text went too far and supported putting the whole emphasis on a State whether it grants asylum or not. The Representative of Egypt stated that a text should include: "Each Contracting State may grant asylum ...".<sup>15</sup> The Representative of Jordan proposed replacing the words "shall use its best endeavours" by the words "shall endeavour".<sup>16</sup>

This Conference of Plenipotentiaries was a failure. No concrete issues emerged and many representatives were totally confused by the issues. Article 1, on the grant of asylum, had been weakened by the replacement of the words "shall use its

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15 UN Doc. A/Conf.78/8.

16 UN Doc. A/Conf.78/C.1/L.16 (Committee Document L.16). This amendment was adopted: 31 for, 29 against, with 18 abstentions. Some representatives were confused, they were under the impression that they had voted for the words "shall use its best endeavours".

best endeavours to grant asylum" by the Jordanian proposal "shall endeavour to grant asylum". The earlier drafts had shown a balance between the right of an asylum-granting State with humanitarian issues, governments were now reluctant to enter into a firm commitment to grant asylum. The socialist and communist States were unhappy with the Conference and the 1959 Convention. The Convention on Territorial Asylum seemed unlikely to be ratified on a universal level. It is perhaps easier to mention regional treaties and agreements and declarations on the question of territorial asylum rather than a general or even universal one.

## 8.2 TREATY AND ASYLUM

### 8.2.1 The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (along with Optional Protocol to the International Covenant on Civil and Political Rights)

These were adopted by the United Nations General Assembly in 1966 but do not contain any provision on asylum. This was because many Members considered that the right of asylum was not a fundamental right of the individual and there were disagreements between the Western delegates and the Eastern delegates as to the personal scope, the definition of the persons to whom asylum could and should be granted and the persons who should be excluded from the grant of asylum.

8.2.2 Asylum and the 1951 Convention Relating to the Status of Refugees

The term "asylum" does not appear in the most important refugee Convention. However, the preamble of the 1951 Convention states:

"... grant of asylum may place unduly heavy burdens on certain countries ..."

The grant of asylum is assumed on behalf of the Contracting States but there is no legal obligation on the Contracting States to at least consider the grant of asylum.

The UNHCR states that asylum could be implemented in the light of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum adopted in 1948 and 1967, respectively. Attention should be drawn to Recommendation E contained in the Final Act of the Conference of Plenipotentiaries, which in fact adopted the 1951 Convention:

"The Conference

Expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

This recommendation enables States to resolve problems affecting the non-conventional refugees or asylum-seekers.

8.2.3 Universal Islamic Declaration of Human Rights (signed in Paris on 19th September 1981) <sup>17</sup>

Article IX of the Universal Islamic Declaration of Human Rights (UIDHR) contains a Right of Asylum:

"(a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex."

There are limitations in that only persons who are "persecuted" or "oppressed" have the right to seek asylum and refuge. Persons who flee from famine, drought, starvation, Acts of God are excluded. This does not just apply to Moslems who can gain asylum,<sup>18</sup> as the terms used: "... every human being irrespective of race, religion, colour or sex", apply to all. However, no mention was made of "political or social groups" or of "different nationality". It is interesting to compare the UIDHR to the OAU Convention, which only applies to persons from the Contracting States. The UIDHR is only recommendatory and not legally binding upon the Islamic States. However, paragraph (a) stipulates possible refuge and asylum for all persons irrespective of race, religion, colour and sex. Paragraph (b) is restrictive to Muslims; it states:

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17 Signed by 19 Islamic States in Paris. This Declaration was adopted for possible guidelines in conjunction with the Quran and Hadith traditions of the Prophet Mohammad.

18 People (whether Moslems, Christians or other faiths) fleeing Ethiopia are given automatic refuge by the Saudi Arabian Government. This is because in 632 AD, Ethiopia granted refuge and asylum to the Prophet Mohammad when he fled Saudi Arabia.

"(b) Al Masjid al Haram in Mecca is a sanctuary for all Muslims."

#### 8.2.4 The Bangkok Principle

As stated earlier, these principles (Declarations) were adopted by the Afro-Asian Legal Consultative Committee in 1966. Article III stipulates that the State has the sovereign right to grant or refuse asylum in its territory and similarly the OAU, Article III(2) states that the exercise of th right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act. Article III(3) stipulates the exemptions of national security or safeguarding property; and paragraph 4 implies a status of provisional or temporary asylum for the refugee.

#### 8.2.5 Caracas Convention on Territorial Asylum 1954 <sup>19</sup>

The Caracas Convention on Territorial Asylum in Article 1 stipulated that "Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State. A restriction is imposed as long as the other States do not complain about the asylum granted".<sup>20</sup> Article 2 consists of a duty of other

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<sup>19</sup> Signed in Caracas on 28 March 1954 at the 10th Inter-American Conference. Entered into force on 29 December 1954, in accordance with Article 4. OAS Official Records, OEA/Ser.X/1, Treaty Series 34.

<sup>20</sup> Cf. OAU Convention, *infra*.

States to respect such asylum, while Article 3 imposes a restriction of expelling or surrendering persons to another State. Article 5 forms an interesting provision, namely, that the asylum-seekers who have entered the territory "surreptitiously or irregularly" are still granted asylum within the provisions of the Caracas Convention. The general emphasis of the Caracas Convention was based on protection for political refugees rather than non-political refugees.

#### 8.2.6 The Organisation of African Unity Refugee Convention <sup>21</sup>

The OAU Convention on refugee problems in Africa is probably the best formulated regional instrument on the issues and problems relating to refugees.

Article II is totally devoted to asylum. Article II.1 states:

"Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."

The ambit of this provision is to oblige Contracting States to receive refugees. Firstly, the word "shall" is used, implying a legal obligation for the States to receive refugees; secondly, the word "receive" is used, implying a sympathetic

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<sup>21</sup> OAU Convention on Refugee Problems in Africa, done at Addis Ababa on 10 September 1969. See 8 *ILM*, 1969, p.1288.

consideration for refugees<sup>22</sup> and a pleasant nature of acceptance rather than a forced acceptance; and, thirdly, the words "secure the settlement" stipulates that States have to afford at least housing and basic human rights for asylum-seekers. Article II.2 states:

"The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by a Member State."

This provision was to overcome hostility between the Member States if one State was to grant asylum to another State's nationals. This provision has encouraged States to be less cautious and sceptical on the granting of asylum. International, or rather regional solidarity, is encouraged in Article II.4, whereby:

"Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member States may appeal directly to another Member State and through the OAU, and such other Member State shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member States granting asylum."

Temporary residence is catered for in Article II.5, while Article II.6 states that refugees must be settled at "a reasonable distance from the frontier of their country of origin". Safety for the refugees must be given priority by the authorities granting asylum. Can the refugee take advantage of

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22 Cf. the word used in the Caracas Convention ("admit"), to the word "receive" in the OAU Convention.

the asylum by propagating propaganda and subversive activities? The answer is NO; in Article III, paragraphs 1 and 2 respectively prohibit refugees from subversive activities against another Member State of the OAU and prohibition of "use of arms, through the press or by radio". Quite basically, Article III prevents refugees from taking advantage of the State granting asylum to cause tension in another Member State.

#### 8.2.7 The American Convention on Human Rights 1969 <sup>23</sup>

The American Convention on Human Rights was adopted at San José, Costa Rica on 22 November 1969. Freedom of Movement and Residence was stipulated in Article 22(7) which states:

"Every person has the right to seek and be granted asylum in a foreign territory in accordance with the legislation of the State and international conventions in the event he is being pursued for political offences or related common crimes." <sup>24</sup>

As in most regional instruments, the drafters of this Convention did not foresee the different types of refugees which could exist. However, in America the great number of refugees flee because of political offences, but reports have been given by the UNHCR of other types of refugees.<sup>25</sup> Articles

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<sup>23</sup> See OAS Official Records OEA/Ser.k/kvi/1.1, Document 65, Rev.1, Corr.1 of 7 January 1970. See also 9 *ILM*, 99, 1970, p.123, Representatives of Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

<sup>24</sup> Cf. with Article 14 of the Universal Declaration of Human Rights, especially "right to seek and be granted asylum".

<sup>25</sup> See causal factors, *supra*.

22(8) and 22(9) state that the non-deportation or prohibition on refoulement of refugees and the collective expulsion of aliens is prohibited, respectively.<sup>26</sup>

The refugees position in bringing a complaint to the Inter-American Commission differs in one significant way from that of any other victim of human rights violation. The paramount right a refugee seeks is the right to remain, to avoid refoulement, return to a place of persecution. The slow and lengthy deliberation of international organisation may delay the admissibility review of his claim beyond the date of expulsion.<sup>27</sup> On the other hand, if the refugee submits a complaint before exhausting all administrative and judicial proceedings and appeals, the claim will be admissible for

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26 There was the American Declaration of the Rights and Duties of Man 1948, which stipulated Article XXVII which stated: "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements". This Declaration is to be found in the Final Act of the 9th International Conference of American States, Bogota, Colombia, held in 1948. It was based on a revision of a draft first prepared in 1946 by the Inter-American Juridical Committee. The Declaration was not binding but was merely a recommendation. Article XXVII was a very good provision, a comprehensive provision purely because of its simple and succinct wording.

27 The 1980 Regulations of the Inter-American Commission of Human Rights now contain a provision to expedite cases in such situations.

failure to exhaust domestic remedies - a Catch-22 issue.<sup>28</sup>

### 8.2.8 The Council of Europe <sup>29</sup>

The Council for Europe in adopted Resolution 67(14), which was unanimously passed by the Committee of Ministers on 29 June 1967, was entitled "Asylum to Persons in Danger of Persecution", which stated:

"... Recommends that Member Governments should be guided by the following principles:

1. They should act in a particularly liberal and humanitarian spirit in relation to persons who seek asylum on their territory."

The language used indicates a firmness when the Committee of Ministers referred to "The should act ..." - "should" indicating an obligation to act. Paragraph 2 calls on States not to refoule persons where they may face danger of persecution; paragraph 3 stipulates the exemptions of non-expulsion; while in paragraph 4, European solidarity is encouraged for action either individually or as a group to try

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<sup>28</sup> The Haitian Refugee test case, for the first time in the West, used an international forum for protecting the rights of refugees. The European Commission on Human Rights has heard numerous cases involving the rights of refugees under the European Convention.

The complaint alleges not only violations of the right of non-refoulement, but violations of other basic rights essential for a fair determination of refugee status in compliance with international law and stands as a challenge to refugee policy and practice.

<sup>29</sup> See European Yearbook, Vol.XV, 1967, p.349.

to overcome any such difficulties in granting asylum.

The European Convention on Human Rights, signed on 4 September 1950 and which came into effect on 3 September 1955<sup>30</sup> contains no right of asylum.

The European Commission of Human Rights has recognised a limited right of asylum under the European Convention on Human Rights for persons subject to deportation or extradition proceedings in countries party to the Convention. This development is remarkable because as the Commission itself recognises:

"... the right to political asylum is not as such included among the rights and freedoms guaranteed by the Convention ..."<sup>31</sup>

The Commission found the basis for a right of non-deportation in Article 3 of the Convention which declares that "no one should be subjected to torture or to inhuman or degrading treatment or punishment". Specifically, the Commission has stated that a State Party violates its Article 3 obligations when it returns an asylum-seeker to a country where he or she might be subjected to treatment which, if inflicted by a party to the Convention, would itself constitute a violation of

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30 Council of Europe, European Convention on Human Rights, Collected Texts, 2nd Ed., 1963.

31 X against the Federal Republic of Germany, Application No.3040/67, 22 Coll. of Decisions 133, 136 (Eur. Comm. on Human Rights, 1967).

Article 3.<sup>32</sup>

8.2.9 The UNHCR Executive Committee

The Executive Committee<sup>33</sup> at its 28th session on asylum,<sup>34</sup> adopted an important resolution which stated that although there were some liberal asylum practices,<sup>35</sup> they were:

"(b) Concerned, however, that according to the report of the High Commissioner, cases continue to occur in which asylum-seekers have encountered serious difficulties in finding a country willing to grant them even temporary refuge and that refusal of permanent or temporary asylum has led in a number of cases to serious consequences for the persons concerned;

(c) Requested the High Commissioner to draw the attention of governments to the various international instruments existing in the field of asylum and reiterated the fundamental importance of these instruments from a humanitarian standpoint;

(d) Appealed to governments to follow, or continue to follow, liberal practices in granting permanent or at least temporary asylum to refugees who have come directly to their territory;

(e) Called on governments to co-operate, in a spirit of international solidarity, with the High Commissioner in the performance of his functions-

32 See Giana v Belgium, Council of Europe Press Release B(80), 36, 31 July 1980 at 4 (1980); X v Federal Republic of Germany, Application No.7334/76, 5 Decisions and Reports 154 (Eur. Comm. of Human Rights), 1976; Amekrane v UK, Application NO.5961/72, 1973; Yearbook of Eur. Conv Human Rights 356; X contra la Belgique, Application No.984/61, 6 Coll. of Decision 39 (Eur. Comm. of Human Rights).

33 No.5 (XXVIII), 1977, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, UN Doc. A/AC.96/549.

34 Ibid.

35 Ibid., para (a).

especially with respect to asylum - in accordance with General Assembly Resolution 428(v) of 14 December 1950."

The Executive Committee on many occasions have expressly appealed to governments to follow liberal practices in granting asylum:<sup>36</sup>

"States should use their best endeavours to grant asylum to bona fide asylum-seekers."<sup>37</sup>

In relation to the protection of asylum-seekers in situations of large-scale influx, a report was formulated of large-scale influx which met in Geneva from 21-24 April 1981, which was adopted by the Executive Committee. The Executive Committee claimed in four parts, the protection of asylum-seekers in situations of large-scale influx. In Part I, the Executive Committee had acknowledged that the refugee problem, especially in situations of large-scale influx, had become acute and also acknowledged an important point that, apart from persons who were refugees within the 1951 Convention and the 1967 Protocol, there were also persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in part of or the whole of their country of origin or nationality, were compelled to seek refuge outside that country. The asylum-seekers, who formed part of such large-scale influx situations were often confronted with difficulties

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<sup>36</sup> See Reports of 29th and 30th sessions, UN Doc. A/AC.96/959 and UN Doc.A/AC.96/572, para 72(2)(a), respectively.

<sup>37</sup> Ibid.

in finding a durable solution by way of voluntary repatriation, local settlement or resettlement in a third country. Large-scale influxes frequently created serious problems for States, with the result that certain States, although committed to obtaining durable solutions, have only found it possible to admit asylum-seekers without undertaking at the time of admission to provide permanent settlement of such persons within their borders. The Executive Committee also noted that it was imperative to ensure that asylum-seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum-seekers.

In Part II, the Executive Committee insisted that asylum-seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them at least on a temporary basis and to provide them with protection. The asylum-seekers should always be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.

8.2.10 The Rights of Asylum-Seekers in Situations of Large-Scale Influx, Once They Have Been Granted Asylum

Once the asylum-seekers have been granted asylum, whether on a temporary or permanent basis, they should be treated in

accordance with the following minimum basic human standards:

1. There should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity.
2. They are to be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities.
3. They should be treated as persons whose tragic plight requires special understanding and sympathy. They should not be subjected to cruel, inhuman or degrading treatment.
4. The family unity should be respected.
5. All possible assistance should be given for the tracing of relatives.
6. The sending and receiving of mail should be allowed.
7. Material assistance from friends or relatives should be permitted.
8. All steps should be taken to facilitate voluntary repatriation.
9. They should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order.
10. Appropriate arrangements should be made, where possible, for the registration of births, deaths and marriages.

11. They should be granted all the necessary facilities to enable them to obtain a satisfactory, durable solution.
12. They should be permitted to transfer assets which they have brought into a territory to the country where the durable solution is obtained.
13. Adequate provision should be made for the protection of minors and unaccompanied children.
14. They should enjoy the fundamental civil rights internationally recognised, in particular those set out in the Universal Declaration of Human Rights.
15. They should receive all necessary assistance and be provided with basic necessities of life including food, shelter and basic sanitary and health facilities. In this respect, the international community should conform with the principles of international solidarity and burden-sharing.
16. The location of asylum-seekers should be determined by their safety and well-being as well as by the security needs of the receiving State. Asylum-seekers should, as far as possible, be located at a reasonable distance from the frontier of their country of origin. They should not become involved in subversive activities against their country of origin or any other State.

Part III provided that the asylum-seekers shall be given access to the Office of UNHCR, whilst Part IV stipulated the aspects of international solidarity, burden-sharing and duties of States.

### 8.2.11 General Assembly Resolutions

The General Assembly adopted a number of resolutions without a vote and:

"Strongly affirms the fundamental nature of the High Commissioner's function to provide international protection and the need for governments to continue to co-operate fully with his office in order to facilitate the effective exercise of this function, in particular by acceding to and fully implementing the relevant international and regional refugee instruments and by scrupulously observing the principle of asylum ..." <sup>38</sup>

Although the General Assembly does not oblige governments to grant asylum, it has, however, expressed gratitude and encouragement to governments who grant asylum.<sup>39</sup>

## 8.3 CUSTOMARY LAW AND ASYLUM

### 8.3.1 Asylum and Constitutional Laws

Many domestic legal systems of the world contain provisions relating to the grant of asylum. Once the asylum-seeker or refugee has been granted asylum, he or she is under the

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<sup>38</sup> Resolutions: 40/118; 39/140; 38/121; 37/195, respectively. See Resolutions 3272 (XXIX) and 3456 (XXX) in ORGA, Supp. No.31 (A/9631) and Supp. No.12C (A/9612/Add.3) on the Draft Convention on Territorial Asylum and the strong support the General Assembly gave this Convention.

<sup>39</sup> For instance, Resolution 40/138, whereby Governments of Botswana, Lesotho, Swaziland and Zambia were congratulated for granting asylum to student refugees. See ORGA, 40th session, Supp. No.12 (A/40/12) and (A/40/590).

watchful eye of the authorities. In this section, it is proposed to mention three countries whose constitutions favour the practice of asylum. These countries have been chosen at random and do not hold any prejudices:

1. China.<sup>40</sup>
2. Ecuador.<sup>41</sup>

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40 The Constitution of the People's Republic of China adopted on 4 December 1982 by the fifth National People's Congress of the People's Republic of China at its 5th session. They adopted Article 32, *inter alia*, which states:

"The People's Republic of China protects the lawful rights and interests of foreigners within Chinese territory, and while on Chinese territory foreigners must abide by the law of the People's Republic of China."

The People's Republic of China may grant asylum to foreigners who request it for political reasons. They have adopted a very restrictive approach to asylum. The term "may" stipulates a complete discretion on the granting of asylum. There is a crucial limitation in that the granting of asylum will only be considered for political reasons, hence people fleeing for non-political reasons have very little chance of obtaining asylum.

41 Article 17 of the Codification of the political constitution of the Republic of Ecuador is more explicit:

"In accordance with the law and with international agreements, the State guarantees foreigners the right to asylum."

A very liberal attitude indeed, which can be interpreted even more liberally. Ecuador will "guarantee" a foreigner the right of asylum, irrespective of the causes.

### 3. Hungary.<sup>42</sup>

One obtains an overall picture by referring to various constitutions where States do not want to commit themselves to granting asylum. The word "may" is commonly used, implying a non-legal obligation for States to grant asylum. Many States follow the original consensus of 1948 at the Human Rights Commission of the United Nations.<sup>43</sup> Many countries have constitutional laws which incorporate the concept of asylum. However, their practice is another matter. In customary international law many countries which are not signatories of the 1951 Convention offer asylum to refugees under the umbrella of humanitarianism. Pakistan and Iran are the most prominent examples. States which are not members of the 1951 Convention have constitutional laws which are often vague and ambiguous. The grant for asylum depends on each individual State. There are no set of guidelines or rules which determine the grant for asylum to the asylum-seekers. Municipal laws and constitutions are, in fact, quite meaningless when they relate to the grant for asylum. The fundamental question is whether asylum is a

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<sup>42</sup> The Hungarian People's Republic in s.67 of the Constitution states:

"In the Hungarian People's Republic anybody persecuted for his democratic attitude, for activity displayed in the interest of social progress, liberation of peoples, and the protection of peace, may be granted political asylum."

"Social progress", "liberation of peoples" and "protection of peace" are somewhat vague and ambiguous wordings. The Hungarian Constitution is generally geared towards political solutions and once again the word "may" is used indicating a complete discretion.

<sup>43</sup> UN Doc. A/C. 3/SR.121, pp.4-6.

part of international law. The aspect of non-signatory members (to the 1951 Convention) granting asylum, must be taken into account.

It would be quite safe to say that asylum is a substantial part of customary international law - bearing in mind that African, Asian and Pan-American States all grant asylum generously. However, in Europe and Australia the policies for grant for asylum are very restrictive and in many cases unfair.

#### 8.4 TRENDS AND DEVELOPMENT OF ASYLUM IN CUSTOMARY LAW

##### 8.4.1 A Change for the Worse?

As stated earlier, States have adopted provisions relating to asylum but there has been a change in attitude of the granting of asylum, especially by the developed world. In the 1960s and 1970s, the developed world made significant progress in understanding refugee problems and aspects. The general overall notion was that refugees and asylum-seekers should be protected and afforded basic humanitarian values. However, sadly, this notion has now changed. States nowadays are treating refugees as a burden, be it social, economic or political. It has become very clear that the developed States have adopted a clearly perceptible policy of discouraging the actual arrival of asylum-seekers. Some governments have prevented the asylum-seekers from entering their territory. The USA has recently refouled boats full of Haitian refugees.<sup>44</sup>

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44 UNHCR Report, Refugee magazine, November 1987.

The United Kingdom has imposed visa requirements for all asylum-seekers in order to prevent and discourage the arrivals of asylum-seekers.<sup>45</sup> Without formal papers, an asylum-seeker will not be allowed entry. European governments, along with many Middle-Eastern governments, have imposed fines on aircraft and their companies who bring asylum-seekers without papers. It is a well-known fact that many of the asylum-seekers are from the Third World and there is a trap in which nearly all developed countries are falling into, by believing that nearly all asylum-seekers are economic refugees, hoping to better their lives in the developed world. However, a report by the UKIAS Refugee Unit<sup>46</sup> stipulated that asylum-seekers from the developed world are given preferential and better treatment than somebody from the developing world.

#### 8.4.2 Secret Sessions of International Airlines Conference <sup>47</sup>

Nine international airlines and representatives of twelve Western governments met in Geneva on 1-2 June 1987 to discuss "the proliferation of pending and enacted national immigration legislation". The object of the meeting was to discuss the imposition of fines on airlines carrying asylum-seekers and other passengers without valid passports and documents. The

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45 See supra in Chapter Six and infra in the present chapter.

46 December 1987, Annual Report, No.31. See also report by the Joint Council for Welfare of Immigrants (JCWI) for 1987.

47 The Meeting was convened by a trade group representing 160 of the major world airlines (IATA International Air Transport Association).

governments insisted that airlines should play a role in the process of immigration restriction and control. This process is found in Annex Nine to the 1944 Chicago Convention on Civil Aviation:

"Airlines have a responsibility for the custody and care of passengers until they are accepted for examination as to their admissibility to the territory and after refused admission."

The airlines are also under an obligation to "promptly transport the passenger away from the territory in case of refused admission".

The United Kingdom has recently imposed £1,000 fines per person to airlines who carry asylum-seekers and passengers without valid travel documents.<sup>48</sup> These are strict fines and not costs for administrative and manpower charges. This is in contravention to the Chicago Convention 1944, Annex Nine, which states:

"Operators should not be fined in the event that any control documents in the possession of a passenger are found to be inadequate ..."

The Meeting ended with polarisation of the governments' view that fines on airlines were justified, while the airlines disagreed about the discouragement and the methods adopted by the governments.

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<sup>48</sup> The Immigration (Carriers Liability) Act 1987.

### 8.4.3 Problems Associated with Asylum in Domestic Law

A number of Western governments have allowed border guards and authorities to reject asylum-seekers. For instance, the immigration authorities of the US have pressed many new arrivals to accept "voluntary departure", thereby waiving their right to an hearing.<sup>49</sup>

Economic rights of refugees are being curtailed. Very few asylum-seekers or refugees in Europe have the right or prospect of employment, while their applications are considered by the competent authorities. However, several countries do provide social security<sup>50</sup> once asylum (temporary or permanent) has been granted, but not for temporary admission.

In general terms, natural justice is not allowed for asylum-seekers or refugees; decisions by the competent authorities (legal and/or administrative) are tragically unfair. These authorities begin with very negative and unfair attitudes which often imposes grave disadvantages for the refugee or asylum-seeker. In some cases, access to legal advice has been denied in the Federal Republic of Germany. Certain groups of asylum-seekers have found it almost impossible to achieve refugee

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49 Telephone interview on 28 Sept 1986 with G.S. Goodwin-Gill. More than 4,000 out of 7,000 Salvadorans stopped at the Mexican border were rejected in this way.

50 For instance, the UK allows a supplementary benefit for an asylum-seeker and his family while his application is assessed and until that time when a formal decision has been reached by the Home Office.

status, purely because of their "identity"; for instance, in FR Germany, Turks and Pakistanis are rarely granted refugee status.<sup>51</sup> In 1988, only 27 out of 10,200 applicants of Salvadorean origin were granted asylum by the US authorities.

More and more asylum-seekers are being sent back to their countries of origin, once their applications have been rejected. Eight Tamil asylum-seekers were returned on 24 September 1987 from the United Kingdom and many from Holland. Several Turks and Pakistanis have also been returned to Turkey and Pakistan respectively.<sup>52</sup>

#### 8.4.4 "Sanctuary" Places

On 20 January 1989 Viraj Mendis was deported back to Sri Lanka after all the legal procedures in the United Kingdom had been exhausted. Viraj Mendis took refuge in the Church of Ascension in Hulme, Manchester, just over 24 months after his deportation order had been signed. He did not leave the sanctuary until police broke down two of the church doors on the 18th January 1989 and deported him on a flight back to Sri Lanka. Mendis, a Sinhalese, was a communist supporter of the Tamil separatists and claimed that his life would be in danger if he was returned to Sri Lanka. The Government argued that Mr Mendis did not qualify for refugee status. The Government also protested that the church premises could not be misused to

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51 German Embassy, 27 September 1988.

52 25 September 1987.

evade the law. Mr Hurd, the British Home Secretary, warned churches to think very carefully before entering into sanctuary arrangements since they had no grounding in law.<sup>53</sup> Sanctuary in a church has had no legal force for more than 350 years, since Parliament abolished the right of sanctuary in 1623. However, there are different views within the Church of England. Martin Field, Press Officer for the Diocese of Manchester, says there is an agreement that it is a last resort when someone's life may be in danger.<sup>54</sup> The British Council of Churches Race Relations Unit is solidly behind sanctuary. There was a tremendous outcry when Mr Mendis was deported back to Sri Lanka where he could face death. The significant point was the manner in which the police used 'strong-arm' tactics against a peaceful, unarmed man in a place of worship, as Mr Keith Vaz MP stated:

" ... not since the days of Henry VIII has the State acted in such a way against the Church." <sup>55</sup>

Mr Mendis could have been accepted by a third country and it is understood that Denmark, Sweden, Holland and France were approached by Mr Mendis' solicitors, but no real promise of acceptance was given.

Mr Mendis' case has demonstrated a worrying concern that the

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53 The 'Guardian' Newspaper, 19 January 1989.

54 Ibid.

55 Ibid.

State will act in a hostile and aggressive manner in order to remove asylum-seekers who, in the Government's opinion, are not refugees because they have no well-founded fear of persecution. It is futile to point out to the Government that Manchester, along with the rest of the United Kingdom, is swarming with illegal immigrants from America or Australia and various parts of Europe who, up until now, have never been harassed into seeking sanctuary in a church. The truth is that most Britons do not resent foreigners from Brooklyn or Sidney or Warsaw wandering among them without proper papers. They resent, very much, little nut-brown men who spout weird political notions at them in a shrill sing-song voice. No, that extenuates their bigotry; they just hate little brown men. It was Viraj Mendis' misfortune that he wasn't a voluptuous passportless Swedish blonde with pouting lips and big boobs!

In the USA, the church-based "Sanctuary Movement" has emerged to openly challenge the law by granting asylum to Central American asylum-seekers who are crossing the border into New Mexico. In Western Europe, trade unions and community groups (such as law centres, advice centres and human rights organisations) are usually quick to launch campaigns on behalf of asylum-seeking applicants although not always with fruitful results.<sup>56</sup>

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56 As in the Mendis case.

8.4.5 What Are the Duties and Rights of Refugees Once They Have Been Granted Asylum?

The refugee-seeker is chiefly governed by the fact that he/she falls under the territorial jurisdiction of the receiving State. In general terms, the refugee occupies the position of any normal alien, with the proviso that he may not be expelled to his country of origin unless there are grave reasons for doing so. It is not clear how far the expulsion of a refugee to a country other than the one in which his life of freedom is threatened, is permissible. As an alien, the refugee is entitled to the rule of law as well as the "International Minimum Treatment" rule. He or she may not be treated as an outlaw nor confined in disregard of the domestic law. However, the refugee cannot claim rights not otherwise granted by legislation to foreigners. In addition, the refugee has to submit to the rules pertaining to alien administration. It is not obviously clear how far refugees can claim benefits from bilateral treaties concerning the treatment of foreigners. General international law is silent on the question of the political rights of refugees in their country of asylum. It would seem that in general refugees have no right to engage in political activities extending beyond the normal freedoms such as freedom of speech, conscience and so on. On the contrary, States may incur international responsibility if they allow or support the activities of exiles directed against the government of another State. It is seen that the status of refugees in country of asylum is by no means clearly circumscribed. It is therefore fortunate that States have been

willing to determine it more exactly in international instruments. It is indeed the only respect of refugee law which in a codified form has achieved anything like common consent<sup>57</sup> in the 1951 Convention. According to the 1951 Convention, refugees should be given the same treatment as nationals in respect of certain basic rights,<sup>58</sup> subject to certain qualifications,<sup>59</sup> national treatment is also granted in wage-earning employment, labour and social security legislation. The personal status of refugees is to be granted and governed by laws of the country of asylum and they are to be exempted from exceptional measures.

The most favoured national treatment that should be accorded to refugees must include permission to create and join non-political, non-profit making associations and trade unions as well as the right to engage in wage-earning employment for those who have not yet fulfilled the requirement for national treatment. Although there is no automatic right to be accepted into any country, refugees once granted asylum and admitted to legal residence should be protected against expulsion, subject to consideration of national security or public order. Even then, expulsion should only take place "in pursuance of a decision reached in accordance with due process of law". The

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57 Non-Discrimination (Article 3), Freedom of Religion (Article 4), Right of Association (Article 15), Access to Courts (Article 16), Employment (Chapter III), Welfare (Chapter IV), and Administrative Measures (Chapter V).

58 Ibid.

59 Ibid.

Contracting States are obliged to issue identity papers to any refugee in their territory who do not possess valid travel documents. Furthermore, the 1951 Convention provides for the insurance of International Travel Documents (ITD) to refugees lawfully residing in the country of asylum. These Travel Documents are internationally recognised, even by States which are non-signatories to the 1951 Convention as was illustrated in Chapter Three.

## 8.5 THE POSITION OF THE ASYLUM-SEEKERS AT SEA

### 8.5.1 Introduction

The position of asylum-seekers at sea was not given much serious thought until the 1970s and 1980s.<sup>60</sup> The asylum-seeker at sea was certainly a new brand of refugee which had not been foreseen by the international community nor indeed by the UNHCR. Large numbers of asylum-seekers emerged, mainly originating from the South East Asian seas and waters. The ironic position of the asylum-seekers at sea is that States can easily ignore refugees or asylum-seekers at sea, whereas if the same situation occurred at their land borders or frontiers, States would face great difficulty in ignoring or rejecting the refugees once they had arrived on their doorstep. Basically, the State granting asylum has three alternatives. Firstly, the State can accept the asylum-seekers and subject them to various provisions concerning the welfare and safety of

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<sup>60</sup> When the problem became prominent.

the refugee (integration). Secondly, States can send the asylum-seekers to another country (resettlement). Or, thirdly, the State can refoule the refugees to their country of origin where they may face violation of human rights and persecution or be subjected to famine, war, drought, intervention by foreign States and civil war (non-1951 Convention asylum-seekers). The second alternative seems dubious if no State is prepared to accept the asylum-seekers and in connection with the third alternative, the State would be in violation of the principle of non-refoulement irrespective of the State being a signatory member of a refugee convention or not. The position of the principle of non-refoulement can be evidenced in customary international law (see Customary Law in the Non-Refoulement section).

#### 8.5.2 The Role of Merchant Ships in Relation to Rescue at Sea

A common action which has worried the international community is that the asylum-seekers have been towed out to the High Seas and abandoned to the mercy of the sea. This places a humanitarian burden on the captain of a merchant vessel who sails past the boat-people. The captain and his crew will be under an obligation to rescue these people while, ironically, the State which refouled these boat-people (although it would deny such an action) can claim non-breach of any customary law or treaty and still maintain their dignity and respect in front of the international community.

Once the asylum-seeker is on the High Seas, they are faced with many problems,<sup>61</sup> and if they are lucky enough to be rescued, their relief may only be temporary as the asylum-seeker must still search for a place of asylum and admission to a State. One interesting point is that no State is bound to accept asylum-seekers when they have been rescued by the master of a ship.<sup>62</sup> It is appropriate to cite some legislation concerning safety at sea.

#### 8.5.2.1 Some legislation concerning safety at sea

Will the captain be under a legal obligation to rescue and pick up asylum-seekers on the High Seas? This legal obligation originated in the early 20th Century by virtue of the Convention for the Unification of Certain Rules relating to Assistance at Sea, signed at Brussels on 23 September 1910.<sup>63</sup> This Convention was ratified by a great number of States,<sup>64</sup> and basically stipulated the duty of a ship's captain or master to provide assistance to persons found at sea. Article 11 states:

"Tont capitaine est tenu, autant qu'il pent le faire sans danger sérieux pour son navire, son équipage, ses passagers, de prêter assistance à toute personne, même ennemie, trouvée en mere en danger de se perdre.

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61 Piracy, storms, famine, starvation, disease and actual drowning.

62 See UN Doc. A/AC 96/Inf.150 and UN Doc. HCR/155/8/77.

63 Parry, The Consolidated Treaty Series, Vol.212, (French text), Oleava Publications, New York, 1910-11. See also, Regulation 10 of Chapter V of the Safety of Life at Sea Convention, 1974.

64 65 States, with the exception of Liberia and Panama.

Le propriétaire du navire n'est pas responsable à raison des contraventions à la disposition précédente."

The crucial aspects of this Article are that it applies to every master who is in a position to rescue and render assistance to anybody, as long as he does not endanger his crew, passengers or vessel in the rescue attempt. More importantly, this provision shows that everybody must be rescued, even enemies. The last paragraph states that the owner of the vessel will incur no liability by reasons of contravention of the above provision.

It seems that from a literal interpretation of the above Article, it only applies to merchant shipping and not to warships, and also only to captains of a ship which is registered in one of the Contracting States. However, it would seem unlikely if a captain of a merchant or passenger ship would not rescue a boat full of people clearly in danger and distress just because he happens to be a captain of a ship which has not ratified the Convention. The captain would be under a moral obligation to rescue and would probably apply humanitarian ethics rather than tangle with legal jurisprudence or provisions.

The late 1920s<sup>65</sup> and the late 1940s saw several pieces of legislation relating to assistance of persons in distress at sea. One was the International Convention for the Safety of Life at Sea 1948 (with annexed regulations) signed at London on 10 June 1948 and containing Article 5 on Carriage of Persons in Emergency:

"(a) For the purposes of moving persons from any territory in order to avoid a threat to the security of their lives a Contracting Government may permit the carriage of a larger number of persons in its ships than is otherwise permissible under the present Convention."

Although this provision was primarily designed for the assistance of large numbers of persons during the Second World War, a great many people have been found on the High Seas, some survivors of wrecks or disablements, others escapees and asylum-seekers waiting to be rescued. However, this Convention was replaced by a later convention,<sup>66</sup> the International Convention for the Safety of Life at Sea 1960 (with annexed regulations). Article IV was of some relevance and of the same wording as Article 5 of the 1948 Convention. The provision of

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<sup>65</sup> International Convention for the Safety of Life at Sea, signed at London on 31 May 1929. See 136 LNTS 82. The relevant position was in Article 45:

"1. The master of a ship ... is bound to proceed with all speed to the assistance of the persons in distress ..." and,

2. The provisions of this article do not prejudice the International Convention for the Unification of Certain Rules with respect to Assistance and Safety at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by Article 11 of that Convention.

<sup>66</sup> See 164 UNTs 113.

Article 11 of the 1910 Convention has been widely accepted and it is noticeable that nearly all international instruments contain a provision similar to Article 11.

#### 8.5.2.2 The Executive Committee

The Executive Committee of the UNHCR Programme became concerned about problems at sea, especially relating to the rescue of asylum-seekers on the High Seas. It adopted the following conclusions on problems relating to asylum-seekers at sea:<sup>67</sup>

"1. It is recalled that there is a fundamental obligation under international law for ships masters to rescue any person in distress at sea, including asylum-seekers, and to render them all necessary assistance. Seafaring States should take appropriate measures to ensure that masters of vessels observe this obligation strictly.

2. Rescue of asylum seekers in distress at sea has been facilitated by the willingness of the flag states of rescuing ships to provide guarantees of resettlement required by certain coastal states as a condition for disembarkation ... All countries should continue to provide durable solutions for asylum-seekers rescued at sea."

#### 8.5.2.3 UNCLOS III and the rescue of boat people

One of the most important conventions on the law of the sea was

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<sup>67</sup> No.23 (xxxii), 32nd session, 1981, Problems Related to the Rescue of Asylum Seekers in Distress at Sea. Conclusion endorsed by the Executive Committee of the High Commissioner's programme upon the recommendation of the Sub-Committee of the whole on International Protection of Refugees. The Executive Committee, in paragraphs 3 & 4, stated that persons rescued at sea should normally be disembarked at the next port of call. However, in practice, this rarely occurs as States are often reluctant to receive asylum-seekers.

the United Nations Convention on the Law of the Sea (UNCLOS), signed in 1982, which will replace the United Nations Convention of the Law of the Sea, signed on 29 April 1958 (the 1958 Convention). UNCLOS III is not in force at the time of writing, containing as it does 19 signatories but with only 32 ratifications.<sup>68</sup> However, Article 98 of UNCLOS III reads:

"1. Every State shall require the master of a ship flying its flag, insofar as he can do so without serious danger to the ship, the crew or passengers:

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, insofar as such action may reasonably be expected of him."<sup>69</sup>

In UNLCOS III, there is no provision referring to boat-people, only to render assistance to people at sea.

Although paragraph (b) is self-explanatory and simple, UNCLOS III urges coastal States to provide protection to people who are in distress at sea near the vicinity of the territorial waters of those States. Paragraph 2, in this connection, states:

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<sup>68</sup> It is interesting to note that the USA, the UK and the Federal Republic of Germany are among those States which have not signed. See, "The Law of the Sea (UNCLOS)", United Nations, New York, 1983; and "The Law of the Sea, Status of UNCLOS", Office of the Special Representative of the Secretary-General for the Law of the Sea, United Nations, New York, 1985.

<sup>69</sup> There is no explanation in the travaux préparatoires about the meaning of this Article, either in UNCLOS II or III. Perhaps the drafters followed Article 11 of the 1910 Convention.

"Every coastal state shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring states for this purpose."

#### 8.5.2.4 Dangers of piracy facing asylum-seekers 70

The Executive Committee in its 31st session<sup>71</sup> outlined the problems that asylum-seekers were facing at sea. They noted with grave concern the continuing incidence of criminal attacks on refugees and asylum-seekers in different areas of the world, including military attacks on refugee camps and on asylum-seekers at sea. The Committee expressed particular concern regarding criminal attacks on asylum-seekers in the South China Sea which involved extreme violence and recommended government action to prevent such criminal attacks, whether they occurred

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70 For a comprehensive analysis, see D.P. O'Connell, The International Law of the Sea, Vol.II, Clarendon Press, Oxford, 1984, pp.966-983.

71 No.20 (xxxix) Protection of Asylum Seekers at Sea, 1980. Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the Recommendation of the Sub-Committee of the whole on International Protection of Refugees. In 1983, the Executive Committee at its 34th session, adopted Resolution No.31 (xxxiv) Rescue of Asylum Seekers in Distress at Sea, which promoted the Rescue at Sea Settlement Offers (RASRO) (see UNHCR section). In 1984, the Executive Committee, at its 35th session adopted Resolution No.34 (xxv) Problems Related to the Rescue of Asylum Seekers in Distress at Sea, which strongly recommended that the RASRO Scheme should be implemented on a trial basis as soon as possible and supported the Disembarkation Resettlement Offers (DISERO). Then, in 1985, the Executive Committee at its 36th session, adopted Resolution No.38 (xxxvi) Rescue of Asylum Seekers in Distress at Sea, which strongly recommended that States should maintain their support and join the DISERO and RASRO schemes as soon as possible.

on the High Seas or in their territorial waters. The Committee stressed that governments should take the following measures to prevent any recurrence of such criminal attacks:

"(i) increased governmental action in the region to prevent attacks on boats carrying asylum-seekers, including increased sea and air patrols over areas where such attacks occur;

(ii) adoption of all necessary measures to ensure that those responsible for such criminal attacks are severely punished;

(iii) increased efforts to detect land bases from which such attacks on asylum-seekers originate and to identify persons known to have taken part in such attacks and to ensure that they are prosecuted;

(iv) establishment of procedures for the routine exchange of information concerning attacks on asylum-seekers at sea and for the apprehension of those responsible, and co-operation between Governments for the regular exchange of general information on the matter."

The Executive Committee called upon Governments to give full effect to the rules of general international law - as expressed in UNCLOS II & III - relating to the suppression of piracy;<sup>72</sup> it urged Governments to co-operate with one another to ensure assistance for the victims of such attacks<sup>73</sup> and called upon the UNHCR to co-operate with the International Committee of the Red Cross and other organisations to protect refugees who are victims of acts of violence, particularly those at sea.<sup>74</sup>

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72 Para (e), *ibid.*

73 Para (f), *ibid.*

74 Para (g), *ibid.*

Asylum-seekers, apart from facing the perils of the High Seas, must also face a bigger danger in the South East China Seas from pirates. Indeed, many boat people have been subjected to violence, rape, humiliation and general abuse from pirates who freely terrorise the High Seas, even in this modern day. Although many States and the UNHCR have taken practical steps to capture pirates at sea and try them in domestic courts (see the UNHCR section), the seriousness of piracy can still be seen in Article 100 (Duty to Co-operate in the Repression of Piracy) of UNCLOS III:

"All States shall co-operate to the fullest possible extent in the repression of piracy on the High Seas or in any other place outside the jurisdiction of any State."

But what is piracy, is there a definition of piracy to be found within the international instruments? The answer is yes.

Article 101 of UNCLOS III states:

"Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against other ships or aircraft, or against persons or property on board such a ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

- (c) any act of inciting or of intentionally facilitating an act described in subparagraphs (a) or (b)."

Clearly, rape, abuse, assault, physical violence and torture satisfy the provision of paragraph (a) of Article 101.

Article 103 (UNCLOS III) states:

"A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act."

Article 105 (UNCLOS III) gives powers to States to arrest pirates and try them in their States, although only "warships or military aircraft or aircraft clearly marked and identifiable as being on government service and authorised to that effect." (Article 107 (UNCLOS III)).

The above articles form some sort of protection for the boat-people or asylum-seekers on the High Seas who constantly face piracy in international waters. It is certainly pleasing to note that many States have arrested and tried pirates and the result is that pirate attacks are diminishing, although they do still occur.

8.5.2.5 Can merchant ships rescuing asylum-seekers be regarded as States granting asylum?

Merchant or passenger ships do not enjoy immunity from local jurisdiction in the same way as do public vessels, such as warships. Exception is made in respect of vessels' internal order and discipline, as long as it does not disturb the peace of the port. These ships, therefore, cannot accord asylum. Merchant ships on an open sea are not subject to territorial jurisdiction but are subject to the jurisdiction of the State of the flag. So, can asylum-seekers claim asylum once they have been rescued by a merchant ship on the High Seas? It seems not. Asylum-seekers are usually rescued on sympathetic and humanitarian considerations, as there is nothing to prevent a captain of a ship from ignoring the plight of asylum-seekers on boats and steering his ship well away from them - except perhaps his conscience!

Asylum-seekers can be in a position of transit or orbit until the captain disembarks them at a port, where they may be accepted and eventually granted asylum. Until such a port is reached, the captain is burdened with the asylum-seekers.

In September 1950, at the Bath Sessions, the Institute of International Law adopted an interesting provision, namely in Chapter III, Article 3, which reads:

"1. Asylum may be granted on the premises of diplomatic missions, consulates, warships, government ships used for public service, military aircraft, and

premises within the jurisdiction of another organ of a foreign state authorised to exercise authority over that territory." <sup>75</sup>

As can be clearly seen, no specific mention of passenger or merchant ships has been made. It seems that either the drafters of the provision did not foresee a situation whereby merchant or passenger ships would be rescuing asylum-seekers from the High Seas, or that they did not want a situation whereby every merchant ship generating assistance on a moral and humanitarian basis would in effect be granting asylum, placing the flag-State in what would surely be a difficult situation. It seems that the former view was probably the reason for not including merchant or passenger ships.<sup>76</sup>

### 8.5.3 Can Asylum-Seekers Claim Asylum Once They Have Crossed the Territorial Waterline?

Aspects of non-refoulement of asylum-seekers who enter the

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<sup>75</sup> Annuaire, Institut de Droit International, Vol.II, No.43, 1950, p.390.

<sup>76</sup> However, Article 3 does specifically mention "warships, government ships used for public service ...". So, could a warship which is used to rescue asylum-seekers in effect grant asylum? There could be two views. One, that warships are reluctant to offer assistance by way of accepting asylum-seekers aboard. They would invariably radio for civilian assistance and stay near the refugee boats until such help arrives; only in extreme cases would asylum-seekers be allowed to board such a vessel. And two, that even if such asylum-seekers are allowed on board a warship, the captain would inform them that they have not been granted asylum but on a temporary refuge until other details can be sorted out. So, legally, the asylum-seekers, once aboard the warship, can claim asylum. However, technically, this is not so. Only one exception would be possible, if the government of the warship informs the warship to grant asylum. However, no such case has ever been recorded.

shoreline or territorial waters of States were discussed in Chapter Seven. But now we can consider an interesting situation. Consider that asylum-seekers are on board a merchant or passenger ship which, owing to obligation and humanitarian reasons, has rescued asylum-seekers and deliberately entered the shoreline or territorial waters of a State. Physically, the asylum-seekers can claim that they have physically crossed the border or frontier, and therefore the asylum-seeker is inside the port territory. Territorial waters are considered an extension of a State. The decision whether or not to grant asylum will ultimately lie with the port authorities and its government. It is ultimately the decision of a State to grant asylum whereas the individual can only ask for asylum. The discretion is entirely with the State and the State is not legally bound by any international instrument to grant asylum.<sup>77</sup> So, if the port authorities so wish, they can grant asylum and the asylum-seekers can disembark at that port. However, if the port authorities refuse the application and deny the granting of asylum, then the asylum-seekers will have to stay on board the vessel until such time as the vessel sets sail for another port.<sup>78</sup>

The captain of a merchant or passenger ship is faced with a conflict between legal duty and humanitarianism if the flag State is not a signatory body of any convention or instrument. If the flag State is a signatory member of the 1910 Convention,

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77 Although the OAU Convention comes very near to it.

78 Where the asylum-seekers will try again.

have to flee by sea.

8.6 THE PRINCIPLE OF INTERNATIONAL SOLIDARITY AND THE ADMISSION OF ASYLUM-SEEKERS FROM AREAS OF SOCIAL STRESS

8.6.1 International Friendship and Solidarity

(i) International Friendship

International friendship can be implied in States granting asylum under Article 14 of the Universal Declaration of Human Rights. The United Nations and many States regard the granting of asylum under Article 14 as a humanitarian act and which cannot be regarded as an expression of hostility towards the State of origin or the State of permanent residence.

(ii) International Solidarity

International solidarity can be explained in simple terms which are often experienced in the practical situations of States burdened with asylum-seekers. Where, in the case of a sudden or man-made influx, or for other compelling reasons, a State can notify other Contracting States or through an agency (for example, the appropriate United Nations body or UNHCR itself), as in Chapters Three and Nine respectively, that it is experiencing difficulty in granting or continuing to grant the benefits of the Refugee Conventions, the other Contracting States in a spirit of international solidarity should take the appropriate measures, either individually or jointly, through the UN agencies to share equitably the burden of that State.

During the past few years, it has become increasingly obvious that the mass influx of refugees into States traditionally known for granting the right of asylum, has outgrown the possibility of a solution being found at a local or national level, and for the problem to be solved needs international co-operation. It is apparent that the underlying principle for dealing with the mass influx of refugees or asylum-seekers appears to be international solidarity. In 1987, the good offices of the UNHCR did call for increased assistance to share the burden of the mass influx of refugees in South East Asia. The clear importance of international solidarity in playing a major and crucial role in attempting to solve this problem was evidently recognised. As a consequence of accepting the urgent need to assist the hundreds of thousands of refugees from South East Asia, a number of States have adhered to the principle of international solidarity and increased their admission quotas for asylum-seekers without applying complex and lengthy eligibility procedures for the determination of who is or who is not a refugee. A number of States have recognised that granting collective asylum to asylum-seekers, especially from South East Asia, is prima facie a humanitarian act whose aim is to prevent further acute jeopardy of lives of refugees, rather than to apply the individualistic definition in Article 1 of the 1951 Convention. The prevention of danger, saving of lives and the sharing of political-economic burdens were certainly decisive considerations for adhering to the principle of international solidarity by States granting asylum. However, there are some States who do not want refugees, for instance,

Malaysia and Finland. The sympathy and willingness to assist the refugees from Indo-China was unprecedented since the time of the Hungarian Revolution in 1956. The mass influx of refugees is in reality based upon the consideration of the State granting asylum in terms of its national security and economic burden rather than the humanitarian principle of international solidarity. These two restrictions can lead to more restrictive policies of admission of asylum-seekers. A real solution has not yet been found. Article 1, para 2, of the Statute of the UNHCR reiterates the legitimacy of the collective admittance of refugees from crisis areas besides those fearing political persecution, as can be seen in Chapter Nine. This implies that the eligibility procedures are left to genuineness of the administration on the domestic level of the asylum-granting State. But this seems to be understood with the reaffirmation of the principle of non-refoulement and non-extradition but not necessarily with the principle of international solidarity.

It is important to note that States continue to grant asylum to refugees, protect them against refoulement and treat refugees in accordance with recognised human standards. International protection must operate in the context of the efforts to find durable solutions. In fact, no durable or temporary solutions should be conceived without full account being taken of fundamental protection concerns.

The root causes of refugee movements must now be addressed in

their own right and whenever the political issues which attend refugee flow are discussed between States. This approach is long overdue with respect to the multitude of refugee situations which have been allowed to perpetuate themselves but is equally valid when examining responses to emerging refugee situations. Specific actions must be accompanied by efforts to reaffirm the spirit of international solidarity.

**(iii) Asylees from Areas of Social Stress**

The practice of admission and resettlement of refugees, especially from South East Asia, was viewed in the light of the several possibilities about the extent of obligation to grant asylum as discussed by the Nansen Symposium on Territorial Asylum in Geneva, 27-30 June 1976. The Symposium came to the conclusion that apart from (a) granting asylum to all persons covered by the Convention; and (b) granting of asylum to persons in danger of persecution, threatening his life, corporal integrity or freedom, the Contracting State may also offer the possibility of granting asylum in accordance with its national laws while making the best possible use of granting asylum beyond the mandatory stipulation of the national laws.<sup>80</sup> The result of applying individual rational solutions in granting asylum to refugees from South East Asia rather than limiting itself to the Convention had the following consequences:

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<sup>80</sup> For further information, see Professor Grahl-Madsen, Territorial Asylum, Alnquist & Visell International, Stockholm, Sweden, 1980, pp.57-58.

1. It calls into question the legitimacy of individual recognition procedure for asylum-seekers (it may take years).
2. This creates 1st and 2nd class refugees: those who were collectively granted residence permits or recognised as "Convention Refugees" immediately upon their arrival, and those who were going through more lengthy procedures.
3. The question of the UNHCR mandate is worth a polite query (see Chapters Nine and Ten).

By applying national standards in admission, recognition of refugees from South East Asia, many countries have de facto recognised that apart from the "well-founded fear of persecution", there are also other legitimate reasons to grant asylum, especially in cases of mass influx of refugees:

1. "Immediate (direct) danger to limb and life"
2. "Danger to corporal and psychological well-being in areas of social distress".

Poverty and hunger under any standard of humanitarianism offers serious dangers impairing both the physical and psychological well-being of a human being. A large number of asylum-seekers in Europe and elsewhere do come from areas of social distress. When it appears that social distress was caused in absolute terms as a consequence of political instability, political

terrorism, and war, it seems sufficient ground for justifying the granting of asylum.

It must eventually be recognised that "well-founded fear of persecution", of danger to limb and life, and social distress, are very often, to some extent, motivation for a person to seek asylum and protection from another State. Article 3 of the Universal Declaration of Universal Rights, which states that "everyone has the right to life, liberty and security of person", would give the principal justification for international solidarity in granting asylum to persons from areas of grave social distress, in spite of the fact the persecution as understood through Article 14 of the Universal Declaration of Human Rights would not apply.

Throughout history, mankind has all too often experienced social distress in one part of the world or another which can mount to direct danger of limb and life and denial of basic human rights. Therefore, that aspect of international solidarity applied to cases of collective admission and granting of asylum to those refugees from South East Asia, should also apply to individual asylum-seekers from various countries of the Third World, especially in cases of large-scale influx. It is worthwhile recognising that while international solidarity and co-operation should not be a precondition for compliance with basic humanitarian principles, they are indispensable for satisfactorily resolving problems of refugees and displaced persons arising in situations of large-

scale influx. International assistance may be essential not only for immediate relief but also for durable solutions. This idea can be applied to the South East Asia exodus and also to other regional asylum-seekers escaping social, economical and political distress.

A number of countries which have provided for refusal of asylum, implemented in their laws, are arguing that refugees coming to the developed countries is a phenomenon paramount to economic parasitism.<sup>81</sup>

According to some opinions,<sup>82</sup> the massive influx of refugees from areas of social distress could be solved by introducing a new instrument on "temporary asylum". These views are worth a polite inquiry. Refugees from areas of social distress do not seek asylum in order to benefit from material wealth of the State in question, but enjoy basic human rights as defined by the Universal Declaration of Human Rights which are denied them and their families in the country or state of origin and/or habitual residence. The non-eligibility for granting asylum to refugees from areas of social distress leads to the following options:-

1. The person in question may become an illegal resident, in spite of the refusal of granting of asylum in that

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81 Ugandan Home Minister, 23 Feb 1985, BBC Radio 4, "Uganda and its Neighbours".

82 Ibid.

country.

2. The asylees may seek asylum in other States and thus possible become refugees "in orbit".
3. If the asylees are returned to their native countries or countries of habitual residence, they may be exposed to the same cruel, inhuman and degrading condition which made them seek asylum in the first place.
4. If returned to their native countries they may be subjected to political persecution, for instance, for unauthorised protraction or protection in their stay abroad, for applying for asylum in a country with an opposing ideology, or for their activities during their period of asylum-seeking.

Instead of complying with the 1951 Convention and the definition contained in Article 1, the majority of today's refugees are seeking asylum on grounds of violation of human rights, danger to life and limb and socio-economic distress. It is also the reality of today's world that social distress all too often happens to be a consequence of international political instability, turmoil and war. Unfortunately, the majority of today's mass refugees are from areas of social distress and it a reality rather than an attempt to create a new category of refugee. Possible solution of this important humanitarian problem must be based upon the principle of international solidarity and co-operation.

8.7 OPENING THE FLOODGATES? ELIGIBILITY FOR ASYLUM IN THE USA AND THE UK

[The Publication in Issue 2 of the Anglo American Law Review, 1989]

8.7.1 Introduction

An asylum-seeker, once he or she has entered the territory of a State, can apply for refugee status and asylum. Eligibility for asylum and refugee status depends on two main international legal instruments dealing with refugees, namely the 1951 Convention relating to the Status of Refugees (1951 Convention)<sup>83</sup> and the 1967 Protocol relating to the Status of Refugees (1967 Protocol),<sup>84</sup> assuming of course that the refuge State has ratified these instruments.

A "refugee" is defined by Article 1(A)(2) of the 1951 Convention as being one who:

"... owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a 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 as a result of such events, is unable or owing to such fear, is unwilling to return to it".

Once the asylum-seeker has satisfied the relevant authorities of the refuge State that he or she fulfills this definition,

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83 189 UNTS 150.

84 606 UNTS 268.

then he or she should be granted refugee status or asylum. One of the conditions within the definition in Article 1(A)(2) is that the applicant must have a "well founded fear of being persecuted". Primarily eligibility depends on the applicant satisfying this condition.

The 1951 Convention has so far been ratified by 106 countries.<sup>85</sup> The United States ratified the 1967 Protocol in 1968 which prompted the 1980 Refugee Act to bring US domestic law into conformity with the refugee conventions. The United Kingdom ratified the 1951 Convention in 1954 and the 1967 Protocol in 1968, but they have not yet formed part of the English domestic law. One can refer to Chapter Six for further detailed analysis on the English domestic scene.

There does not seem to be an international standard regarding eligibility for asylum. Courts are left to deal with cases on their merits; in other words, there is case by case adjudication. The results of two such cases will be highlighted here, one from the United States of America, the other in the United Kingdom.

This article deals with the history of the 1951 and 1967 refugee conventions; the extent to which these conventions have come to be recognised in US and UK domestic law; the US Supreme Court ruling in the Cardoza-Fonseca case and the UK Court of Appeal and House of Lords' rulings in the Tamils' case; finally

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<sup>85</sup> As of April 1989.

suggestions are made as to the way forward for legislative development.

## 8.7.2 The History of the 1951 Convention and the 1967 Protocol

### 8.7.2.1 The 1951 Convention

Before the First World War, individuals who had left their home countries rarely lost their nationalities without acquiring another citizenship, and few individuals had to leave their home country for political reasons. They were not really a problem until the great changes in the political and social structures in Europe which followed the breakdown of centuries-old Russian and Turkish empires which resulted in a mass exodus of persons who were refugees.

The establishment of the Fascist regime in Italy resulted in many thousands of Italian refugees, while the Civil War in Spain added hundreds of thousands of Spanish refugees. The creation of the Nazi regime in Germany resulted in a new wave of refugees. Irrespective of their origins, all these persons had one fundamental characteristic in common: they were foreigners in the country of refuge but differed from other foreigners of the same origin in that they did not enjoy the protection of their home country and they could not or did not want to return to their former homeland, for fear of persecution. These people created problems of rights and privileges of refugees which had been practically unknown until that time. There was a small number of instruments dealing

with the legal status of refugees but they were rather slow and impractical.

With the end of World War II the problem of the refugees assumed far greater dimensions than ever before. The status of the new categories of refugee was regulated by the Constitution of the International Refugee Organisation (IRO) in 1949. In Germany and Austria the occupying powers established a special status for refugees but in other countries practically nothing was done to regularise their status. The creation of these new refugees led the Economic and Social Council of the United Nations on March 2 1948, to adopt Resolution 116(VI)(D) requesting the Secretary General of the United Nations to undertake a further study of the refugee problem. As a result of the Secretary General's study, the Economic and Social Council, on 8 August 1949, adopted Resolution 248(IX)(B), appointing an Ad Hoc Committee consisting of representatives of 13 governments. One of its tasks was to prepare a draft for a convention relating to the international status of refugees and stateless persons. The Ad Hoc Committee produced a report which was given to the Economic and Social Council at its 11th session and subsequently submitted a draft to the General Assembly at its 5th session. The General Assembly did not deal with the substance of the Draft Convention but decided to convene a Conference of Plenipotentiaries in Geneva to complete the drafting of the Convention. The reason for this was to allow non-members of the United Nations, who may so have desired, to participate in the final draft of the document. At

the Conference of Plenipotentiaries, 26 states were represented by delegates and 2 governments by observers. The Conference unanimously adopted the Convention relating to the Status of Refugees. The 1951 Convention was born which attempted to establish an international code of rights and privileges for refugees. It was more favourable than previous instruments. A large number of states were concerned in its drafting. Five major continents had been represented at the Conference of Plenipotentiaries; thus the 1951 Convention reflected opinions and views from all parts of the world rather than simply from a European or American perspective.

The first appearance of the test "well founded fear of persecution"

The test "well founded fear of persecution" was based on the Constitution and Practice of the International Refugee Organisation (IRO) (1949). This required no more than that an applicant show a plausible reason for fearing persecution. The Ad Hoc Committee on the Draft Convention gave careful consideration to the provisions of previous international agreements. It sought to retain as many of them as possible in order to ensure that the new consolidated Convention should afford "at least as much protection" to refugees.<sup>86</sup>

The Constitution of the IRO<sup>87</sup> had served as a point of departure for the refugee definition in the US draft proposal.

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86 Report UN Doc. E/1618 at 37.

87 18 UNTS 283.

The phrase "well founded fear of persecution" originated from the "valid objections"<sup>88</sup> listed in the IRO Constitution. These consisted of "Persecution or fear, based on reasonable grounds, of persecution because of race, religion, nationality or political opinions",<sup>89</sup> provided these opinions were not in conflict with the principles of the United Nations, as stated in the Preamble of the Charter of the United Nations.<sup>90</sup>

The French version, "fear based on reasonable grounds of persecution", in the IRO constitution was translated as "justifiable fear of persecution",<sup>91</sup> while the UK version was "serious apprehension based on reasonable grounds of persecution", which was extremely close to the IRO terminology. Eventually, the phrase used in a revised UK proposal was adopted by the Committee.

The working papers of the Ad Hoc Committee demonstrate that the drafters of the refugee definition in the 1951 Convention were fully aware of the close ties between the two definitions. The

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88 Under the IRO Constitution, the determination of whether a refugee was a concern to the IRO involved a derivation of the validities of their objection of return to their country of origin. See *Ibid.*, at 3, Annex 1, part 1 section c(1)(a)(1).

89 Due to race, religion, nationality or political opinion.

90 The language used in this objection and that used in US, UK and French draft proposals is clearly parallel. See UN Doc. E/AC.32/L.4 at 5; UN Doc. E/AC.32/SR.5 at para 9 and UN Doc. E/AC.32.L.3 (Jan 17 1950).

91 French original: "Crainte fondee de persecution".

French and Italian delegates expressed the view that the Draft Convention was too similar to the provision of the IRO constitution and argued that it was "unduly restrictive". Both countries pleaded for a broader definition.<sup>92</sup> The travaux préparatoires do not suggest that the standard of the 1951 Convention definition was to be regarded as narrower than that which prevailed under the IRO. In fact, bearing in mind the Ad Hoc Committee's intention to provide protection for refugees, the 1951 Convention was to be interpreted similarly to the IRO Constitution.<sup>93</sup> This is significant, for the meaning of the earlier phrase had been clearly established through the eligibility decisions made by the IRO.

The drafters of the 1951 Convention agreed that fear should be considered well founded when a person can show "good reason" why he or she fears persecution. The travaux préparatoires of the 1951 Convention contain no further discussions of its meaning and the formulation and comments by the Ad Hoc Committee are still the final words on interpreting the term "well founded fear of persecution".

#### 8.7.2.2 The 1967 Protocol

The 1951 Convention was limited by the words "as a result of

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92 That is, as requiring no more than that the applicant gives a "plausible" and "coherent" account of why he or she fears persecution.

93 UN Doc. E/1703 (Corr.1); UN Doc. E/1703/Add. 2-7; and UN Doc. E/AC.32/L.40.

events occurring before 1 January 1951 in Europe". The limiting nature of the date became increasingly apparent as time passed. For example, in the early 1960s, Africa witnessed the citation of many thousands of new refugees, due mainly to the decolonisation of certain territories. These "new" refugees were not considered conventional refugees because they became refugees after 1 January 1951 and did not originate from Europe.

This problem was discussed by many delegates in the Executive Committee of the UN High Commissioner's Programme at the second session in 1964 and the twelfth session in 1965. The Executive Committee studied the scope of the 1951 Convention and decided that the dateline should be deleted.<sup>94</sup> The Colloquium on Legal Aspects of Refugee Problems with particular reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner for Refugees (Colloquium) met in Bellagio, Italy, to discuss how the dateline and the geographical limitations could be removed and to try to establish a binding legal obligation. The Colloquium reported that two possibilities seemed to be available; first a revision of the 1951 Convention in accordance with Article 45 of the 1951 Convention whereby 'any contracting state may request revision of this Convention ...'; or secondly, the establishment of a separate legal instrument on similar lines to the 1951 Convention, which would be a lengthy, cumbersome and a very impractical task. Eventually, the Colloquium

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<sup>94</sup> 12th Session, UN Doc. A/AC.96/270, p.7, para 33.

agreed that the best way of overcoming this problem was to attach a Protocol to the 1951 Convention, which would remove geographical and date restrictions.

The Executive Committee at its 16th session, held in October 1966, adopted these proposals, subject to government replies to them. These replies were very favourable and the draft was submitted to the General Assembly through the Economic and Social Council, which approved the draft in November "unanimously" at its 41st session, as an Addendum to the High Commissioner's Annual Report.<sup>95</sup> The General Assembly at its 21st session held discussions and voted a unanimous approval of the text. The text of the 1967 Protocol was adopted, thereby removing the geographical and dateline limitations. States can now ratify either the 1951 Convention or the 1967 Protocol or both.

### 8.7.3 Are the 1951 Convention and the 1967 Protocol Recognised in the US and UK Municipal Legal Systems?

#### 8.7.3.1 The United States of America

Prior to 1980, there was only one US statute which dealt with asylum. This was s.203(a)(7) of the Immigration and Naturalisation Act 1952, (INA). At that time there were no statutory bases for granting asylum to asylum-seekers who applied for asylum within the US. Section 203(a)(7) authorised the Attorney General to permit "Conditioned entry" to a certain

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<sup>95</sup> ECOSOC Res. 1186 (XL) on 18 Nov 1966.

number of refugees because of "persecution or fear of persecution", on account of race, religion or political opinion. It was primarily designed to cater for refugees escaping Communist or Middle Eastern states after the conclusion of the Second World War. This provision was very relaxed in its wording, more so than any of the later provisions which were to be adopted. The practice under s.203(a)(7) did not seek proof of "well founded fear of persecution" a test which the Congress later adopted in 1980.

The test of "well founded fear of persecution" was incorporated after the US had ratified the 1967 Protocol in 1968. In 1968, the US authorities did not consider it then to create any new obligations beyond those already contained in domestic law. The authorities considered the provisions in domestic law as being sufficient to deal with the refugee problems.

The result of many thousands of refugees in Asia and Africa in the late 1970s prompted the US authorities to establish more permanent and systematic Procedures for the admission of refugees and a comprehensive framework for providing assistance to refugees within the US. The Refugee Act of 1980 replaced a patchwork of legislation in response to each new refugee crisis. The Refugee Act, inter-alia, expanded the definition of the refugee as well as mandatory non-refoulement, which conformed with the 1967 Protocol, and for the first time in the history of the US refugee law established a statutory basis for asylum. The US Senate had been informed that "extant asylum

procedures" for refugees outside the US were acceptable under the 1967 Protocol, but there were political and geographical distinctions.<sup>96</sup> The congressional definition a refugee was virtually identical to the 1967 Protocol's definition and the indications were clear in various governmental reports and statements<sup>97</sup> of the conformity of the definitions, but no reference was made to the standard of proof.

There was a provision which permitted the withholding of deportation pursuant to s.243(h) of the Immigration and Naturalisation Act 1952 (INA) which originally stated:

"The Attorney General is authorised to withhold deportations of any alien within the US to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems it to be necessary for such reason." <sup>98</sup>

This provision was amended by the Refugee Act 1980<sup>99</sup> so that s.243(h) of the INA (amended) now provides:

<sup>96</sup> Senate Report No. 96-256.

<sup>97</sup> 126 Cong. Rec. H 1521 (daily ed. March 4 1980). Remarks of Rep. Holtzman: "House definition of the term 'refugee' ... essentially conforms to that used under the United Nations Convention and Protocol relating to the Status of Refugees". The Refugee Act of 1979, Hearings on HE 2816, before the SIO HC FA 96th Cong., 1st session (1979) at 71, Ms Meissner, Deputy Associate Attorney General, implying that the UN definition for "refugee" has been incorporated by the Administration bill.

<sup>98</sup> 8 USC 1253(h).

<sup>99</sup> Publ. LNo. 96-212, 94 Stat. 102.

"The Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group or political opinion."

S.243(h) of the INA (as amended) is thus in direct compliance with Article 33(1) of the 1951 Convention and the 1967 Protocol.

S.243(h) upholds the principle of non-refoulement which is defined in Article 33(1) of the 1951 Convention and 1967 Protocol as follows:

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

Paragraph 2 contains exemptions on grounds of danger to security of the country, a serious crime or a danger to the community of that country.

It is interesting to note that prior to 1968, the Attorney-General had complete discretion under s.243(h) of the INA 1952 as to whether or not to deport an alien. However, this was changed by the 1980 Refugee Act which incorporated Articles 2-34 of the 1951 Convention and the 1967 Protocol. Article 33(1) of the 1951 Convention and 1967 Protocol imposed an absolute and mandatory obligation on states who were signatories of the

1951 Convention and 1967 Protocol not to return aliens to countries where their "life or freedom" would be threatened. Accordingly, the amended version of s.243(h) of the INA now strictly forbids deportation of aliens where that would result in persecution.

The Refugee Act 1980 took into account two additional grounds of persecution, namely nationality and membership of a particular social group, mentioned in the revised version of s.243(h) of the INA. This can be attributed to the effort made by the US Congress to bring US domestic law into conformity with the 1967 Protocol.

In passing the 1980 Refugee Act, Congress plainly adopted the definition of "Refugee contained in the 1951 Convention and the 1967 Protocol and directed that it should be interpreted consistently with those international instruments.

One other provision which deals with grants of asylum is s.208(a) of the INA (amended) which:

"authorises the Attorney-General, in his discretion to grant asylum to a refugee who, under s.101(a)(42)(A) of the INA, is unable or unwilling to return to his home country because of race, religion, nationality, membership in a particular social or political opinion." 100

In turn, s.101(a)(42)(A) defines refugee as:

"... (A) any person who is outside any country of such person's nationality or in the case of a person having no nationality, is outside any country in which such person last habitually resided and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership or a particular social group or political opinion." <sup>101</sup>  
 (my emphasis)

The language which Congress chose in 1980 to define a refugee reflects virtually verbatim the corresponding provision of the 1967 Protocol, which defines a "refugee" as an individual who:

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

Upon the US ratifying<sup>102</sup> the 1967 Protocol, the terms of the 1951 Convention applied through Article 1(2) of the 1967 Protocol which states:

"2. For the purpose of the present Protocol, the term "refugee" shall, ... , mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1st January 1951 and ..." and the words "... as a result of such

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<sup>101</sup> 94 Stat. 102, 8 USC 1101(a)(42)(A).

<sup>102</sup> HR Conf. Ref. No. 96-781, p.19 (1980), HR Rep 9, s Rep 47.

events", in article 1A(2) were omitted." 103

The US is under a legal obligation define a refugee within the provisions of the 1951 Convention and the 1967 Protocol, and US laws relating to asylum comply with the terms of the two refugee instruments.

#### 8.7.3.2 The United Kingdom

Applications for refugee status in the United Kingdom are also considered under the 1951 Convention and the 1967 Protocol. However, the 1951 Convention or the 1967 Protocol form no part of English domestic law, though immigration rules are made on the basis that the Secretary of State for Home Affairs will give effect to their provisions. Any person applying for asylum and refugee status in the United Kingdom and who demonstrates their eligibility under the terms of the 1951 Convention and the 1967 Protocol may be granted asylum and refugee status.

The Immigration Act 1971, s.3(2) states that the Secretary of State can from time to time lay before Parliament statements of the rules which stipulate the provisions for immigration, including the grant of asylum and refugee status. The immigration rules fall into two categories: to those applying to "Control on Entry" and those applying to "Control after Entry".

"Control on Entry" states in paragraph 16 that where a person is a refugee full account is to be taken of the provision of the Convention and Protocol relating to the Status of refugees. Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments. Simply, paragraph 16 assumes that the person has been granted the status of a refugee and is therefore not an asylum-seeker.

By contrast, para.73 provides:

"Part VII: Asylum:

73. Special considerations arise where the only country to which a person could be removed is one to which he is unwilling to go owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Any case in which it appears to the immigration officer as a result of a claim or information given by the person seeking entry at a port that he might fall within the terms of this provision is to be referred to the Home Office for decision regardless of any grounds set out in any provision of these rules which may appear to justify refusal of leave to enter. Leave to enter will not be refused if removal would be contrary to the provisions of the Convention and Protocol relating to the Status of refugees."

Paragraph 73 is extremely vague. "Special considerations" are not defined, nor is there any provision preventing the asylum-seeker or refugee from being refouled to the country where he or she might face "persecution". Paragraph 73 cannot be held to comply with the provisions of Article 33(1) of the 1951 Convention or the 1967 Protocol.

However, there are other provisions which are in line with the refugee instruments. Paragraph 96 is the same as paragraph 16 above, while paragraph 134 states that an asylum-seeker can apply for asylum and refugee status on the grounds that if he were required to leave, he would have to go to a country to which he is unwilling to go, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, any such claim is to be carefully considered in the light of all the relevant circumstances. Paragraph 134 is in compliance with the definition of a refugee in the 1951 Convention and 1967 Protocol.

Paragraph 153 is the same as paragraph 16 above, while paragraph 165 states "In accordance with the provisions of the Convention and Protocol ...", a deportation order will not be made against a person if the only country to which he can be removed is one to which he is unwilling to go, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion. Paragraph 153 conforms to Article 33(1) of the 1951 Convention and 1967 Protocol.

#### 8.7.3.3 The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)

The Handbook was prepared at the request of member states of the Executive Committee of the High Commissioner's Programme, for the guidance of governments. The Handbook is based on

UNHCR's experience, including the practice of States in regard to the determination of refugee status. It has been widely circulated and utilised by governments and cited in many judicial decisions. The interpretation of the term "well founded fear of being persecuted" is explained in the Handbook (1979)<sup>104</sup> in fairly lengthy detail. Paragraph 37 explains that it is the key phrase of the refugee definition:

"... It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (ie. persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin."<sup>105</sup>

Paragraph 38 implies that to the element of fear - as state of mind and a subjective condition - is added the qualification "well founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well founded fear" therefore contains:

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104 Published in Geneva 1979 by UNHCR Protection Division. This booklet contains criteria for determining refugee status, which is essentially an explanation of the definition of the term "refugee" given by the 1951 Convention and 1967 Protocol. It is a practical guide and not a treatise on refugee law.

105 Idem. p.11.

"... a subjective and an objective element, and in determining whether well founded fear exists, both elements must be taken into consideration." 106

Paragraph 39 rules out persons affected by famine or natural disaster, unless they also have a well founded fear of persecution for one of the reasons stated.

An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions.<sup>107</sup>

Paragraphs 41 and 42 explain the subjective and objective elements which are necessary to evaluate the statements made by the applicant.<sup>108</sup>

106 Idem. p.12.

107 Ibid. One person may have strong political or religious connections, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may have an impulsive decision to escape; another may carefully plan his departure.

108 Idem. para 41 states: "Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation personal experiences - in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well founded, if, in all the circumstances of the case, such a state of mind can be justified".

Para 42 states: "As regards the objective element, it is necessary to evaluate the statements made by the applicant.

The UNHCR Handbook along with the travaux préparatoires show that the crux of the matter in the refugee definition is that the fear of the applicant must be looked at rather than the hypothetical likelihood of future events.<sup>109</sup>

The Handbook takes into account that the applicant is usually in difficulties in submitting his or her case to the relevant authorities and also the fact that the burden of proof lies on

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The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin, while not a primary objective, is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for reasons stated in the definitions, or would for the same reasons be intolerable if he returned there".

109 Idem. para 43 states: "These considerations need not necessarily be used on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also would become a victim of persecution is well founded. The laws of the country of origin and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, eg. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well founded".

the person submitting a claim for refugee status and asylum.<sup>110</sup>

Paragraph 196 stipulates that the asylum-seeker brings with him the barest of belongings and documents and that although the asylum-seeker has to satisfy the authorities, the authorities must give him the benefit of the doubt, even though the asylum-seeker cannot produce evidentiary proof in support of his application. Paragraphs 197, 203 and 204<sup>111</sup> all stipulate that if the asylum-seeker cannot produce evidentiary proof, then the standard of proof must not be applied too strictly.

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- 110 Idem. para 190: "It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience and an understanding of an applicant's particular difficulties and needs".
- 111 Idem. para 197 states: "The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant". Para 203 states: "After the applicant has made a genuine effort to substantiate his story, there may still be a lack of evidence for some of his statements ... it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement, the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt" and para 204 states: "The benefit of the doubt should, however, only be given when all evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible and must not run counter to generally known facts".

8.7.4 Analysis of the Application of the Conventional and Domestic Legislation in the Context of the Cardoza-Fonseca and Tamil Cases

8.7.4.1 Immigration and Naturalisation Service (INS) v Luz Marina Cardoza-Fonseca

(a) Facts

In the United States of America in a recent case heard by the Supreme Court,<sup>112</sup> the respondent was a 38 year old Nicaraguan national who entered the US as a visitor. After her overstay the INS commenced deportation proceedings. The respondent attempted to show that if she was returned to Nicaragua, her "life or freedom" would be threatened on account of her political views and consequently she had a "well founded fear of persecution". The respondent's brother had already been tortured and imprisoned because of his political activities in Nicaragua and the Sandinistas knew of the location of her brother and herself. The respondent further claimed that if she was to return to Nicaragua, she would be imprisoned, tortured and interrogated about her brother's whereabouts.

Cardoza-Fonseca conceded that she was in the US illegally, but requested withholding of deportation pursuant to s.243(h) of the INA 1952 (amended) and also requested asylum as a refugee pursuant to s.208(a) of the INA,<sup>113</sup> namely that Eligibility for asylum depended upon the alien being a refugee as defined by

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112 107 S. Ct. 1207 No. 85-782.

113 8 USC 1158(a).

s.101(a)(42)(A). S.208(a) of the INA was cited by Cardoza to support her request that she had a "well founded fear of persecution" if she was returned to Nicaragua.

**(b) The Decisions**

In the lower court, the Immigration judge had held that Cardoza-Fonseca had not established a "clear probability of persecution" under s.243(h) of the INA (as amended) or s.208(a) of the INA respectively and thus she was not entitled to relief.<sup>114</sup>

Cardoza-Fonseca appealed to the Board of Immigration Appeals (BIA). They agreed with the Immigration judge and decided that she had "failed to establish that she would suffer persecution within the meaning of s.208(a) or s.243(h) of the INA (as amended)", and that there was no difference in application between the "clear probability" and "well founded fear" standards.<sup>115</sup> Cardoza-Fonseca's application for asylum under s.208(a) of the INS was rejected by the BIA.

Cardoza-Fonseca appealed to the US Court of Appeal, who disagreed with the above two decisions. The Court of Appeal stated that Cardoza-Fonseca was eligible for asylum under

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<sup>114</sup> File No A 24 420 980- San Francisco at 4 (Hornback, ALJ, 1 June 1982) reprinted in Petition for a Writ of Certiorari to the US Court of Appeals for the 9th Circuit, Appendix C at 24, a, 27 a.

<sup>115</sup> File No A 24 420 980- San Francisco at 3 (BIA 21 Sept 1983), reprinted in Petition for Writ of Certiorari to the US Court of Appeals for the Ninth circuit, Appendix B at 17a, 21a.

s.208(a) of the INA and held that s.208(a)'s "well founded fear" standard was more generous than s.243(h) of the INA (as amended) standard, in that it only asks the refugee seeking and requesting asylum to show either persecution or "good reason to fear future persecution".<sup>116</sup> The Court of Appeal commented that the earlier decisions (by the Immigration judge and BIA) had "erred in applying the wrong tests".<sup>117</sup> The Court of Appeal held that the term "well founded fear" which governs asylum was more "generous" than the term "clear probability of persecution" which governs the withholding of deportation under s.243(h) of the INA (as amended), but argued that she was eligible for consideration for asylum under s.208(a) of the INA. Cardoza-Fonseca had contended that the lower courts should have applied the "well founded fear" standard which governs asylum proceedings. This standard, per se, was more liberal than the "clear probability" standard which governs withholding of deportation proceedings.<sup>118</sup>

The INS had appealed to the US Supreme Court requesting that the Supreme Court should reverse the Court of Appeal's earlier decision.

The Supreme Court stated that the term "well founded fear"

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<sup>116</sup> The Court of Appeal agreed with the decision of Carvajal-Munoz v INS, 743 F.2d 562,574 (CA7 1984). The asylum-seeker had to present "facts" through objective evidence to prove past persecution or "good reason" to fear future persecution.

<sup>117</sup> Cardoza-Fonseca v INS, 767 F.2d 1448 (CA9,1985).

<sup>118</sup> Idem. pp.1452-1453.

seems to indicate that, so long as an objective situation is established by the evidence, it need not be shown that the situation would probably result in persecution, but it is enough that persecution is a reasonable possibility. The issue of withholding deportation or non-refoulement under s.243(h) corresponds to article 33(1) of the 1951 Convention and 1967 Protocol. By implying article 33(1), one can note two issues:

- (i) That the applicant must show or demonstrate a "well founded fear of persecution" if he is to obtain a refugee status.
- (ii) That the applicant (refugee) should state that his or her life or freedom would be threatened if deported or refouled to his country of origin.

S.243(h) imposition of the "would be threatened" requirement is entirely consistent with the US obligation under the 1967 Protocol. However, s.208(a) by contrast is a discretionary mechanism which gives the Attorney-General the authority to grant the broader relief of asylum to refugees. It does not correspond to Article 33 of the 1951 Convention but instead corresponds to Article 34<sup>119</sup> of the 1951 Convention. Like s.208(a), an alien must only show that he is a "refugee" to

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119 "The contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings."

establish eligibility. No further showing that he "would" be persecuted is required. One can argue that the structure of the INA must be looked at, since it is analogous to s.208 of the Refugee Act 1980 which shows greater benefits than s.243 and has a less stringent standard of eligibility. But this argument does not take into account the fact that an alien who satisfies the applicable standard under s.208 does not have a right to remain in the US, though he is strictly eligible for asylum if the Attorney-General chooses to grant it, whereas an alien satisfying the s.243(h) standard is automatically entitled to withhold deportation. The Supreme Court did consider it relevant that out of the entire class of "refugees", those who can show a "clear probability of persecution" are entitled to mandatory suspension of deportation and are eligible for discretionary asylum, while those who show a "well founded fear of persecution" are not entitled to anything, but are eligible for the discretionary relief of asylum.

The 1980 Act amended s.243(h) for the exact purpose of changing it from discretionary to a mandatory provision. The Supreme Court made it absolutely clear that:

"... the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent ..." 120

The Supreme Court stated that there was obviously some ambiguity in a term like "well founded fear" which can only be given concrete meaning through "case by case adjudication". The Supreme Court respected the interpretation of the agencies to which the Congress have delegated the responsibility for administering the statutory programme.<sup>121</sup> But while the Supreme Court did not attempt to set forth a detailed description of how the "well founded fear" standard test should be applied, it held that the Immigration judge and BIA were wrong in holding the "clear probability" standard and "well founded fear" standard to be identical.

The Supreme Court made reference to the UNHCR Handbook. Justice Stevens stated:

"In interpreting the Protocol's definition of "refugee" we are further guided by the analysis set forth in the office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) ... The High Commissioner's analysis of the United Nations standard is consistent with our own examination ... as well as the conclusions of many scholars who have studied the matter.<sup>122</sup> <sup>123</sup>

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- 121 In the case of Chevron USA Inc. v National Resources Defence Council, 467 US 837 (1984); See Stevens J., *op.cit.*, p.25.
- 122 Professor Grahl-Madsen, *The Status of Refugees in International Law* (1966), Vol.I, 181; GS Goodwin-Gill, *The Refugee in International Law* (1983), pp.22-24; and Cox, "Well founded fear of being persecuted: The sources and Application of a Criterion of Refugee Status", *BJIL*, 10, 1984, p.333.
- 123 Cardoza-Fonseca, *op.cit.*, at p.18. Cf. this statement by Justice Powell (dissenting opinion).

Although this was the view of a majority,<sup>124</sup> it is interesting to note the dissenting opinion delivered by Justice Powell. He was keen to point out that the respondent's application for asylum rested on her testimony that her brother had experienced difficulties with the Nicaraguan authorities. One of the factors which had led the Immigration judge to reject the claim for asylum was that he had found no evidence of any substance in the record, other than her brother's claim for asylum. She had not proved that she would be persecuted for political or other reasons; she had not informed the judge that her family, close relatives or relations had been detained, tortured, interrogated, arrested and imprisoned by the Nicaraguan authorities, except that her brother had been interrogated and imprisoned.

Justice Powell had referred to the BIA's claim that the respondent had never taken physical actions against the Nicaraguan authorities in the form of reprisals or guerilla acts and had never been politically active. In fact, Cardoza-Fonseca had actually testified that she never assisted her brother in any political activities and that she had never been singled out for persecution by the Nicaraguan authorities.

In Justice Powell's opinion the interpretation given by the BIA

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124 The US Supreme Court ruled 6-3 majority. Stevens J. delivered the opinion of the Court in which Blackmun, Marshall, Brennan, Scalia and O'Connor, JJ, joined. Powell J. filed a dissenting opinion in which Rehnquist CJ. and White, J. joined.

was reasonable. The Congress had provided two forms of relief asylum under s.208 and withholding of deportation under s.243(h) of the INA (as amended) for asylum-seekers and refugees who were escaping persecution. The majority of the Supreme Court had not taken into account that the BIA was an administrative body with a great responsibility and experience in matters relating to immigration of refugees.

In the Matter of Acosta,<sup>125</sup> the BIA did not interpret the term "well founded fear". The BIA indicated that the application must show historical facts relating to his determination, which the judge would eventually analyse and formulate. Once the judge has decided upon what is admissible or inadmissible, then he can decide if these facts or evidence meet the "refugee" definition. The BIA actually listed four conditions by which the statutory definition should be interpreted:

- (i) The alien must have a "fear" of persecution.<sup>126</sup>
- (ii) The "fear must be well founded".
- (iii) The persecution must be on account of race, religion, nationality, membership of a particular social group or political opinion.

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125 Interim Decision No.2986 (BIA 1 March 1985).

126 The degree of probability must take into account the following factors: intensity of fear; nature of projected harm (death, imprisonment, interrogation, detention, torture); the history of the persecution in the country of origin; personal experiences of applicant; his family and other factual surrounding circumstances. See also Bolanos-Hernandez v INS, 749 F 2d 1316 (9th Circuit 1984).

- (iv) The alien must be unable or unwilling to return to his homeland because of persecution of his well founded fear of persecution.

The BIA held that evidence must establish the following four matters:

- (i) The persecutor has the inclination to punish the alien.
- (ii) The persecutor has the capability of punishing the alien.
- (iii) That the persecutor is aware or could easily be aware that the refugee possesses this belief.
- (iv) The alien possesses a belief of punishment of some sort.

The BIA continued to note that a "well founded fear of being persecuted" which requires a showing that persecution is likely to occur, refers to a standard that is different and distinct from "clear probability of persecution", which requires showing that persecution is "more likely than not to occur". The BIA noted that the enquiry is not quantitative but qualitative. The refugee's experience should be taken into account, along with "other external events" (if the refugee or asylum-seeker is the sort who is or can be a victim of persecution). If one was to take this context, then there is no substantial difference between the "persecution is likely to occur" standard and the "persecution is more likely than not to

occur". Contrary to the majority decision of the Supreme Court, the BIA did not intend or argue that the "well founded fear" and "clear probability" standards require a proof of 51% chance that the alien will suffer persecution if the asylum-seeker or refugee is returned to his homeland. Luz Marina Cardoza-Fonseca and the Sandinistas certainly satisfied the conditions in the Acosta Case.

Justice Powell posed one critical question:

"... whether the objective basis required for a fear of persecution to be "well founded" differs in practice from the objective basis required for there to be a "clear probability of persecution." 127

Congress had plainly limited the eligibility for refugees and asylum-seekers to be granted asylum, simply due to the discretion nominated to the Attorney-General, "if he determines ... to be a refugee". The BIA have given this responsibility to the office of the Attorney-General and it is a fact that as the BIA have examined more cases than anyone else, they were certainly more experienced. There was a tendency to ignore the practical realities of the expert agencies and for the majority to give hypothetical situations, although the main theme was not the subjective example but the objectivity and the interpretation.<sup>128</sup>

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127 Cardoza-Fonseca, op.cit., p.5 (Dissent).

128 Grahl-Madsen, op.cit., p.180.

Justice Powell stated that "Governments rarely persecute people by numbers"<sup>129</sup> but there have been instances where this has happened.<sup>130</sup> The majority in the Supreme Court have nowhere in the judgement criticised the "fear" element in the interpretation of the "well founded fear" as being unreasonable. The BIA believed that fear is not "well founded" unless the fear has an objective basis indicating that there is a "realistic likelihood" that persecution would occur.

In responding to the majority's decision, citing s.203(a)(7), (refugees from Communist and Middle Eastern states), the Attorney-General's office argued that the words "well founded fear" were inserted by the Congress to pressurise the Attorney-General's regulations governing application for asylum by refugees and asylum-seekers in the US. These regulations were in accord with BIA's views (namely that there was no significant difference between the "well founded fear" and "clear probability"). Moreover the legislative history shows that Congress was referring to the regulations rather than to s.203(a)(7). These words were intended to forward the practice of the Attorney-General in adjusting to asylum applications. The Attorney-General had concluded that the standard for asylum was substantially identical to the standard for withholding deportation. Justice Powell did not find the 1967 Protocol relevant. He stipulated that the President and Senate thought

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129 Cardoza-Fonseca, *op.cit.*, p.6 (Dissent).

130 Nazi Germany and Jews, South Africa and blacks, Sri Lanka and Tamils, and Afghanistan and Mujahedens, to mention a few.

that the 1967 Protocol was perfectly consistent with the US immigration laws.<sup>131</sup> It was surprising that for over 20 years, the US had been violating the 1967 Protocol.

Justice Stevens had referred to the UNHCR Handbook, but Justice Powell stipulated that the Booklet had "no binding force".<sup>132</sup>

The Supreme Court allowed Cardoza-Fonseca to stay in the US and sustained the US Court of Appeal's decision not to remove Cardoza-Fonseca to Nicaragua and subsequently granted her refugee status and asylum. The Court followed the view of the drafters of the 1951 Convention that the term "well founded fear of being persecuted" means that a person seeking refugee status must show that his or her subjective fear of persecution is based upon objective facts which make the fear reasonable under the circumstances, but not necessarily that he or she would more likely than not become the victim of persecution. The Supreme Court also relied upon the travaux préparatoires and the UNHCR guidelines which gave additional background information and the relevant facts to this case.

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131 Cardoza-Fonseca, op.cit., p.9 (Dissent); see also INS v Stevic 467 US 407, 417 (1984).

132 Cardoza-Fonseca, op.cit., p.10 (Dissent). The Executive-Committee of the High Commissioner's Programme at its 28th session, requested the Office of the High Commissioner to consider the possibility of issuing, for the guidance of Governments, a handbook relating to its procedures and criteria for determining refugee status. The Handbook was issued in response to their request by the Executive-Committee.

8.7.4.2 Regina v Secretary of State for the Home Department, ex parte Sivakumaran, Vaithialingam, Vilvarajah, Vathanan and other, and Navaratnam

(a) Facts

Six Tamils arrived in the United Kingdom from Sri Lanka between the dates of 13 May and 31 May 1987. On their arrival they had applied for refugee status and asylum. Their application consisted of the fact that they possessed a "well founded fear of persecution" if they were returned to Sri Lanka. They claimed that they would be persecuted by the Sri Lankan authorities if they entered Sri Lanka, because they held differing political opinions and views from those of the Sri Lankan authorities.

Their applications were rejected by the Home Office and the Secretary of State. The six Sri Lankan Tamils then requested a judicial review by the High Court, but this request was refused and the six Tamils were ordered to be removed back to Sri Lanka. They appealed to the Court of Appeal.

The Court, consisting of the Master of the Rolls (Sir John Donaldson), Lord Justice Neill and Sir Roualeyn Cumming-Bruce, found the Secretary of State's decision rather puzzling, and held that each applicant was entitled to individual consideration and that the Secretary of State had misdirected himself in his application of immigration policy. They held that the Secretary of State should reconsider their asylum and refugee status applications and consequently allowed the appeal.

of the six Sri Lankan Tamils.<sup>133</sup>

The House of Lords, however, on appeal by the Home Office, overruled the Court of Appeal and ordered for the removal of these six Tamils.

**(b) The Decisions**

The relevant policy was in the Statement of Changes in Immigration Rules (1983) (HC 169),<sup>134</sup> and since the Tamil asylum-seekers sought asylum upon entry, the relevant rules were those contained in paragraphs 16 and 73 (HC paper 169) (1983).

The Court of Appeal viewed the Articles in the 1951 Convention as providing something in the nature of a "Bill of Rights" for refugees. It limited the freedom of a contracting state to expel a refugee lawfully in its territory (Article 32) and prohibited his expulsion or return "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (Article 33). There was a clear contrast between the pre-conditions for acquiring the status of refugee, which require a "well founded fear of persecution" and for the application of Article 33

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133 R v Secretary of State for the Home Department ex parte Navaratnam, Vathanan, Rasalingam, Siva Kumaran, Vilvarajah, and Vaithialingam. On appeal from the High Court of Justice, Queen's Bench Division (Divisional Court) (Mr Justice McCowan).

134 Cmd. 9171, Cmd. 3096.

which requires a "threat to the life or freedom" of the person concerned. Persecution includes a "threat to life or freedom", but is much wider and, depending upon its nature and degree, could perhaps be defined to include "serious embarrassment".

However, there may be another distinction, which turns upon the meaning of the "well founded fear" term in the definition of refugee. The Secretary of State interpreted this expression as meaning that the applicant for refugee status must establish not only that he "in fact" fears persecution upon one or more of the specified grounds, but also that these fears are objectively justified. The Tamils contended that they need only establish the genuineness of their expressed fears on one or more of the specified grounds and that, in their particular circumstances, such fears were not unreasonable.

The Secretary of State had said that none of these cases had satisfied him that the applicants had a "well founded fear of persecution" in Sri Lanka, within the terms of the 1951 Convention. If he had applied the interpretation contended for by the applicants, he might have accorded them refugee status. If he had done so, the Secretary of State would have had a general discretion whether to permit them to enter, which might or might not have been fettered by Article 33, according to how he found the facts in each individual case. But there is a real distinction between denying entry to one who is not a refugee within the meaning of the Convention and taking some course in relation to one who is. Even if Article 33 did not

apply, the policy considerations applicable in the case of a "bona fide" refugee, which would of course be matters for the Secretary of State and not for the court, might well be quite different. This was not a matter which had ever been considered by the courts of this country, and the Court of Appeal doubted whether it had been fully developed before Mr Justice McCowan, due perhaps to the speed with which some of these applications were brought before the court. The Court of Appeal referred to INS v Cardoza-Fonseca (1987) as a highly persuasive authority, not only because of its status as a supreme common law court, but also because the convention should, if possible, be applied in similar fashion in all jurisdictions. Whilst the legislative context is different in detail, the "fundamental issue" was the same as that which faced the Court of Appeal in the Tamil appeal. Authority apart, the Court of Appeal accepted that "well founded fear" is demonstrated by proving (a) actual fear and (b) good reason for this fear, looking at the situation from the point of view of one of reasonable courage. The "fear" according to Court of Appeal was entirely a subjective state experienced by the person who is afraid. The adjective phrase "well founded" qualifies, but cannot transfer the subjective nature of the emotion. The qualification will exclude fears which can be dismissed as paranoid, but the Court of Appeal did not understand why it should exclude those which, although fully justified on the face of the situation as it presented itself to the person who was afraid, can be shown objectively to have been misconceived.

The Court of Appeal gave a simple but graphic example to illustrate this point. A bank cashier, confronted with a masked man who points a revolver at him and demands the contents of the till, could without doubt claim to have experienced a "well founded fear of persecution". His fear would have been no less well founded if, one minute later, it emerged that the revolver was a plastic revolver or a water pistol.<sup>135</sup>

In conclusion, the Court of Appeal stated that the Secretary of State had applied the wrong test and therefore erred in law. The Court of Appeal gave the Secretary of State some examples, which they hoped he might note. Some of the Tamil applicants had expressed fears for their lives as a result of the indiscriminate shelling by the forces of law and order of villages believed to contain insurgents. Under the terms of the 1951 Convention, this would not form a basis for claiming refugee status. But it might well be different if it appears that these forces would not have resorted to indiscriminate shelling, but that all villagers, whether insurgents or not, were of a particular race. The Secretary of State should consider whether the applicants are refugees within the meaning in the Immigration Rules and the conventions. This involved, *inter alia*, subjective considerations such as the age and personal experience of the applicant and of those known to him.

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<sup>135</sup> See, however, the House of Lord's decision on this example.

If the Secretary of State decides that they are not refugees, then that is the end of the matter, unless he is prepared to admit them in the exercise of his overriding residual discretion to depart from the Immigration Rules. If, however, he decides that any applicant is a refugee as so defined, he has then to decide whether Article 33, which involves an objective test, prohibits a return of that applicant to Sri Lanka. If Article 33 applies, the applicant has to be allowed to enter or be sent to some other country which will accept him (resettlement) and to which the same considerations do not apply. If Article 33 does not apply, the Secretary of State has a complete discretion whether or not to permit the applicant to enter.

An appeal was lodged at the House of Lords by the Secretary of State with great urgency. Before Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Templeman, Lord Griffiths and Lord Goff of Chieveley, the Secretary of State argued that, while the existence of a state of fear in the applicant for asylum was a subjective matter, the question was whether the fear was "well founded" fell to be assessed by the Secretary of State on an objective basis in the light of facts and circumstances known to him or established to his satisfaction. The crucial test was whether, in the light of these facts and relevant circumstances, there was a real and substantial risk that the asylum-seeker would be persecuted for one of the reasons specified in the Convention if returned to the country of his nationality or origin. The House of Lords, highlighting the

Secretary of State's position, contended that the Court of Appeal's formulation would accord refugee status to one whose fears, though genuine, were objectively demonstrated to be misconceived, that is, one who was at no actual risk of persecution for a Convention reason. The Court of Appeal would qualify that by denying refugee status to one who, while holding a genuine fear, was not a person of reasonable courage, so that his fears were not such as a person of that degree of courage would entertain. The House of Lords argued that the differentiation meant that the fears of some, but not those of others, would be allowed, and it might be by no means easy to decide what degree of courage a person of ordinary fortitude might be expected to display.

The House of Lords dismissed the example the Court of Appeal cited regarding the imitation firearm, by stating that the example did not support the "thesis for which it was prayed in aid". The House of Lords stated that if a neutral observer was at the scene, he would argue that when the imitation firearm was used, the cashier's fear was "well founded", but when it was made clear that the imitation firearm was actually an imitation, then the "fear" would be no longer "well founded".

The House of Lords stated that "fear of persecution" in the conventional sense was not to be assimilated to a fear of instant personal danger arising out of an immediately presented predicament. The asylum-seeker was not immediately threatened with danger arising out of a situation then confronting him.

The question was what might happen if he were to return to the country of nationality of origin. The asylum-seeker was not immediately threatened with danger arising out of a situation then confronting him. The question was what might happen if he were to return to the country of nationality or origin. The asylum-seeker would fear that he might be persecuted there. Whether that might happen could only be determined by examining the actual state of affairs in the country. If the examination showed that persecution might indeed take place, then the fear was well founded; otherwise it was not.

The House of Lords dismissed the support of the Court of Appeal gave to the US Supreme Court ruling in the Cardoza-Fonseca case and stated that it rather favoured the case put forward by the Secretary of State.

Dr Richard Plender (for the United Nations High Commissioner for Refugees) intervened by the leave of the House of Lords and made the case for the intervener applying the travaux préparatoires for the 1951 Convention, especially relating to the meaning of "well founded fear". Surprisingly, however, the House of Lords found the travaux préparatoires unhelpful and not any persuasive indication that the objective approach was erroneous. With respect, however, the travaux préparatoires to the 1951 Convention do suggest that the objective approach was indeed erroneous. The US Supreme Court in the Cardoza-Fonseca case relied heavily on the Amicus Curiae provided by the United Nations High Commissioner for Refugees, which

contained a great deal of reference to the travaux préparatoires of the 1951 Convention.

In Lord Keith's opinion, the requirement that an applicant's fear of persecution should be "well founded" meant that there had to be a demonstration of a reasonable degree of likelihood that the asylum-seeker would be persecuted for a Convention reason if returned to his own country.<sup>136</sup> Lord Keith argued that if the Court of Appeal's formulations of the test were correct, the Secretary of State's decision would be undoubtedly quashed. The Secretary of State in his decision letters had proceeded on the basis of the objective situation in Sri Lanka as understood by him.

The Secretary of State had taken into account the reports which were made available to him.<sup>137</sup> The House of Lords had agreed that there was serious civil disorder within Sri Lanka. The authorities had suppressed the people who were responsible for the disorder, innocent people were caught up in the troubles, the invasion of the Indian armed forces had caused more hostility and violence. The House of Lords stated that the trouble occurred principally in areas inhabited by Tamils—these were the people who had suffered most. The Secretary of

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136 R v Governor of Pentonville Prison, ex parte 1971 ICLR 987 Lord Diplock at p.994.

137 Compiled from press articles, journals and Amnesty International publications on Sri Lanka; also information supplied to him by the Foreign Office and the reports made by the Ministers on their recent trip to Sri Lanka.

State, in his decision letters, said that the army activities were aimed at discovering and dealing with Tamil extremists and did not constitute evidence of persecution of Tamils as such.<sup>138</sup>

To the House of Lords it appeared that the Secretary of State, while taking the view that neither the Tamils in general or any group of Tamils were being subjected to such persecution, had also considered whether any individual applicant had been so subjected and had decided that none of the applicants had indeed been so. Consideration of what happened in the past was material for the purpose of assessing the prospects for the future.

It was argued that the Secretary of State's decision did not clearly indicate that he had actually applied the real and substantial risk test but left it open that he might have applied a "more likely than not" test. It was, however, clearly to be gathered from what the Secretary of State had said that there existed no real risk of persecution for a Convention reason. The House of Lords allowed the appeal and restored the judge's orders.<sup>139</sup> The six Sri Lankans were removed to Sri Lanka on 13 February 1988.

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138 This apparently had not been disputed by counsel for any of the applicants, nor had it been seriously maintained that any subgroup of Tamils, such as young males in the North of Sri Lanka, were being subjected to persecution for any Convention reason.

139 Lord Templeman and Lord Goff delivered concurring opinions and Lord Bridge and Lord Griffiths agreed, speeches recorded on December 16 1987.

The House of Lords held that the six Tamils had not possessed a "well founded fear of being persecuted". The House of Lords also considered that the troubles in Sri Lanka were reflections of civil disorder and not persecution in the conventional sense. The House of Lords implied that the objective test was correct for interpreting "well founded fear" and it was merely a different interpretation of the definition of refugee in the 1951 Convention.

The United Kingdom's domestic laws had complied with the international conventions and the House of Commons rules were in conformity to the refugee conventions. Although the UK had conformed with the basic humanitarian purposes, the emergence of new legislation has led me to believe the underlying policy of the present government is to restrict and deter future asylum-seekers. The recent imposition of visas to all immigrants (including asylum-seekers) through the HC (Cmd) paper 9914 (statement of changes Rules) is one such legislation. Asylum-seekers will find it extremely difficult to obtain visas to enter into the UK, especially in countries where they may face persecution and hostility. The even more recent imposition by the Immigration (Carrier Liability) Act 1987 of a fine of up to £1,000 to the transport companies (air, land or sea) who carry passengers who are without visas, entry clearances or travel documents, to ports of the United Kingdom makes the point even clearer. Not all asylum-seekers can obtain the paperwork needed for entering such ports.

#### 8.7.5 Suggestions for Possible Legislative Development

After having reviewed the US and the UK refugee laws and the international conventions relating to the status of refugees, there are a number of suggestions which may provide a way forward for possible legislative development.

First, there is no actual definition of the term "persecution". There is no definition within US and UK domestic laws or the 1951 Convention and/or 1967 Protocol. The two preceding cases have many references to the term "persecution"; but no explanation of the term is to be found. The term "persecution" needs to be defined, especially for the Contracting States for the 1951 Convention and for the 1967 Protocol.

Secondly, the term "asylum" is not explained by either of the above domestic legal systems or the refugee instruments. States have a discretion whether to grant asylum or not. There is no legal provision binding the contracting states to grant asylum.

Thirdly, there are no set procedures for the determination of refugee status within the refugee instruments. The Contracting States are left to their own devices as regards determination procedures. In the US, they appear to be quite lenient, while, in contrast, the UK has very strict and "aggressive" procedures for determining the refugee status. There should be set procedures which Contracting States must follow. These

procedures should include: the maximum length of time to process applications; the selection of competent officials to deal with these applications; the possession by the interviewing officer of a basic knowledge of the refugee law—they must be aware of the background and relevant facts for each particular case; an appeal system which should be explained to every asylum-seeker; the asylum-seeker must be informed of the various stages of his application and sympathy must be given to asylum-seekers; the selection of decision makers and judges must be on the basis of experience and knowledge, rather than political appointments.

The notion that every asylum-seeker is simply seeking a better life in the West must be stamped out. Genuine asylum-seekers are escaping persecution and violation of human rights and have no choice but to escape to the West to seek refuge.

Fourthly, the actual definition of a "refugee" needs to be broadened. It is a very individualistic and outdated one. A review is urgently required for the definition of a refugee. The definition does not cater for masses of people arriving at the borders or frontiers. Within the US and UK domestic legal systems, refugee status *prima facie* depends upon the asylum-seeker satisfying that he or she has a "well founded fear of persecution". There is no provision for refugees escaping from natural disasters such as earthquakes, floods, cyclones, famine, or man-made disasters such as civil strife (of which the Tamil case is a perfect example). 95% of the world's

refugees are from the natural or man-made disasters. The definition must be expanded to include the people fleeing from such disasters.

Fifthly, once a major decision has been reached by the highest court in the land, there is no further higher authority to which the asylum-seeker can apply to have his case reviewed. From the Cardoza-Fonseca and Tamil cases, it is clear that cases can go either way. There should be a higher independent body, composed of independent experts (selected from various governments and the UNHCR) who could review cases such as the Tamils' case.

#### 8.7.6 Conclusion

There is a need for standardisation of eligibility for asylum. If one is to rely on case by case adjudication, decisions can go either way - it is a risky business, especially since lives of human beings are at stake. Many bona fide and genuine asylum-seekers will face harsh and unpredictable decisions, which must be avoided. In Europe, there is a trend for deterring asylum-seekers who arrive seeking safety and refuge.

Governments have adopted very restrictive attitudes towards asylum-seekers, especially those arriving from poor Third World countries. The US still has a liberal and quite generous attitude towards asylum-seekers, which European States should follow. The refugee problem is not a regional problem but it

is a global problem in which all States must co-operate, not just those who happen to be next door to the country producing the refugees. Refugees are an enduring feature of the human landscape and constitute one of the tragedies of our time. It is a serious problem - co-operation and solidarity is required from all. The floodgates have not been opened and never will - only drops have seeped through the hinges of these gates.

8.8

**POSTSCRIPT**

Refugee law is basically concerned with three areas: the 1951 Convention; the principle of non-refoulement; and the concept of asylum. There is an international organisation which basically deals with refugees and refugee law. The organisation is a subordinate body of the United Nations and no work on refugee law would be complete unless the UNHCR is examined in the light of its History, the Statute and its work. The next two chapters comprise such an examination.

## **CHAPTER NINE**

### **The Work of the United Nations High Commissioner for Refugees (UNHCR): Part 1**

## CHAPTER NINE

### THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR): PART 1

#### 9.1 HISTORICAL BACKGROUND AND DEVELOPMENT

After the Second World War, the UN became so concerned about the refugee problem they decided that an Organisation had to be created to partly solve this problem. Although the idea of a United Nation's International Refugee Organisation (IRO) had been discussed by the Preparatory Commission of the UN in May 1945 at San Francisco, USA, but not real or firm action was taken. The closure of the United Nations Relief and Rehabilitation Administration (UNRRA)<sup>1</sup> on 30th July 1947 (which had in fact returned about 7 million displaced persons to their homes) did not help the situation. Many States became concerned about the closure, amongst them was the United Kingdom who stated that the refugee problem would continue to exist and that this would concern all of the international community.<sup>2</sup> The United Kingdom delegate stressed that the refugee problem should be brought under the auspices of the UN because of the political and financial problems involved and because of its concern to all Member

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<sup>1</sup> The UNRRA was established by 44 nations on 9 November 1943 as an operational and temporary UN-specialised agency. For text of Agreement, see Louis W. Holborn (Ed.), War and Peace: Aim of the UN, Vol.2, pp.159-161.

<sup>2</sup> On 13th December 1945, before Committee Three (Economic and Social) of the Prep. Commission of the UN (GA(1), Third Committee, SR).

Nations.<sup>3</sup>

The problem of refugees was put on the Agenda for the first part of the first session of the General Assembly under Item 17 as: "Matters of urgent importance including the problem of refugees".<sup>4</sup> This matter was discussed but was eventually referred to the Third Committee of the General Assembly for consideration. Vigorous debates were held over two prime issues: "National security" and the "Refugee question". These discussions were on the nature, the scope and the political and humanitarian roles of any new international refugee organisation.

Western States, including the United Kingdom, the United States and France, emphasised that the refugee problem was international in scope and nature, and that a possible solution was to form an international organisation. Such action was needed for the "sake of social instability and interest of humanity".<sup>5</sup> The Eastern viewpoint was quite different. The Yugoslav delegate stated that the problem of displaced persons had now ceased to be a problem and hence no international organisation was needed. This view, which was supported by the Eastern European States,<sup>6</sup> was upheld by the General Assembly through the discussion in the 3rd Committee

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3 Ibid.

4 GA(1), Official Record, Part 1.

5 GA(1), Third Committee, 1947, SR, Annex 5A:56.

6 Poland, USSR, Ukrainian SSR.

and in the following Plenary Meetings of the General Assembly.

Here, two important views were divided. The USSR, representing the "Eastern Block States", believed that the State had complete authority over its nationals; but the United States, representing the "West", believed that the individual was free and at liberty and no authority should be vested in him.

In the Third Committee of the General Assembly in 1946, the General Assembly rejected the former view, but Dr Nansen did consider repatriation as a solution if it was "voluntary" rather than "forced". The General Assembly on 12 February 1946<sup>7</sup> recognised the problem of refugees was "one of immediate urgency" and laid down three principles:-

- "1) The Refugee problem should be viewed as "international in scope and nature".
- 2) There should be no forced repatriation.
- 3) Repatriation for displaced persons should be pursued and assisted." <sup>8</sup>

An aspect of some considerable importance was that this matter, relating to refugees, should be dealt with by a "special committee" set up by ECOSOC for a further

7 Resolution A/45.

8 See Holborn, A Problem of Our Time, Vol.I, The Scarecrow Press, New Jersey, 1954, p.589.

examination and to prepare a report for the second part of the first session of the General Assembly. The "special committee"<sup>9</sup> was set up, as was mentioned in the resolution,<sup>10</sup> and vigorous discussions took place over the period of two months.<sup>11</sup> The term "refugee" was considered and functions and character of the agency which would cope with the problem were also considered. The Committee considered three possibilities, inter alia,:

(a) Under Article 22 of the UN Charter:

"The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions."

The General Assembly could establish a machinery directly under its authority:

(b) Under Article 68 of the UN Charter:

"The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions."

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9 Comprising the representatives of 20 States.

10 See Holborn, A Problem of Our Time, op.cit., p.589.

11 8 April to 1 June 1946.

(c) A Commission Under ECOSOC Might Be Set Up:

"Under Article 57 and 63 of the UN Charter,<sup>12</sup> a specialised agency could be created as an autonomous body linked with the UN by a negotiated agreement."

Of these three possibilities, the United Kingdom favoured either (a) or (b) (mentioning the High Commissioner under the authority of the League as a precedent). The Commonwealth, Belgium, France and the Netherlands were in favour of integration of the new organisation with the UN and expressed doubts if such an organisation was not formed under the auspices of the UN.<sup>13</sup>

But the United States was in agreement with the ideas of a temporary specialised agency (linked with the UN) and that the UN was a quasi-parliamentary body. The Draft Constitution was prepared, discussed and adopted by the

12 The various specialised agencies, established by inter-government agreement and having wide network of international representatives, as defined in their basic instruments, in economic, social, cultural, and educational with the UN in accordance with the provision of Article 63.

13 Such agencies thus brought into relationship with the UN are hereinafter referred to as specialised agencies. Article 63 of the UN Charter:

"1. The ECOSOC may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the UN. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialised agency through consultation with and recommendation to such agencies and through recommendations to the GA and to members of the UN."

Plenary Session in the Resolution of 15 December 1946.<sup>14</sup>  
This constitution reflected the efforts of the international community as a whole.

The International Refugee Organisation (IRO) was set up primarily as a temporary specialised agency of the UN and dealt with all categories of refugees. The IRO began on 1st July 1947, at which time the UNRRA was liquidated. The IRO had its headquarters in Geneva and had about 90 branches in the world. The IRO was an operational and a functional agency of the United Nations.

The Director-General was nominated by an Executive Committee and elected by the General Council (the policy making body). The Director-General possessed administrative and executive functions in accordance with the views of the two governing bodies. He was directly responsible to them and had to report the work of the IRO at least twice a year. The staff was appointed by the Director-General and they worked as international civil servants under the principles and

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<sup>14</sup> Voting 30:5 with 18 abstentions.

conditions of Article 101 of the UN Charter.<sup>15</sup> One of the difficulties was availability of finance even though, on occasions, donations were made to the IRO directly.<sup>16</sup> The organisation was in difficulty due to financial hardship and lack of donations but the overwhelming point was that through international solidarity the problems of refugees were being resolved, at least for the time being. The majority of the refugees were under the mandate of the IRO and included refugees from Germany, Austria and Italy. Most of the remaining refugees were dispersed in Belgium, France, the Netherlands, Portugal, Spain, Greece, Sweden, Switzerland and Turkey. In addition, there were refugees in the Middle East as well as in East Africa and India. In Shanghai, Europeans of Jewish and White Russian origins were awaiting an opportunity to leave China.

The IRO categorised three types of refugees:

(a) Refugees and displaced persons living in camps who were

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1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
  2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council and, as required, to other organs of the UN. These staffs shall form a part of the Secretariat.
  3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

16 \$398,596,802 from 18 governments.

receiving care and maintenance.

(b) Refugees living outside camps but were still receiving aid resettlement and legal protection.

(c) Those who were de jure or de facto stateless persons and receiving only legal protection.

These refugees were spread over twenty countries<sup>17</sup> and the majority were Poles, Hungarians, Ukrainians, Latvians and Rumanians.<sup>18</sup> The refugee population naturally fluctuated during the period of IRO operations but precise and accurate figures were not available. International co-operation was indeed evident, with governments, agencies (voluntary) and the UN all co-operating to achieve a settlement of refugees, namely by: temporary relief of activities, movement of refugees by repatriation and resettlement; and the establishment of refugee status.<sup>19</sup>

During the 4½ years of the existence of the IRO, it was truly commendable that international solidarity was evident, with a strong emphasis on the collectivity of international

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17 In Africa, North and South America, Asia, Europe, the Middle East and the Far East.

18 IRO, The Refugee Problem, 1948, p.4.

19 As a person possessing full citizenship and thus adequate legal protection and the means of earning his livelihood.

entities.<sup>20</sup> In fact, it:

"... brought into effect a truly combined effort which enormously increased the organisational resources which could be mobilized ..."<sup>21</sup>

Wide powers in Article 2 were provided to the IRO for the purpose of carrying out these functions.

The IRO had two prime activities: resettlement and repatriation. But human values and human rights were upheld and world peace was regarded as of paramount importance since refugees usually fled from situations involving political or social upheavals. In resettlement and repatriation, the IRO itself shipped refugees to countries bordering Germany, Austria and Italy. These States were eager to relieve human misery and suffering in an effort to reduce political tension. Governments sought to counteract political instability by not making refugees a social burden to countries, either politically or economically. Accordingly, many governments relaxed their immigration legislation to accept refugees. Belgium, France and the United Kingdom became the new receiving countries but the acceptance of refugees lessened because of two reasons:-

(i) There was a shortage of manpower which could be met by

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<sup>20</sup> In other words, the co-operation of governments, voluntary agencies, non-government organisations and so on.

<sup>21</sup> ECOSOC (XIV), E/211, July 1952.

the admission of ordinary migrants.

- (ii) Refugees availed themselves of the overseas resettlement opportunities which became more readily available through agreements concluded by the IRO.

The United States admitted 72,000 refugees which resulted in the passage of the "Displaced Persons Act 1948" by Congress on 24 June 1949 providing admission to the US of about 400,000 refugees.

The IRO grew and became more organized, especially under the leadership of Dr Kingsley and his staff. One of the problems that faced the IRO was the constant change and development of international politics and economic conditions, which explicitly affected refugees and the governments involved. Co-operation was the keynote to the efforts of the IRO. One prominent point about the constitution and policy of the IRO was that emigration was never compulsory and this organisation was unique in the sense that human rights were observed and respected.<sup>22</sup> Although the refugee problem was extensive, evidence suggested that the IRO handled the situation very well and the IRO even extended its assistance to those who were unable to emigrate, by issuing "hard-core"

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22 Refugees could be granted safe haven (which included basic rights such as housing, education and social benefits) and would not be repatriated unless it was voluntary.

programmes.<sup>23</sup> Many States were under the impression that the refugees were a post-war problem which could be solved by international co-operation and financing. However, three issues were left unresolved:-

- (i) Material assistance.
- (ii) Plans and funds for permanent solutions.
- (iii) Legal protection for those who did not have the protection of their country of origin.

The problems still remained but what had been achieved? The IRO had reported to the ECOSOC,<sup>24</sup> acknowledging the problem and stating that the size and the urgency of the refugee problem had been reduced. At that time, neither the UN nor the international community envisaged a permanent problem; they all assumed that the problem would be temporary. In fact, the UN General Assembly did state that the aim of the IRO was to:

"... to bring about prompt liquidation of one of the most tragic consequences of the Second World War ..."<sup>25</sup>

The General Assembly expected that the original 3-year

23 These programmes were aimed at helping the aged or chronically sick to secure care in their country of residence.

24 Report of IRO & ECOSOC (XIV), E/211, July 1952, p.31.

25 GA (III), Third Committee, Official Record, 12 May 1945, p.435.

programme for the IRO would come to an end by 30 June 1950. But the functions of the IRO had to be transferred to a successor organisation. In fact, the Director-General, as early as 1947, indicated this in a document which he presented to the Preparatory Commission of the IRO (PCIRO).<sup>26</sup> The PCIRO had requested the Commission on Human Rights<sup>27</sup> to ensure that legal protection by an international body of stateless persons and to establish a right of international asylum. The Commission on Human Rights, in turn, asked ECOSOC<sup>28</sup> to discuss the issue. ECOSOC then adopted Resolution 116(vi) which requested the Secretary-General to undertake a study of the position of "stateless persons" in consultation with "interested communities and specialised agencies".

By 1949 the IRO and voluntary agencies were considering the sliding decline of the agencies, and in its second session<sup>29</sup> the IRO General Council considered preliminary recommendation of the Director-General with a view to terminating the programme and the future proposals.<sup>30</sup> The General Council continued to discuss this matter and the future of refugees<sup>31</sup> at the third (special) session). The attitude of the Member

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26 Doc. IRO/Prep/4, 29 April 1947, p.12.

27 2nd session in December 1947.

28 6th session in March 1948.

29 Held from 29 March 1948 to 8 April 1949.

30 IRO, Doc. GC/W/3 and Doc. GC/W/4.

31 June to July 1949. IRO Docs. GC/80 and GC/81.

States of the General Council made clear that, when their mission came to an end, the problem would remain.

Member States mentioned that the task which they had undertaken to perform was only temporary in nature and that they did not want to become involved after the problem had subsided. However, ironically, the majority of the 54 UN Member States,<sup>32</sup> along with other States who wanted "peace", were signatory parties to the Constitution, but only 30 States ratified the Constitution. Eighteen Member States bluntly indicated that they were no longer willing to contribute to a "costly" and "large-scale operational agency" whereas it should have really have been the responsibility of the entire UN and its membership. In short, they were not prepared to recommend that the IRO be continued.

The General Council set a completion date<sup>33</sup> and instructed the Director-General to "discontinue on 31st August 1949 all registration whereby refugees and displaced persons may be determined to fall within the mandate of the organisation", except unaccompanied children, refugees leaving their countries of origin after the date but notifying as under the IRO mandate, and those refugees who were in need of legal and political protection. Furthermore, on 31 December 1949, the Council instructed the Director-General to discontinue admission of refugees to care and maintenance in assembly

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32 Out of the total Members of UN States.

33 30 June 1950.

centres and that after 31 March 1950 discontinue admission to care and maintenance under cash-assistance programmes. By 30 June 1950 he was to discontinue care and maintenance for all persons except those who were under repatriation and resettlement. The Director-General informed the ECOSOC that the IRO was to terminate operational activities on 30 June 1950 and that ECOSOC was to examine the problem of future international action on behalf of refugees because:

" ... the situation demanded a new organisation corresponding to the facts ... " <sup>34</sup>

This was dangerous because what would happen to the large number of refugees who were still under the IRO's mandate in Europe and the rest of the world? What would be the position of refugees who did not enjoy the protection of their Government?<sup>35</sup> And what would be the position of new refugees in the future? Such questions needed answers.

ECOSOC replied to the Director-General with the following recommendations:<sup>36</sup>

1. That ECOSOC should determine that international assistance in the protection of refugees should continue unbroken.<sup>37</sup>

34 IRO, GC/80, 11 July 1949.

35 Especially in Germany.

36 ECOSOC (I), E/1392, 11 July 1949.

37 Ibid., p.39.

2. That an organ within the UN should be set up.
3. That a fund be set up for appropriate matters in dealing with refugees.

By mid-1949 the operational plan of the IRO had begun to diminish, but in phasing-out plans it was difficult to liquidate the IRO because there were so many schemes and programmes left unfinished, with many refugees in the process of repatriation. Nevertheless, liquidation was finally implemented on 28 February 1952.<sup>38</sup>

One problem in the termination of the IRO was that the General Assembly had already decided on 3 December 1949 to establish, as of 1 January 1951, a High Commissioner for Refugees. The final Statute of the Office was not adopted by the General Assembly until 14 December 1950.<sup>39</sup> This Statute (see later) limited the competence of the High Commissioner to non-operational and predominantly promotional activities. The transfer did not actually take place until 1952. The Director-General faced one major problem, namely the procedural delays in refugee settlement and he recommended four points to deal with the problem:

1. Case by case basis of intensive counselling.
2. Training programmes (rehabilitational and vocational).

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<sup>38</sup> Res. GC/108. The period of operation after the initial 1950 deadline was known as the supplementary and closure period.

<sup>39</sup> GA Res. 319 (iv), 1949.

3. Co-operation and assistance of voluntary agencies.
4. Agreement in certain areas for establishment of an institution to be operated by local welfare organisations.

Two major political issues marked the process which produced the United Nations High Commissioner for Refugees (UNHCR) from delegates of ECOSOC and the General Assembly during 1949 and 1950. Firstly, what should the international community do with the presence of refugees; and, secondly, the tensions between East and West were growing worse.<sup>40</sup> This latter issue was clearly evident in debates, even at the discussion sessions, on matters concerning refugees. Once again the Western view was that repatriation would be acceptable as long as it was voluntary and that the refugees could settle elsewhere from their country of origin, but the East insisted that refugees should be repatriated on an involuntary basis. Although it was possible to amalgamate the two views, as may have occurred before the existence of the IRO, it was stated in the Statute (UNHCR) that the organisation's two functions were primarily of repatriation and resettlement. Prior to 1950, the US had consented to the East's views, but after 1950 the US vetoed and stated that the use of American funds,

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40 By early 1948, tension grew following the communist takeover of Czechoslovakia and the Berlin blockade and airlift, the dispute between the USSR and Yugoslavia, the appearance of the People's Republic of China, and the beginning of the Korean conflict in 1950. In Europe, NATO was created (North Atlantic Treaty Organisation) as a protection against threat from Soviet attack. There had also been the setting-up of the German Democratic Republic out of Soviet-occupied Germany.

for any organisation involving Soviet States, would be withdrawn. The US made it clear that it only wanted refugee agencies (outside the UN) composed of allies and the US. The US also reduced its financial contribution to the organisation,<sup>41</sup> because large numbers of refugees had been resettled in many countries. Several years had passed and there was no longer a willingness to accept refugees.

The US had always financed the IRO but now felt that refugees were basically a European problem and that they should resolve this problem themselves.<sup>42</sup> The UNHCR was adopted by a majority of votes from the Western States and all these States felt that the UNHCR should provide "international protection for refugees". This point was not even discussed at the debate of the UN and delegates only discussed the type of organisation which would deal with refugees. The US strictly defined the UNHCR with narrow and limited functions, with a small staff and finance for a temporary and limited operation.<sup>43</sup>

The US favoured a refugee organisation within the UN Secretariat, rather than an appointment of a High Commissioner or the creation of a new specialized agency. If the High Commissioner was to be appointed by the Secretary-

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41 The US was the main financial donator to the IRO.

42 For further details on the East and West drift, see Holborn, A Problem of our Time, op.cit., p.61.

43 For 3 years.

General rather than elected by the General Assembly, this suggests that the High Commissioner should serve under the Secretary-General and not exercise some independent authority where he might exert influence on public opinion or on governments while in office. The US favoured a narrow definition of "refugee" and indicated that the agency should be temporary and should only relate to the protection of refugees.

Was it due to the fact that more sizeable funds would be needed if more new refugees fulfilled the Constitution of the IRO? Also, the American public, although still generally sympathetic to refugees, were beginning to ask questions about refugee numbers. The reaction of other Western States differed from the US. They believed that UNHCR should be made permanent as a multi-purpose organisation with an independent High Commissioner who could raise his own funds.<sup>44</sup> Lengthy debates took place within the UN, especially in ECOSOC, the 3rd Committee and the Plenary Session of the General Assembly, although there was a general consensus amongst States that a new agency be formed especially for the international protection of refugees. There were, however, a number of disagreements:-

1. The relationship between the new agency and the Secretary-General.

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<sup>44</sup> ECOSOC, 3rd Committee of the GA, and in Plenary Session of the GA.

2. The method of selecting the High Commissioner.
3. Life of the agency.
4. Material assistance and funding.
5. The extent of activities of the new group of refugees.
6. Which type of groups would come within its scope.

The General Assembly decided on 3rd December 1949 to accept the establishment of the Office of the UNHCR as of 1st January 1951 when it was expected that the IRO would cease to function. Resolution 319 (iv) was adopted on 3 December 1949, entitled "Refugees and Stateless Persons in Resolutions A & B". This resolution considered the problem of refugees and adopted the view that solutions to the problem would be by "voluntary repatriation" or their integration within new States. The resolution requested Governments (Members and Non-Members) to provide legal protection for refugees. It also recommended that the Council should make recommendations for the definition of the term "refugee".<sup>45</sup>

The UNHCR was to continue for 3 years, beyond which the case would be reviewed again.<sup>46</sup> An annex was attached to this resolution but this was superseded by the annex to Resolution 428 (v), Statute of the Office of UNHCR.

In Part B, the General Assembly appealed to all governments,

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<sup>45</sup> Official Records of the 4th Session of the General Assembly, A/1251, para 4(b).

<sup>46</sup> Used para 5.

irrespective of membership to the UN, to provide:

" ... the widest possible assistance, particularly in respect of the admission and care of refugees in the most destitute categories ... " 47

The General Assembly did not define the meaning of "destitute categories". However, the general form and functions of the agency had been laid down and the final text for the Statute of the UNHCR had to be presented. ECOSOC had worked out the draft in response to the General Assembly's earlier request and had been rewritten in the Assembly's 3rd Committee. Eventually, the Assembly passed three resolutions on 14 December 1950 and the election of the first UN High Commissioner for Refugees was announced - Mr G J van H Goedhart.

The three resolutions were:-

1. Resolution 428 (v): "Statute of the Office of the UNHCR".<sup>48</sup>
2. Resolution 429 (v): "Draft Convention Relating to

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47 Used Part B, para 1.

48 Official Records of the GA, 5th Session, Supp. No.20 (A/1775).

Status of Refugees".<sup>49</sup>

3. Resolution 430 (v): "Problems of Assistance to Refugees".<sup>50</sup>

What was the Relationship of the UNHCR to the Secretariat?

One of the earliest debates concerned the relationship between the UNHCR and the existing organisations of the UN. There were two possibilities:-

1. to place the service of international protection within the existing framework of the UN Secretariat. Or,
2. to place it under an independent High Commissioner who would be responsible to the General Assembly.

France and Belgium in the Plenary Meeting of ECOSOC on 6 August 1949 urged the immediate acceptance of the High Commissioner to succeed the IRO but the US stated that no decision should be taken until all other alternatives could be settled or sorted out.<sup>51</sup> The US view prevailed. The Secretary-General in ECOSOC Resolution 248 (ix) A, requested

<sup>49</sup> Ibid. The annex to this resolution contains the text of a draft definition of the term "refugee" which was considered by the Conference of Plenipotentiaries of the UN on the Status of Refugees and Stateless Persons in July 1951. The definition adopted by the Conference included in the 1951 Convention Relating to the Status of Refugees differs from that annexed to Resolution 429 (v).

<sup>50</sup> Ibid., (A/1775).

<sup>51</sup> ECOSOC (ix), p.616.

that Members should bear in mind the alternative forms which had been debated, namely:

"(a) The establishment of a High Commissioner's Office under the control of the UN,

(b) The establishment of a service within the UN Secretariat." 52

This resolution also recommended that the General Assembly (4th Session) should decide on the functions and organisation arrangements within the framework of the UN which was necessary for the international protection of refugees after the IRO had terminated its activities. In response, to the ECOSOC request, the Secretary-General filed a plan for the new agency with the General Assembly on 26 October 1949, indicating that the High Commissioner was to have a special status within the UN. It was preferable for the High Commissioner and UNHCR to stay away from the political debates to which the UN Secretariat is exposed - a common-sense view. There was general agreement amongst nations.

There was indeed opposition expressed by delegates of France and the US on the nomination of the High Commissioner. Once again, France urged the election of the High Commissioner by ECOSOC or the General Assembly on the nomination of the Secretary-General, while the US urged the direct appointment by the Secretary-General. There were two views on the

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52 Official Records of the Economic and Social Council, 9th Session, Supp. No.1 (E/1553).

nomination. Should the protective function be placed within the Secretariat or under an independent High Commissioner? One argument was that the High Commissioner would out of necessity have to work very closely with and under the Secretary-General to enable the High Commissioner to efficiently achieve his objectives. The opposite argument was that the High Commissioner needs the independent Statute and this could only be provided by direct election. The problem with the appointment of the High Commissioner by the Secretary-General was that this would in effect reduce the new agency to the status of a part of the Secretariat. There were ample precedents for the direct election of the High Commissioner; the High Commissioner for Refugees, Sir Herbert Emerson, for example, had been elected rather than appointed.<sup>53</sup>

The procedure of direct election on the nomination of the Secretary-General was incorporated in the final statute, paragraph 13. Mr G J van Heuven Goedhart was elected in 1950 in:

" ... accordance with the terms of the above statute,<sup>54</sup> the General Assembly on the nomination of the Secretary-General, elected by secret ballot Mr G J Van Heuven Goedhart (Netherlands) to the office of the UNHCR ..." <sup>55</sup>

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53 In fact, the suggestion that the High Commissioner be elected by the General Assembly was made directly by the delegate for Lebanon.

54 Statute of UNHCR.

55 325th Plenary Meeting on 14 December 1950.

There have been eleven elections and re-elections of High Commissioners up to the present one, Mr J P Hocké.<sup>56</sup>

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- (i) Re-election of Mr G J van Heuven Goedhart on 23 October 1953 - ORGA, 8th session, Supp. No.17 (A/2630), p.15.
  - (ii) Election of Mr Auguste R Lindt on 10 December 1956: "The General Assembly elected Mr Auguste R Lindt as UN High Commissioner for Refugees to fill the vacancy caused by the death of Dr G J van Heuven Goedhart". ORGA, 11th session, Supp. No.17 (3572 and Carr.1), p.x.
  - (iii) Re-election of Mr Auguste R Lindt on 14 November 1958: "The General Assembly on the recommendation of the Secretary General (ORGA, 13th session, Supp. No.18 (A/4090), agenda item 20, document A/3987) elected Mr Auguste R Lindt as UN High Commissioner for Refugees".
  - (iv) Election of Mr Felix Schnyder on 5 December 1960: "The General Assembly on the recommendation of the Secretary-General, elected Mr Felix Schnyder as UN High Commissioner for Refugees from the period from 1 February 1961 to 31 December 1963". ORGA, 15th session, Supp. No.16 (A/4684), p.xvi - annex, agenda item 19, Doc. A/4607.
  - (v) Re-election of Mr Felix Schnyder on 27 November 1963: "The General Assembly decided on the recommendation of the Secretary-General to extend for a two-year period, from 1 January 1964 to 31 December 1965, the term of office of Mr Felix Schnyder as UN High Commissioner for Refugees". ORGA, 18th session, Supp. No.15 (A/5575), p.xvii.
  - (vi) Election of Prince Sadruddin Aga Khan on 3 December 1965: "The General Assembly on the recommendation of the Secretary-General elected Prince Sadruddin Aga Khan as UN High Commissioner for a period from 1 January 1966 to 31 December 1968". ORGA, 20th session, Supp. No.6c (A/6006/Add).
  - (vii) Election of UN High Commissioner for Refugees on 15 November 1968: "On the recommendation of the Secretary-General, the General Assembly decided to extend for a period of 5 years, from 1 January 1969 to 31 December 1973, the term of office of Prince Sadruddin Aga Khan as UN High Commissioner for Refugees". "The General Assembly also decided to approve the recommendation of the Secretary-General regarding the salary and emoluments of the High Commissioner". ORGA, 23rd session, Supp. No.18 (A/7218), p.xv.

THE UNHCR STATUTE

The Statute<sup>57</sup> of the UNHCR contained in the annex of General Assembly Resolution 428 (v) of 14 December 1950, consists of three chapters and 33 paragraphs detailing the general provisions for the Office of the UNHCR, the functions of the High Commissioner and the organisational and functional arrangements of the Office.

Chapter 1, Article 1, contains:-

"The UNHCR, acting under the authority of the General Assembly, shall assume the function of

- (viii) Election of the UNHCR for Refugees on 3 December 1973: "The General Assembly decided, on the recommendation of the Secretary-General, to extend for a further period of five years, from 1 January 1974 to 31 December 1978, the term of office of Prince Sadruddin Aga Khan as UN High Commissioner for Refugees". ORGA, 28th session, Supp. No.30 (A/9030), p.xvi.
- (ix) Decision of the General Assembly at its 32nd session: 32/314, Election of the UN High Commissioner for Refugees: "At its 98th Plenary Meeting, on 8 December 1977, the General Assembly on the proposal of the Secretary-General, elected Mr Poul Hartling UN High Commissioner for Refugees for a 5-year term beginning on 1 January 1978". ORGA, 32nd session, Supp. No.45 (A/32/45).
- (x) Re-election of Mr Poul Hartling as High Commissioner for Refugees: "At its 111th Plenary Meeting, on 18 December 1982, the General Assembly on the proposal of the Secretary-General, elected Mr Poul Hartling UN High Commissioner for Refugees for a further 3 year term beginning on 1 January 1983". ORGA, 37th session, Supp. No.37/319.

To date Mr Jean-Pierre Hocké was elected (on 10 December 1985) the new High Commissioner for a period of 3 years commencing on 1st January 1986.

<sup>57</sup> See UN Resolution Relating to the UNHCR, 2nd Ed., HCR/INF/48.

providing international protection under the auspices of the UN, to refugees, who fall within the scope of the present statute and of seek permanent solutions for the problem of refugees by assisting Governments and subject to the approval of the Governments concerned, private organisations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."

"International protection" and "permanent solutions" are the crux of this article. The aspect of international protection is to give to refugees a recognised legal status analogous to that of other nationals living abroad, since the refugee does not have the protection of its own government. This protection cannot be considered a permanent solution because it just simply seeks to provide an international substitute for the diplomatic and consular protection of a State which a refugee lacks. The aspect of permanent solution can refer to social or economic integration in States where refuge and asylum have been offered. The protection still applies to the refugee as long as the refugee does not acquire that State's nationality. If that occurs, the refugee ceases to come under the mandate of the High Commissioner and does not need international protection.

According to the traditional doctrine of international law, States are subject to international law, individuals are only its objects. Nationality can be described as the link between the individual and international law and once this is broken, either because the refugee is stateless or he does not have the protection from his State, then his nationality

would be non-existent.

Diplomatic protection implies that the States must ensure that their subjects or nationals receive the standard of treatment to which they are entitled from other States. Such activities can be listed:

1. Espousing the legal claims of nationals against other States.
2. Trying to improve the standard of treatment by issuing and completing bilateral consular treaties, trade agreements or immigration.
3. Assuring these agreements are actually carried out.
4. Providing, through Embassies and Consulates, documentation certifying the identity of their nationals.
5. Issuing passports allowing for travel.
6. Repatriating those nationals who become distressed.<sup>58</sup>

In traditional law, obligations are only owed to foreigners who possess a nationality and the protection of a State. A refugee has no protection from his/her own State, no legal standing and is open to maltreatment and abuse by any State. As mentioned earlier, although customary international law has changed, many States treat refugees in the same way as

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58 See P. Weiss, "The International Protection of Refugees", *AJIL*, April 1954, pp.193-221. See also the discussion in the Secretary General's "Study of Statelessness", Doc. F/1112 of 1 February 1949, Ch.3.

aliens and few States offer the same rights as those enjoyed by their nationals under their constitution. Some States have tried to change their domestic laws, but refugees still suffer from legal and social disabilities, so refugees who are by definition either de facto or de jure stateless, are still people in "no-man's land".

It is perhaps appropriate at this stage to state the two categories of stateless persons: De facto and De jure.

De facto: "are those who have left their country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection of their countries of which they were nationals."

De Jure: "Persons who are not nationals of any State either because at birth or subsequent they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one." 59

Refugees (de facto and de jure) suffer from the same disabilities as stateless persons but their situations are different in that they lack the protection of the State of

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59 Ibid., UN Study of Statelessness, Ch.3. See also N. Robinson, Convention Relating to the Status of Refugees, New York, 1953, p.53.

their nationality because "persecution" or "fear of persecution" by reason of "race, religion, nationality or political opinion."<sup>60</sup> Protection for the stateless person can be redeemed by creating international conventions which explicitly and implicitly set down treatment for refugees, and also through implementation and the competence of UNHCR. It is important to realise that international protection cannot be substituted for diplomatic protection, because the UNHCR does not have the authority or standing of a State. The UNHCR, per se, exists because of the general consent by States and a general overall agreement to allow the UNHCR to carry out its duties. International protection for refugees is thus complementary to the national protection of refugees provided by States on a basis of either their domestic laws or international contractual obligations. Legal protection is an "essential factor" in the assimilation of refugees in new communities; without such a legal status, their fundamental human rights would not be recognised or respected.<sup>61</sup>

The UNHCR carries out protection on four basic levels:-

1. At the universal level, the UNHCR promotes the ratification of international conventions (such as the 1951 Convention relating to Status of Refugees and the 1967 Protocol) for the protection of refugees.

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60 Definition of refugees: Statute of UNHCR.

61 See Human Rights in Chapter Three.

2. At the regional level, the UNHCR has contacts with the Council of Europe, the EEC, the Asian-African Legal Consultation Committee, the OAU Convention and Organisation of American States (OAS).
3. At the national level, the UNHCR assists governments in the preparation of legislation and regulations relating to refugees entering in their respective countries, for example, France whose national laws relating to refugee status determination include the ordinance of 2 November 1945, as amended by Law No.80-9 of 10 January 1980, and Law No.81-973 of 29 October 1981, Law No.52-893 of 25 July 1952 and Decree No.53-377 of 2 May 1953.<sup>62</sup>
4. At national level, the UNHCR performs a variety of roles such as certifying the eligibility of refugees. The organisation intervenes on behalf of individuals where recognition of refugee status, the right of asylum or the principle of non-refoulement is at the determination stage.<sup>63</sup>

Within the Statute, the High Commissioner, in acting to seek permanent solutions through material assistance, is directed to assist governments, but no similar provision grants the

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<sup>62</sup> For further examples, see C. Avery, *op.cit.*, Vol.19, Issue 2, Summer 1983. See also, G. Goodwin-Gill, *op.cit.*, pp.167-211.

<sup>63</sup> *Ibid.*

High Commissioner the authority to provide international protection. The whole discretion to exercise such a function is left entirely to the High Commissioner's competence, experience and suitability, independent of States, individuals or even the Executive Committee.

The term "permanent solution" can be divided into three categories:-

1. Voluntary Repatriation.
2. Local Integration.
3. Resettlement through Migration.

#### 9.2.1 Voluntary Repatriation

The UNHCR has to make sure that the repatriation is not forced and is voluntary. Conventions or Treaties, along with customary international law, does not allow forced repatriation or expulsion as it would violate the general principles of international law (see later). UNHCR does do a great deal of work behind the scenes, such as helping refugees to obtain visas, bearing the cost of the refugee's return travel to his country and even in large groups to organise large-scale transport and travel. The UNHCR, as a part of its task, makes sure that no pressure is exerted for voluntary repatriation. UNHCR assistance provides refugees with the material wherewithal to make voluntary repatriation possible.

### 9.2.2 Local Integration

If voluntary repatriation is non-practicable and impossible, the other solution available is to try to integrate the refugees within the new State and community.

Integration is a term which is used as a process by which diverse elements are combined into unity while retaining their basic identity. There is no insistence upon uniformity or elimination of differences other than the difference of each component group "which would disturb or inhibit the total unity".<sup>64</sup>

The difference between assimilation and integration is considerable. Integration seeks to remove all "purely ethnic lines" of cleavage and to guarantee the same rights and opportunities to all citizens whatever their group membership.

Refugees are not only refugees but also residents or, more precisely, persons staying for a shorter or a longer period in their country of refuge, or visitors in some third country. Either as residents or as visitors, they will be covered by a network of international instruments, for example, the convention under the ILO or Council of Europe. The entry of International Conventions on Civil and Political

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<sup>64</sup> See Dr P. Thornberry, "Minorities and Human Rights Law", MRG, Report No.73, p.4. See nuances between Fusion, Assimilation and Integration.

Rights on Economic and Social and Cultural Rights 1966, has affected the status of all individuals within the territory and, subject to the jurisdiction of any Contracting State,<sup>65</sup> includes refugees in residence or transit.

It is important to analyse the network of international rules applicable in various countries and the interactions with the provisions of the Refugee Convention, in order to determine what is the actual international status of refugees within any particular territory and in different parts of the world.

Article 2 of the 1951 Convention stipulates that every refugee has duties to the country in which he finds himself, which require in particular that he/she conforms to its laws and regulations as well as to measures taken for the maintenance of public order.<sup>66</sup>

Prince Aga Khan observes that the final aim of integration is the acquisition of a new nationality,<sup>67</sup> but before the refugee acquires a new nationality he must satisfy time periods and other conditions such as determination of his status by the host government which can take up to 20 months<sup>68</sup> to reach a decision. Meanwhile, the refugee has to

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65 Article 2 (1).

66 Cf. Article 3, OAU, 1969.

67 Sadruddin Aga Khan, "Legal problems relating to Refugees and Displaced Persons", Hague Recueil, 1976, p.336.

68 In the UK. See the Determination of Refugee Status section.

integrate or at least try to integrate with the local community. This can prove fatal, since social, cultural, religious and linguistic differences abound. In 1980, Malaysia saw the increasing numbers of boat loads of asylum-seekers or refugees from Vietnam (basically of the same Chinese ethnic origin) as likely to upset the racial and economic balance sought by the Malaysian Government. Hence, the boats were prevented from landing and turned back to sea.<sup>69</sup>

The economic and social context of the country of receiving refugees is important. Integration is far from easy as it puts a heavy burden on the host country and results can be disastrous<sup>70</sup> with overt aggression often directed against refugees.<sup>71</sup>

### 9.2.3 Resettlement through Migration

The UNHCR is actively engaged in promotion of this solution. It liaises closely with interested governments, the Inter-Governmental Committee for Migration (ICM) and Voluntary Agencies. Although governments are willing to accept small

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69 UNHCR Information Division. See Non-Refoulement - Chapter Seven.

70 Pakistan is a good example of this. The influx of 3 million Afghan refugees because of the invasion of Afghanistan by Soviet forces has caused mounting tension amongst the local Pakistani population who resent the special treatment afforded to the refugees via logistic aid. The Pakistan Government appealed to the world for aid.

71 Ibid., Pakistan.

numbers of refugees, the problem of massive numbers of refugees still remains.

Chapter I, Article 1, first paragraph, continues:

" ... by Governments and subject to the approval of the Government concerned, private organisation ..."

The drafters at the time of drafting the Statute, believed that the UNHCR would be a short-term agency, that the funds would be limited and the staff small in number, and that because of these factors the operations to achieve its aims would be devoted to governments and private organisations. In other words, UNHCR, prima facie, would become a non-operational agency.<sup>72</sup> International protection aims would be achieved through governments and the UNHCR would not involve itself explicitly in protection of refugees. This "non-operational" aspect was also the role given to the High Commissioner under the League of Nations. His role was to achieve co-operation and co-ordination in support of government efforts. However, this can be contrasted to the period of the International Refugee Organisation when the agency per se could undertake direct and extensive action on behalf of refugees, especially in such matters as international protection, care, maintenance, repatriation and

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<sup>72</sup> Compare the opening speech by John Pierre Hocké, the High Commissioner at the 37th Executive Committee, in Refugee Volume, p.35, November 1986: "I see UNHCR as fundamentally an operational agency which is accountable to the international community ...", p.18.

resettlement.

The second part of paragraph 1 of Chapter 1 states:

"In the exercise of his function, more particularly when difficulties arise, and for instance with regard to any controversy concerning the international status of these persons the High Commissioner shall request the opinion of the advisory committee as refugees if it is created."

Reference is made to the role of the High Commissioner who could request the advisory committee to assist him on his functions, especially on the importance of determination of the eligibility of groups with his mandate. This aspect is linked with Article 4 (see later).

Paragraph 2 of the Statute states:-

"The work of the High Commissioner shall be entirely of a non-political character, it shall be humanitarian and social and shall relate as a rule, to groups and categories of refugees."

The first part of this paragraph is highly important and has a significant attribute towards neutrality and non-involvement in international politics by the Office of the UNHCR. In the phrase, "The work of the High Commissioner shall be entirely of a non-political character", the word "entirely" indicates that the Office as a complete "entity" must not participate in international politics, and the Office must possess a "non-political character". Prima

facie, it seems difficult to reconcile the fact that the cause of the plight of refugees is usually of a political nature and if this Office offers protection irrespective of who implements it, is indeed touching the boundaries of politics. The High Commissioner's work is generally exposed to politics and implicit political pressure but the High Commissioner has to ensure that this Office remains as a non-political agency. The High Commissioner's mandate requires the High Commissioner to take cognizance of the political situation, since in the Statute definition of a refugee it requires someone who has "well-founded fear of being persecuted for reasons of ... political opinion", but at the same time his mandate requires the Office to be "non-political". In simple terms, the Office must minister to the human needs of refugees without getting involved in the political views or disputes which made them refugees in the first place. In fact it is through the non-political character of the Office, that it has been so successful in commendably achieving its aims, ie. international protection and material assistance.

Professor David Forsythe<sup>73</sup> has explained the term "politics". He suggests that there are three types of definition and meanings:

1. Partisan Politics: "A factual politics (competition

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<sup>73</sup> D. Forsythe, Humanitarian Politics, The International Committee of the Red Cross, Geneva, 1977, p.1.

among groups within a nation for what there is to get)".

2. Real Politik: Usually refers to competition amongst actors in world politics for power, prestige and, in general, who gets most of the pie.

The UNHCR has tried to avoid involving itself in either of these two categories of politics.

But "politics" in a third sense is different. Professor Forsythe goes on to explain this third category of politics when he says that any "institution must be a political animal if it is to do the job it has set for itself".<sup>74</sup> In its broad definition, "politics" refers to the competition and struggle to make and implement public policy. If the UNHCR wishes to promote human rights and international protection for refugees, then it must succeed in getting these values implemented in public life - as the public policy of nations. Since the UNHCR is consistently engaged in humanitarian policies, the struggle to implement humanitarian values as official policy in the nations of the world remains a difficult task.

Total non-involvement in politics is difficult to avoid, as in the case of the 'boat-people' from Vietnam. The Real Politik issues included the following three factors:-

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74 Ibid.

1. The US were unsympathetic to the cause and less enthusiastic to grant haven to these refugees.
2. Vietnam wanted to get rid of as many people as possible.
3. There was a desire amongst the ASEAN States not to deal with human "flotsam".

The UNHCR did not want to blame Vietnam for the flow of refugees although subsequently the blame had to be turned towards Vietnam in order to limit the outflow of refugees.<sup>75</sup>

The people whose outflow was limited probably felt that the UNHCR was being political.<sup>76</sup>

The second part of paragraph 2 of the Statute states:-

" ... it shall be humanitarian and social and shall relate as a rule to groups and categories of refugees."

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<sup>75</sup> See Refugees - UN Meeting on Refugees and Displaced Persons in south East Asia, 20-21 July 1979, HILJ, 290, 1980.

<sup>76</sup> Another example of political involvement was in the case of the Cuban refugees in 1980. UNHCR officials worked in Washington and Fort Chafee, separating genuine refugees from criminals escaping Cuban authorities. President Castro, through his foreign minister Malmierca Peoli, stated that there was no political persecution in Cuba and hence there were no refugees, and the matter was to be exclusively dealt with by the US and Cuban authorities, respectively. There should be no involvement of the UNHCR. The New York Times commented "This caution is attributed in part to an unwillingness to embarrass a UN which is continually called upon to make political decisions but dislikes drawing attention to them ..." (10 June 1980 at A/6, Col.1). The Americans contended that the UNHCR had been called in to provide a measure of legitimacy. The UNHCR was implicitly asserting that most of the fleeing Cubans feared political retaliation and therefore were bona fide refugees.

In 1949, The Geneva Conventions on the Protection of Victims of War had been adopted under the auspices of the International Red Cross, and the mood was right for further development of international humanitarian law. The work of the UNHCR was to be "humanitarian" and "social". General human rights and "humanitarianism" are intermingled and cannot be separated when dealing with refugees. The whole issue of refugees and human rights are linked (see section on Human Rights and Refugees). Observance of human rights is of the utmost importance and should be implemented and adhered to as much as possible.

The phrase "..., as a rule, to groups and categories of refugees" implies that the UNHCR should not act in the same way as the IRO in matters of administrating to individual refugees. The UNHCR Statute moved away from the individual determination of refugee status to a determination of group or groups because, at that time, it was becoming more difficult and impracticable to determine individual status as numbers of refugees grew. The determination of groups of refugees rather than individuals was certainly much simpler and practicable and when individual determination was necessary, it was simply a matter of which group this individual belonged to. The drafters<sup>77</sup> did make reference to this, stating that the function of international protection

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<sup>77</sup> Especially the French delegate, Monsieur M. Rochefort at the Conference of Plenipotentiaries.

was not acting on behalf of individual refugees<sup>78</sup> but promoting better national treatment for refugees as groups.<sup>79</sup>

The drafters also indicated that the UNHCR would not possess the funds or the staff to deal with the problem of a host of individuals but should oversee what national protection had been provided to individual refugees by the country of their asylum. However, in practical terms, the Office had to consider the eligibility of refugees individually in accordance with the Statute.

The definition of refugee requires a person to have a "well-founded fear of persecution" but this seems difficult to determine without an examination of the refugees' "subjective view" as well as of the "objective circumstances".

The staff of the UNHCR have become involved in services to individuals, the so-called "legal-test" whereby the individual, if determined to be a refugee, would be able to indicate his group/groups of refugees to which he belonged. The emergence of the "good offices" made it possible to deal with a group or groups of refugees without having to make reference to individual eligibility as a refugee. One advantage of the "good offices" was that it reconciled the Statute reference in paragraph 2 to "groups" with the Statute

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78 For example, by assisting individuals in their relations with national authorities.

79 By encouraging new international agreements or domestic legislation.

definition of a refugee - two principles within the Statute which might originally have appeared to be in opposition or mutually contradictory.<sup>80</sup>

Paragraph 3 states:

"The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council."

The General Assembly have, from time to time, given new authority to the High Commissioner to undertake specific tasks or to extend his regular activities to new groups of refugees.<sup>81</sup>

The fourth paragraph of the Statute states:

"The Economic and Social Council may decide after hearing the views of the High Commissioner on the subject to establish an advisory committee on refugees, which shall consist of representatives of Member States and non-Member States of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem."

The Advisory Committee was created on the basis of the above paragraph. Its functions would be to assist the High Commissioner in whatever capacity it could. It was the Secretary-General who recommended that such a committee

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80 See Felix Schnyder, "The Good Offices and the Functions of the UNHCR in the Social Field", Doc. HCR/RS/32, p.25.

81 Requests for donations to States (see later).

should be formed to assist the High Commissioner since it was a "norm" whereby the UN agencies were allowed to handle funds. In fact, it was the French delegate who had included such a provision in the 1950 draft for the Statute as a way of involving Non-Member States who had a genuine concern about refugees and their problems.<sup>82</sup> The French insisted that the committee be composed of Member States and Non-Member States, but the debate did not materialise and many States stated that the High Commissioner's views must first be obtained. Paragraph 4 was drafted simply to permit ECOSOC to establish such a committee if it so decided. The High Commissioner's response was favourable and ECOSOC accordingly implemented the paragraph and established the Advisory Committee on Refugees on 10th September 1951:<sup>83</sup>

"Decides to establish an advisory committee to be known as the UN Advisory Committee on Refugees to advise the High Commissioner at his request in the exercise of his functions."<sup>84</sup>

The members of the committee were designated at the 562nd meeting of the Council. In paragraph 2 it was decided to invite 15 States<sup>85</sup> to form such a committee and to review the

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82 Especially Germany and Switzerland.

83 ECOSOC Resolution (xiii) B of 10 September 1951.

84 Official Records of the ECOSOC, 6th year, 13th session (E/2152).

85 Members and Non-Members: Australia, Austria, Belgium, Brazil, Denmark, the Federal Republic of Germany, France, Israel, Italy, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Vatican City and Venezuela.

composition of the committee at the next session of the council.<sup>86</sup>

The Advisory Committee on Refugees was subsequently replaced by the UN Refugee Fund (UNREF) Executive Committee of the Programme of the UNHCR (Executive Committee) on 30 April 1958.<sup>87</sup>

The Economic and Social Council adopted Resolution 672 (XIV), namely: "Establishment of the Executive Committee of the Programme of the UNHCR".<sup>88</sup> The Council noted that it was to establish an Executive Committee consisting of representatives from twenty to twenty-five States of the UN or Members of any specialised agencies recognised by the Council. These members would be elected from the widest possible geographical basis, and from those States who demonstrated an interest in and devotion to solutions to refugee problems.

The Council decided:

"(a) To establish an Executive Committee of the programme of the UNHCR to take the place of the Executive Committee of the UN Refugee Fund";

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86 Para 3.

87 General Assembly Res. 832 (xi) on 21 October 1954. GA Res. 1166 (xii) on 26 November 1957.

88 Official Records of the ECOSOC, 25th session, Supp. No.1 (E/3123).

and

- (b) That the Executive Committee of the Programme shall consist of 24 States, the membership being subject to review at the thirty-first session of the Council." 89

The Executive Committee and UNREF Executive Committee had the authorities issue directives to the High Commissioner in the field of material assistance programmes but where matters of international protection arose, these committees could give advice. The Advisory Committee was empowered only to give advice to the High Commissioner on any aspects of his functions where he solicited its views.<sup>90</sup>

Finally, the chapter concludes with paragraph 5 which states:

"The General Assembly shall review, not later than at its eighth regular session, the arrangements for the Office of the High Commissioner with a view to determining whether the Office should be continued beyond 31 December 1953."

This limited the existence of the UNHCR to 3 years, pending the decision of the General Assembly. By subsequent resolutions, extension of the UNHCR has been granted up to 31 December 1988. The General Assembly has extended the life of

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89 Ibid.

90 For example, in 1952 the Advisory Committee gave advice on the eligibility on Turkish refugees from Bulgaria. The question of ineligibility of Chinese refugees in Hong Kong was considered by the Advisory Committee and by UNREF Executive Committee which succeeded it, but was eventually referred to the General Assembly in 1957.

the UNHCR for subsequent periods of 5 years.<sup>91</sup>

Chapter II of the Statute contains twelve paragraphs comprising a lengthy definition of the term "refugee", the High Commissioner's competence is specified, and specifications which relate to the implementation of the Statute by the High Commissioner to enable him to carry out its functions.

Paragraphs 6 and 7 of the Statute define the term "refugee" and those refugees who came within the competence of the High

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1. Resolution 428 (v) adopted on 14 December 1950 at 325th Plenary Meeting - for a period of 3 years until 31st December 1953. ORGA, 5th session, Supp. No.20 (A/1775).
  2. Resolution 727 (viii) adopted on 23 October 1953 at 453rd Plenary Meeting - for a period of 5 years until 31 December 1958. ORGA, 8th session, Supp. No.17 (A/2630).
  3. Resolution 1165 (xii) adopted on 26 November 1957 at 723rd Plenary Meeting - for a period of 5 years until 31 December 1963. ORGA, 12th session, Supp. No.18 (A/3805).
  4. Resolution 1783 (xvii) adopted on 7 December 1962 at 1187th Plenary Meeting - for a period of 5 years until 31 December 1968. ORGA, 17th session, Supp. No.17 (A/5217).
  5. Resolution 2294 (xxii) adopted on 11th December 1967 at 1625th Plenary Meeting - for a period of 5 years until 31 December 1973. ORGA, 22nd session, Supp. No.16 (A/6716).
  6. Resolution 2957 (xxvii) adopted on 12 December 1972 at 2107th Plenary Meeting - for a period of 5 years until 31 December 1978. ORGA, 27th session, Supp. No.30 (A/8730).
  7. Resolution 32/68 adopted on 8 December 1977 at 98th Plenary Meeting - for a period of 5 years until 31 December 1983. ORGA 32nd session, Supp. No.45 (A32/45).
  8. Resolution 37/196 adopted on 18 December 1982 at 111th Plenary Meeting - for a period of 5 years until 31 December 1988. ORGA, 37th session, Supp. Nos.12 & 12A (A/37/12 and Add.1).

Commissioner, ie. "mandate" refugees. There are certain differences between the Statute and the Convention (see earlier), the major ones concerning the scope of the Convention as it was limited to persons who became refugees as a result of events occurring before 1 January 1951, but the "mandate" refugees extended to persons who became refugees at a later date.

Another difference is that States who became parties to the Convention could further limit the scope of the Convention by declaring that "events occurring before 1 January 1951" meant "events in Europe before 1 January 1951, and that if refugees appeared (i) from non-European States and (ii) after 1 January 1951 then States could not oblige the Convention. This was to be overcome by the adoption of the 1967 Protocol relating to the Status of Refugees (see earlier).

Paragraph 6 states:

"The competence of the High Commissioner shall extend to:

A (i) "Any person who has been considered a refugee under the Arrangement of 12 May 1926 and 30 June 1928 or under the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the constitution of the International Refugee Organisation."

The first category of refugees are known as "statutory refugees", because these refugees were already considered

under previous arrangements and pre-1940 conventions<sup>92</sup> or under the constitution of the IRO.<sup>93</sup>

The most significant paragraph is 6 (ii) which states:

"Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence, is unable to, owing to such fear or for reasons other than personal convenience, is unwilling to return to it." <sup>94</sup>

This paragraph includes a second category of refugees, which was included in the High Commissioner's mandate, those who were granted the status of refugees for the first time. The definition, as above, is basically devoted to two main categories of refugees: those who possess a nationality and those who do not. The former can be termed "de jure" and the latter "de facto".

There are two conditions which apply to both de jure and de facto refugees:

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92 See Section 1 re: League of Nations, Arrangements and Conventions.

93 See Appendix.

94 Note the term "social group" is missing.

1. The refugee must be outside the country of their nationality (for de jure refugees) and their habitual residence (for de facto refugees).
2. The reason for their alienation must be well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion.

The first condition is easy to utilise but the second condition needs some thought. The term "well-founded fear of being persecuted" is extremely important and is considered to be the key to the definition. This phrase was not used in previous agreements, arrangements and conventions, though the terms "persecution" and "fear based on reasonable grounds of persecution"<sup>95</sup> were used by the International Refugee Organisation. The use of the above terms marked an attempt to move away from previous definitions, which tended to categorise refugees by nationalities, to an approach that would concentrate on the essential personal characteristics of the refugees. The drafters must have been aware that many people may take advantage of these definitions and leave their countries for the sake of personal convenience. There may be many reasons for a person being outside his country and a variety of reasons for not returning to it. This aspect of "the refugee must fear being persecuted for reasons of race, religion, nationality or political opinion" was deliberately inserted to distinguish between those who leave

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95 Constitution, Annex I, section C.

their country for personal reasons such as natural disasters, famine, fear of prosecution and economic advantage.

The term "fear" as many international lawyers have noted,<sup>96</sup> indicates the physical and psychological attitude of the sufferer; physical fear can be clearly evident but psychological fear varies by degree and is indeed subjective.<sup>97</sup> Who is to say that a person is undergoing fear of something, which others would not even notice

The term "well-founded" established an objective element. The sufferer must show sufficient grounds that his apprehension is credible and worthy. The term "well-founded fear of being persecuted" indicates that the refugee may have left his country before being persecuted or before the events occurred that now make him fear persecution. Fear of persecution can be anticipated. The fact that a refugee may have left his country for reasons other than the definition is irrelevant as long as he/she can show that he/she is still outside his/her country due to these fears.<sup>98</sup> The term "persecution" is not defined,<sup>99</sup> but it includes threats to

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96 Goodwin-Gill, The Refugee in International Law, op.cit.; and Grahl-Madsen, op.cit, pp.45 and 315 respectively.

97 Some persons fear mice but others do not.

98 Persons who in effect become refugees after leaving their countries of origin are called "refugies sur place". See also Chapter Eight on the case of the Tamils.

99 Human Rights as a Standard of Persecution. See also the definition of 'persecution' within the Nuremberg Principles (later).

life and liberty, and general violation of human rights.

Blame can be attached to successive governments who:

1. Encourage and initiate the persecution or violation of human rights (see earlier section for relevance of general human rights).
2. Do not provide protection for victims of persecution.

Although the drafters did not intend to include the economic migrant as a refugee, economic reasons can and sometimes do have racial, religious or political overtones, especially if discrimination against certain minority groups is applied.

There were categories for de jure and de facto refugees, respectively in the paragraph headed "Nationality Refugees":  
 "... is outside the country of his nationality" and "... (the person) is unwilling to avail himself of the protection of that country". Likewise for persons "Without Nationality":

"... who, not having a nationality and being outside the country of his former habitual residence, is unable to, owing to such fear or for reasons other than personal convenience, is unwilling to return to it."

If, however, the refugee possesses more than one nationality, then he must satisfy the above conditions in the countries of his nationalities.

The latter part of paragraph 6 (ii) states:

"Decisions as to eligibility taken by the IRO during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of the present paragraph."

A person who had been refused the status of refugee by the IRO on a previous occasion, could be eligible for the definition if he satisfied the criteria in paragraph 6 (ii). The definition in paragraph 6 (ii) has two main criteria. Firstly, that the refugee must be outside his/her country or habitual residence and, secondly, he/she must be "unable" or "unwilling" to return because of lack of protection by his/her government. It is important that refugees within the competence or mandate of the High Commissioner must be de facto stateless persons in that they lack the protection of any State. The basic function of the High Commissioner is to provide international protection for suffering human beings. The word "unwilling" was added instead of "unable", thus clearly establishing a subjective factor. Hence, a person who wants to seek refugee status or become a refugee can either demonstrate that he/she is unable to obtain his/her country's protection or that he/she has good reasons for not wanting to do so.

Paragraph 6 contains six cessation clauses which indicate the circumstances in which a person ceases to be a refugee under

the High Commissioner's competence or mandate:<sup>100</sup>

"The competence of the High Commissioner shall cease to apply to any person defined in Section (A) above if:

- (a) He has voluntarily availed himself of the protection of the country of his nationality; or
- (b) Having lost his nationality, he has voluntarily reacquired it; or
- (c) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (d) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or "

The above clauses are phrased in terms of protection underlying the fact that the whole purpose of the Statute is to provide protection. The High Commissioner can provide material assistance and the criteria for two are not the same.

The final two clauses state:

- "(e) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, claim grounds other than those of personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked; or
- (f) Being a person who has no nationality, he can no longer, because the circumstances in

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<sup>100</sup> Compare these clauses to exclusion clauses in paragraph 7 (infra).

connection with which he has been recognised as a refugee have ceased to exist and he is able to return to the country of his former habitual residence, claim ground other than those of personal convenience for continuing to refuse to return to that country;"

These two clauses state that if circumstances in connection with the determination of refugee status meant that he could return to his country, then the refugee will not be within the competence and mandate of the UNHCR. These words are not the same as the Convention wording; although there are exemptions, the UNHCR continues to follow the wording of the Convention. This point may be of some importance; for example, there were Jews from Germany who could not bring themselves to return to the place where gross violations of human rights took place and memories of mass genocide were still extremely vivid and unforgettable. These exemptions were included in the Convention and the cessation clauses permit this type of refugee to continue as refugees.

Paragraph 6(b):

"Any other person who is outside the country of his nationality, or if he has no nationality, the country of the former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality; or, if he has no nationality, to return to the country of his former habitual residence."

Paragraph 7 indicates the exclusion clause which indicates

the type of persons who shall not be within the High Commissioner's competence even though they might otherwise meet the requirements of the definition. Paragraph 7:

"Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:

- (a) who is a national of more than one country unless he satisfies the provision of the preceding paragraph in relation to each of the countries of which he is a national; or ..."

This paragraph excluded the refugees who possessed double nationality unless he satisfied the requirements already mentioned in relation to each of the countries of which he is a national.

Paragraph 7(b):

"who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligation which are attached to the possession of the nationality of that country; or"

After World War II, many refugees fled Germany, mainly from Eastern European States. These people, mainly ethnic Germans,<sup>101</sup> were excluded, regardless of their nationality. They were excluded by a special provision in the constitution

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<sup>101</sup> Volksdeutsche. See De Zayas, *op.cit.*, Chapter Seven.

of the IRO but the words used in the Statute are somewhat vague and ambiguous, since the drafters intended to exclude other similar groups of refugees from the mandate.<sup>102</sup>

Paragraph 7(c):

"who continues to receive from other organs or agencies of the United Nations protection or assistance; or

This provision was intended to be applied mainly to Arab refugees and others; as long as they were the responsibility of UNRWA they were excluded from the High Commissioner's mandate. The UNRWA only caters for material aid and assistance and not legal protection.

Paragraph 7(d):

In respect of whom there was serious reason for considering that he has committed a crime covered by the provision of treaties of extradition or a crime mentioned in article vi of the London Charter of the International Military Tribunal<sup>103</sup> or by the

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102 These refugees were treated like nationals by the country of their asylum.

103 Article 6: "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes. The following acts or any of them, are crimes within the jurisdiction of the Tribunal for which there shall be individual responsibility.

(a) **Crimes Against Peace:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy

provision of article 14, paragraph 2, of the  
 Universal Declaration of Human Rights.<sup>104</sup> 105

This provision applied to persons who "were deemed not to deserve" international protection. They were people who had committed war crimes, serious non-political common crimes or "acts contrary to the principles and purposes of the United Nations". This was to exclude fugitives from justice and criminals from prosecution.

Paragraph 8 is sub-divided into 9 further paragraphs which provide for the protection of refugees under the competence of the High Commissioner's office:

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for the accomplishment of any of the foregoing;

(b) **War Crimes:** namely, violations of the laws or customs of war. Such violation shall include but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of POWs or persons on the seas. Killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **Crimes Against Humanity:** namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any form of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

104 Article 14 (2): "This right (implying asylum) may not be involved in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principle of the United Nations."

105 See Resolution 217 A (iii).

"(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto, ..."

Initially, States were reluctant to ratify and conclude the 1951 Convention and 1967 Protocol. They assumed that the refugee problem would diminish by the time they had got round to acceding and ratifying, but States today have realised that the problem is not temporary and will remain on their consciences.

Another reason is that bureaucratic procedures are deliberately slow on ratification. Some States do not ratify the Convention and/or Protocol for political reasons.<sup>106</sup>

Sub-paragraph (b):

"(b) Promoting through special agreements with governments, the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection."

This indicates that Governments (Members and Non-Members) can form special agreements with the Office of UNHCR, which could

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<sup>106</sup> For instance, Pakistan is reluctant, because on becoming a Member of the 1951 Convention and/or 1967 Protocol it would be obliged to comply with the Convention and/or Protocol and it would have to accept refugees and not turn them away (non-refoulement). Some refugees could comprise Sikh or Russian dissidents who could be a hazard to national security or public order.

improve the situation of refugees and ultimately reduce the numbers requiring protection. One such agreement was made with Pakistan, namely, to allow the Office of the UNHCR to set up offices in Islamabad and three other towns<sup>107</sup> for improving the situation of Afghan refugees.

Sub-paragraph (c):

"Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;"

The UNHCR will assist governments and private organisations to promote voluntary repatriation or integration with new States, thus forming part of a durable solution to the problem of refugees.

Sub-paragraph (d):

"Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States."

The principle of non-refoulement is to be respected, but the term "most destitute categories" seems somewhat vague and ambiguous and it is difficult to provide the correct interpretation of the above phrase.

Sub-paragraph (e):

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<sup>107</sup> Quetta, Karachi and Peshawar.

"Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement."

The transference of assets has not been defined precisely. Does it mean money, or goods? The term is vague, but could the Office of the UNHCR assist a rich refugee in transferring large amounts of financial assets to his new home? The Office of the UNHCR can obtain goods on behalf of refugees but each case has to be examined on its merits. This sub-paragraph could be misused by wealthy refugees; the emphasis is on small items which could assist refugees who had had to leave suddenly. But it must be remembered that refugees can also be wealthy.

Sub-paragraph (f):

"Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;"

This is an important paragraph, because actual physical numbers are necessary in allocating aid and logistics. Governments which provide information relating to the number of refugees tend to overestimate numbers, perhaps exaggeratingly, so that more aid, logistics and financial assistance can be gained. The latter part of this sub-paragraph indicates that governments have to supply information regarding the conditions of refugees and the laws

and regulations affecting them. Allegations of bad housing for refugees was dismissed by the German delegate at the Executive Meeting.<sup>108</sup> The Office of the UNHCR does not want to see violations of human rights occurring within States which give refuge.

Most States have municipal laws and regulations relating to refugees. The Protection Officers of the UNHCR would like, ideally, to assist and advise government lawyers in drafting legislation. Many States treat refugees in the same way as the host community on some rights and privilege, but there are some who avoid this. In such instances the UNHCR will try to intervene and apply pressures through the international community if necessary, to repeal and amend those laws (see earlier section).

Sub-paragraph (g):

"Keeping in close touch with the governments and inter-governmental organisations concerned;"

The importance of keeping in touch with governments and inter-governmental organisations is of great value. Close liaison between UNHCR and Governments is important. Member States and, to a lesser degree, Non-Member States, have a great deal of influence over the Office of the UNHCR, since representatives of States are present at the General

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<sup>108</sup> Executive Committee, 37th session, 6-13 October 1986, Doc. A/AC.96/688.

Assembly, ECOSOC, the Executive Committee, and even as observers. Through these delegates, the High Commissioner can obtain feedback from the States. Also the field officers keep in touch with governments and inter-governmental organisations.

Sub-paragraph (h):

"Establishing contact in such a manner as he may think best with private organisations dealing with refugee questions;"

This provision can have a two-fold interpretation. Firstly, to liaise with private organisations, for instance, with the British Refugee Council over the condition of refugees in the United Kingdom. And, secondly, he can contact various private organisations to provide assistance in perhaps food or materials.<sup>109</sup>

Sub-paragraph (i):

"Facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees."

The UNHCR staff can and do co-ordinate with private organisations, especially when material assistance is needed.

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<sup>109</sup> In Sudan on 7 September 1986, UNHCR chartered planes from private organisations to drop food and supplies to the refugees who could not be reached by train or road.

The staff can ensure that, through private organisations, money and material is spent wisely. The UNHCR can also employ local agencies on short-term projects.<sup>110</sup>

Paragraph 9 states:

"The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal."

In Africa, over 80,000 Ethiopians, some 50,000 Ugandans and 20,000 Chadians,<sup>111</sup> and hundreds from Nicaragua and Guatemala have returned to their country of origin. In Asia, however, the number of repatriating refugees remained small.<sup>112</sup>

The UNHCR's main objective is to voluntarily repatriate refugees and resettle them, preferably in their land of origin although this can be extremely difficult in some cases.<sup>113</sup>

Paragraph 10 states:

110 Such as irrigation and farming. Also the UNHCR have leased private helicopters in Peshawar, Quetta, Pakistan to make sure that co-ordination is maintained between UNHCR staff, Pakistan authorities and private organisations.

111 Report of the UNHCR, General Assembly, 41st session, Supp. No.12 (A/41/12), p.11.

112 Ibid.

113 For example, Afghan refugees cannot return until the Soviet forces have left Afghanistan - could be a long-term problem.

"The High Commissioner shall administer funds, public or private, which he receives for assistance to refugees, and shall distribute them among the private and, as appropriate, public agencies which he deems best qualified to administer such assistance."

UNHCR expenditure is financed by a very limited subsidy from the regular budget of the UN (to be used exclusively for administrative costs) as well as by voluntary contributions from governments, non-governmental organisations and individuals. Under this paragraph, the High Commissioner administers any funds (public or private) which he receives for assistance to refugees.

Paragraph 10 further states:

"The High Commissioner may reject any offer which he does not consider appropriate or which cannot be utilised."

This paragraph is self-explanatory and needs no further interpretation. The final two sub-paragraphs in paragraph 10 state:

"The High Commissioner shall not appeal to governments for funds or make a general appeal, without the prior approval of the General Assembly."

and

"The High Commissioner shall include in his annual report a statement of his activities in this

field."

The former was removed by the General Assembly Resolution 538 B (vi) of 2nd February 1952,<sup>114</sup> at the 371st Plenary Meeting:

"1. Authorizes the High Commissioner, under paragraph 10 of the statute of his Office, to issue an appeal for funds for the purpose of enabling emergency aid to be given to the most needy groups among refugees within his mandate."

Also in the General Assembly Resolution 832 (ix) of 21 October 1954 of the 496th Plenary Meeting,<sup>115</sup> paragraph 3:

"Authorises the High Commissioner to make appeals for funds for the purposes set in paragraph 2 above;"

Paragraph 2 states:

"Requests the Negotiating Committee for Extra Budgetary Fund in co-operation with the High Commissioner, to negotiate with the governments of Members and Non-Members States for voluntary contributions towards a fund based on the proposal of the High Commissioner (the amount to be determined by the High Commissioner's Advisory Committee at its next session), to be devoted principally to the promotion of permanent solutions, and also to permit emergency assistance to the most needy cases, such fund to incorporate the fund authorised by the General Assembly in Resolution 538 B (vi),"

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114 ORGA, 6th session, Supp. No.20 (A/2119).

115 ORGA, 9th session, Supp. No.21 (A/2890).

These resolutions, inter alia, clearly authorised the High Commissioner to make appeals to Member and Non-Member States for donations towards the refugee cause and problems. The latter paragraph of paragraph 10 allows the High Commissioner to submit an annual report, including its activities.<sup>116</sup>

Paragraph 11 states:

"The High Commissioner shall be entitled to present his views before the General Assembly, the Economic and Social Council and their subsidiary bodies."

One example of this is that in the Executive Committee of the High Commissioner's Programme,<sup>117</sup> where the opening statement was given by the High Commissioner.

Paragraph 11 further states:

"The High Commissioner shall report annually to the General Assembly through the Economic and Social Council; his report shall be considered as a separate item on the agenda of the General Assembly."

The High Commissioner presents a comprehensive annual report

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<sup>116</sup> Poul Hartling (High Commissioner in 1985) presented an Annual Report to the General Assembly, Official Records, 40th session, Supp. No.12 (A/40/12). This report involved Status of Accessions to and Ratifications of inter-governmental legal instruments of benefit to refugees, 31 March 1985, pp.46-48; and financial data, pp.49-58. Also, in 1986, Jean Pierre-Hocké (new High Commissioner) presented an annual report to the GA, Official Records, 41st session, Supp. No.12 (A/41/12) which included financial data on pp.31-40.

<sup>117</sup> A/AC. 96/688 on 22 October 1985 at 37th session.

of his activities through ECOSOC to the General Assembly where it is first considered by the Third Committee. Since 1970, ECOSOC considers UNHCR's annual report only if it receives a request from the High Commissioner or one of its members to place it on the agenda; otherwise ECOSOC simply transmits the report to the General Assembly without debate.<sup>118</sup> The administrative and financial aspects of UNHCR's activities are considered by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and by the Fifth Committees of the General Assembly.

The rules of procedure for the Executive Committee of the High Commissioner's programme<sup>119</sup> in Rule 4 states:

"The provisional agenda for each session shall be drawn up by the High Commissioner and shall be communicated to the Government Members of the Committee, Governments of other Member States of the UN, specialised agencies, the appropriate inter-governmental organisations and non-governmental organisations in consultative status and those referred to in Rule 38, with the notice convening the meeting."

Rule 5 states:

"The provisional agenda shall include:

- (a) all items proposed by the committee at a previous session;
- (b) all items proposed by any member of the committee provided that such items are proposed within 8 days after receipt of the provisional agenda;
- (c) all items proposed by a sub-committee which

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<sup>118</sup> Doc.A/AC 96/185/Rev.2, pp.42-43.

<sup>119</sup> Doc. A/AC 96/187/Rev.3, 37th session.

- may have been appointed by the committee to serve in-between its session;
- (d) all items proposed by the High Commissioner."

The final paragraph in Chapter II states:

"The High Commissioner may invite the co-operation of the various specialized agencies."

The UNHCR may draw on the expertise of other organisations of the UN system experienced in such matters as food production (FAO), education (UNESCO), child welfare (UNICEF), health measures (WHO) and vocational training (ILO). The participation of the World Food Programme (WFP) is particularly important in supplying food until such time as the refugees are able to grow their own crops or become self-sufficient through other activities. Close contact is also maintained with the offices of the United Nations and United Nations Development Programme (UNDP). In areas where the UNHCR is not represented, UNDP representatives frequently administer UNHCR-financed projects and act on UNHCR's behalf in relation with governments.<sup>120</sup>

Chapter III (Organisation & Finances), paragraph 13 states:

"The High Commissioner shall be elected by the General Assembly on the nomination of the Secretary-General. The terms of appointment of the High Commissioner shall be proposed by the Secretary-General and approved by the General

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<sup>120</sup> For example, Mexico, China, India, Cameroon, and the Central African Republic.

Assembly. The High Commissioner shall be elected for a term of three years, from 1st January 1951."

There have been six High Commissioners,<sup>121</sup> with the present incumbent being John Pierre-Hocké (from 1986).<sup>122</sup>

Paragraph 14 states:

"The High Commissioner shall appoint, for the same term, a Deputy High Commissioner of a nationality other than his own."

This paragraph is self-explanatory, but the importance lies in two issues: firstly, the High Commissioner can appoint whoever he wishes; and, secondly, the nationality must not be the same. This is to avoid accusations of political connivance levelled against the leadership of the Office. The present Deputy is Mr A. Dewey who was appointed by Jean Pierre-Hocké.

Paragraph 15 states:

"(a) within the limits of the budgetary appropriations provided, the staff of the office of the High Commissioner shall be appointed by the High Commissioner and shall be responsible to him in the exercise of their

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121 (i) Fridtjof Nansen (1921-30, League of Nations); (ii) Gerrit Jan van Heuven Goedhart (1951-56); (iii) August R. Lindt (1956-60); (iv) Felix Schnyder (1961-66); (v) Sadruddin Aga Khan (1966-77); (vi) Poul Hartling (1978-86).

122 Election of the UNHCR, decision of the General Assembly at its 40th session, Res.40/310, term of 3 years from 1 January 1986 to 31 December 1988.

- functions.
- (b) such staff shall be chosen from persons devoted to the purposes of the office of the High Commissioner.
  - (c) their conditions of employment shall be those provided under the staff regulations adopted by the General Assembly and the rules promulgated thereunder by the Secretary-General.
  - (d) Provision may also be made to permit the employment of personnel without compensation."

UNHCR staff (international level) are chosen for three qualities:-

1. The order of nationality. There is a marked improvement in the number of Third World staff employed by the UNHCR, but not enough to stifle complaints about "Western" or "European" domination within the UNHCR.
2. Qualifications of the utmost calibre are required.
3. Experience related to the relevant fields is required, usually in terms of at least 3 years for junior posts.

There are two subsidiary requirements for prospective staff. Firstly, that recommendation must be received from the government of the candidate; UNHCR seems to possess a policy of not recruiting "people off the streets", although there have been cases where external recruitment has taken place.<sup>123</sup> Secondly, the ability to speak several languages

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<sup>123</sup> In 1982/83, when Africa was faced with a refugee crisis, UNHCR recruited persons who were available for selection. (A. Johnson - interview in Islamabad in January 1984).

is a must. The minimum requirement is French and English but training is given at the UN Headquarters for staff not possessing either of these two languages. Basically, the staff are international civil servants and some possess diplomatic immunity.

Paragraph 16 states:

"The High Commissioner shall consult the government of the countries of residence of refugees as to the need for appointing representatives therein. In any countries recognizing such need, there may be appointed by the government of that country, subject to the foregoing, the same representative may serve in more than one country."

The High Commissioner has appointed over 67 representatives in States where a refugee problem exists. The representative is responsible for the High Commissioner and the staff working under him/her. Usually the representatives are rotated from one State to another.

Paragraph 17 states:

"The High Commissioner and the Secretary-General shall make appropriate arrangements for liaison and consultation on matters of mutual interest."

Paragraph 17 continues:

"Since the UNHCR is a subsidiary body of the UN, the overall functions of the UNHCR concern the UN as well. The Secretary-General should be in a position to exercise his powers within the UN if

the need arises."

The relationship of the High Commissioner and the Secretary-General has to be good to meet the demands of this paragraph.

Paragraph 18 states:

"The Secretary-General shall provide the High Commissioner with all necessary facilities within budgetary limitation."

Little interpretation is needed here but recently the budgetary boundaries have been somewhat reduced, making the job of the High Commissioner more difficult and, in turn, hampering the work of the Office in carrying out its functions.

Paragraph 19 states:

"The Office of the High Commissioner shall be located in Geneva, Switzerland."

The Office of the UNHCR has always been based in Switzerland. It grew from three rooms in the Palais des Nations into a very substantial office based within pleasant surroundings in Geneva.

Paragraphs 20-22 state:

"The Office of the High Commissioner shall be

financed under the budget of the UN. Unless the General Assembly subsequently decides otherwise, no expenditure other than administrative expenditures relating to the functioning of the Office of the High Commissioner shall be borne on the budget of the United Nations and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions.

The administration of the Office of the High Commissioner shall be subject to the Financial Regulations of the United Nations and to the financial rules promulgated thereunder by the Secretary-General.

Transactions relating to the High Commissioner's funds shall be subject to audit by the United Nations Board of Auditors, provided that the Board may accept audited accounts from the agencies to which funds have been allocated. Administrative arrangements for the custody of such funds and their allocation shall be agreed between the High Commissioner and the Secretary-General in accordance with the Financial Regulations of the United Nations and rules promulgated thereunder by the Secretary-General."

The above paragraphs relate to the financing of material assistance activities. The Secretary-General of the United Nations made an appeal in 1984 concerning the drought and related developments in Africa.<sup>124</sup> The High Commissioner then issued a special appeal in November to fund a special programme for African refugees which was very successful. Continued generous financial support was crucial to UNHCR's ability to maintain its operations. Contributions were received from 76 governments, 67 non-governmental and 7 inter-governmental organisations, along with funds received from private sources. But for the first time in the history of the UNHCR, the essential general programmes of assistance

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<sup>124</sup> UN Doc. A/AC 96/187/Rev.3.

to refugees were not fully funded and expenditure had to be reduced and programmes cut.<sup>125</sup> The High Commissioner relies on the international community to maintain its support and generosity, so that effective help can be given to refugees through full funding and implementation of the programmes approved by the Executive Committee. The Executive Committee<sup>126</sup> takes note of the accounts for the previous years<sup>127</sup> and the observations of the High Commissioner,<sup>128</sup> and then decides on the allocation of finances for the current year.

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125 Report of the UNHCR, ORGA, 41st session, Supp. No.12 (A/14.12), p.28.

126 37th session of the Executive Committee of the High Commissioner's Programme, Doc. A/AC 96/688, p.35.

127 Submitted by the UN Board of Auditors, 1985, Doc. A/AC 96/678.

128 Doc. A/AC 96/678/Add.1.

## **CHAPTER TEN**

### **The Work of the United Nations High Commissioner for Refugees (UNHCR): Part 2**

## CHAPTER TEN

### THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR): PART 2

#### 10.1 INTRODUCTION

Today's refugee situation increasingly affects countries in all parts of the world, as evidenced by growing transcontinental movements of refugees and asylum-seekers. The work of the Office of the UNHCR (hereinafter referred to as the Office) depends solely on the co-operation between States and the Office. The Office's action in the implementation and enforcement of international protection is founded on the shared interest of States in ensuring that refugees are treated according to accepted humanitarian standards. The full support and understanding of States is therefore a sine qua non for the successful accomplishment of the Office's task. It should be mentioned that refugees include not only persons who are outside their countries due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights. Even though the majority of today's refugees are persons who do not fall within the classical refugee definition in the UNHCR statute, come to be recognised as persons of the Office's concern by successive resolutions in the General Assembly. There can be no doubt that efforts to meet the causes of the current refugee situations, if successful, would go a long way towards minimising the world's refugee problem, and the

various initiatives taken to this end within the competent organs of the UN are greatly to be welcomed. This aspect is not one falling within the purely humanitarian and non-political character of the mandate entrusted to the Office by the international community. As mentioned earlier, it is becoming increasingly obvious that most of today's refugee movements are due to famine, drought, state intervention and increasing violence rather than individually experienced persecution or fear thereof as defined by the United Nations Convention of 1951 relating to the Status of Refugees<sup>1</sup> and the 1967 Protocol relating to the Status of Refugees.<sup>2</sup>

By this measure, many of today's refugee problems differ in nature and scope from those prevalent at the time the Office was established. There is now an urgent need to identify new ways in which these problems can be solved in an appropriate and humane manner.

## 10.2 THE OFFICE OF THE UNHCR

### 10.2.1 Asylum

Chapter Eight has elaborated on the concept of asylum, however for a refugee to enjoy his basic human rights, he must be granted asylum, which is very essential and it is an attribute of State sovereignty. It is for this reason that

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<sup>1</sup> United Nations Treaty Series (UNTS), Vol.189, No.2545, p.137.

<sup>2</sup> UNTS, Vol.606, No.8791, p.267.

the Universal Declaration of Human Rights (the modern day Magna Carta) embodies the principle in Article 14:

"(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution." <sup>3</sup>

Underlying this basic humanitarian principle is the universal conviction that everyone is entitled to freedom from persecution. More recently, the Universal Islamic Declaration of Human Rights denotes its Article 9 to the Right of Asylum:

"(a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex." <sup>4</sup>

It is pleasing to notice that there is now a growing recognition, in all parts of the world, that persons whose human rights have been violated should be protected from danger through the granting of at least temporary asylum,<sup>5</sup> until such time as conditions in their country of origin permit their safe return. This position was also reconfirmed at the consultation on the Arrival of Asylum-Seekers and Refugees in Europe.<sup>6</sup> The Office has noticed that despite the

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<sup>3</sup> Adopted and proclaimed by the General Assembly in its Resolution 217 A(III) of 10 December 1948.

<sup>4</sup> Universal Islamic Declaration of Human Rights (Islamic Council of Europe) of 19 September 1981.

<sup>5</sup> Out of 10 million refugees registered in the world today, almost all have been granted at least temporary asylum. Refugees are almost always granted asylum and refuge.

<sup>6</sup> Convened by UNHCR at Geneva in May 1985.

substantial and sometimes overwhelming increases in the number of refugees seeking asylum, many countries have continued to maintain fair and generous asylum practices. This is the situation, for instance, in many parts of Africa, where hundreds of thousands of refugees have sought to escape from a combination of civil strife and devastating drought. Sudan has opened its doors to a seemingly endless flow of refugees (though it is itself ravaged by drought in many areas), currently estimated to be over 1,250,000 and still arriving at 1,000 per day. Sudan has been commended by the international community and the Office for their act of humanitarianism.

There are several aspects which concern the Office:

- i) The restrictive tendencies including the adoption of measures of so-called "human deterrence" considered with prolonged detention of asylum-seekers and the adoption of summary procedures, sometimes not accompanied by adequate legal guarantees, for dealing with "abusive" or "manifestly unfounded" claims;
- ii) The refusal to examine asylum applications based on a strict application on the notion of "country of first asylum" which has led to an increase in border rejections and returning of refugees to countries through which they have merely transited or travelled through.

- iii) The strict interpretation of the term "refugee"<sup>7</sup> and the fact that the asylum-seeker has to discharge an unduly heavy burden of proof.
- iv) The refusal to grant asylum to certain groups of refugees because of the fear of compromising bilateral relations with their countries of origin, particularly if the latter are neighbouring States. The Office has stressed that such concern should not be of decisive importance in view of the universally accepted principle that the granting of asylum is a peaceful and humanitarian act and that, as such, it should not be regarded as an unfriendly act by any other State.<sup>8</sup>

A problem which has received considerable attention by the Office and the international community was that of refugees and asylum-seekers who moved from a country where they had allegedly found protection to seek asylum or a durable solution in another, without receiving the consent of the national authorities of that country. Such movements also involved persons travelling without an entry visa or documentation at all.<sup>9</sup> In several cases, refugees and

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7 As defined in Article I of the 1951 Convention and the 1967 Protocol.

8 Preamble to the Declaration of Territorial Asylum, contained in General Assembly Res.2312 (XXII), 14 December 1967.

9 In some cases, such persons carried insufficient, false or fraudulent documentation.

asylum-seekers wilfully destroyed their documentation apparently in order to mislead the immigration authorities of the country of arrival as to their previous sojourn in other countries where they may already have found protection. Almost all of the receiving countries expressed a growing concern at this phenomenon, but, at the same time, it is clear that basic protection is not always provided in the countries from which these persons travelled, nor did human rights or minimum human standards of treatment prevail. Similarly, durable solutions were usually not available in these countries. These cases, apart from creating problems between governments, have the effect of undermining public support and understanding in receiving countries for the special situation and needs of refugees. The Office has therefore been actively involved in the examination of this problem, notably in the Executive Committee in its 36th session,<sup>10</sup> but no conclusions could be agreed upon, although the High Commissioner is continuing his consultations, at the request of the Executive Committee, with a view to reaching agreement on this matter in a spirit of international co-operation and burden-sharing amongst States.

Another problem of major concern on the implications of asylum, is the steady build-up in the number of persons in holding centres in several countries for whom no durable solution by way of voluntary repatriation, local integration

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<sup>10</sup> Official Record of the General Assembly (ORGA), 40th session, supplement no.12A (A/40/12/Add.1), para 115 (i) & (j).

or resettlement has yet been found. Some of these "long-stayers" have been waiting in camps for a number of years. Unless appropriate solutions are found in accordance with the principle of international solidarity and burden-sharing, there will be adverse consequences for asylum, not to mention the suffering of the human beings concerned.

### 10.2.2 The Principle of "Non-Refoulement"

Rightfully, the fundamental importance of the principle of non-refoulement as a cornerstone of international protection has become universally recognised. Chapter Seven deals with non-refoulement extensively. The Executive Committee at the 28th session reaffirmed the importance of this principle:

"(c) ... both at the border and within the territory of a State - of persons who may be subjected to persecution or returned to their country of origin irrespective of whether or not they have been formally recognised as refugees."<sup>11</sup>

The principle of non-refoulement has now been embodied in a number of international instruments (both universal and regional) and domestic legislation and, due to its repeated affirmation at these levels, the principle has now come to be characterised as a peremptory norm of international law.

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11 Contained in United Nations General Assembly (UNGA) Document No.12A (A/32/12/Add.1): No.6 (xxviii) Non-Refoulement. Conclusion endorsed by the Executive-Committee of the High Commissioner's programme upon the recommendation of the sub-committee of the whole on international protection of refugees (hereinafter referred to as "Conclusion").

In 1984, at the "Cartagena Declaration on Refugees",<sup>12</sup> the three participating States unanimously concluded, inter alia, that the principle of non-refoulement was:

"... imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of Jus Cogens;"<sup>13</sup>

That is, an overriding legal principle having a normative character independent of international instruments (see earlier).

The principle of non-refoulement received strong endorsement, once again by the General Assembly of the Organisation of American States (hereinafter referred to as OAS), at its meeting in Columbia in December 1985. During the European consultations,<sup>14</sup> the participating States agreed that persons fleeing severe internal upheavals and armed conflicts should receive humane treatment and not be returned against their will to areas where they may be exposed to danger.

It is an accepted known fact that the majority of States have "scrupulously" accepted and respected the principle of non-

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12 See Non-Refoulement in Chapter Seven.

13 Only reference where refugees in international law have been associated with the concept of Jus Cogens.

14 Consultations on Asylum-Seekers and Refugees in Europe convened by UNHCR at Geneva in May 1985.

refoulement, but there have been cases of individual and/or group violations of this principle. Some of the persons affected were recognised refugees, but the vast majority were persons whose refugee status had not yet been determined. This emphasises and establishes the important fact that certain procedures should be established for identifying refugees and of taking appropriate measures to ensure that these can be availed of by persons claiming to be refugees (see later). It is estimated that thousands of individuals (be they refugees or asylum-seekers) were refouled in 1986. In one instance, a country forcible returned some 200 asylum-seekers to their country of origin and another country "pushed-back" about 1,000 asylum-seekers.<sup>15</sup>

Once the Office becomes aware of threatened measures of refoulement, they are then able to make appropriate representations to the authorities of the country concerned and in many cases forcible return is prevented. In instances where violation of the principle of non-refoulement had already occurred, the High Commissioner will express his profound preoccupation to the authorities of the State concerned pointing out the imperative need for the strict observance of the principle. In some cases, the Office can and does appeal to the authorities of the country of origin to treat the refouled refugees humanely and their human rights should be respected and not violated.

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<sup>15</sup> ORGA, 41st session, Supp. No.12 (A/41/12). The General Assembly refrains from naming this country.

### 10.2.3 Detention of Asylum-Seekers and Refugees

It is, of course, a basic principle of human rights that a person should not be subject to unjustified measures of detention or imprisonment. This principle is stated in Article 9 of the Universal Declaration of Human Rights: "No one shall be subjected to arbitrary arrest, detention or exile". Such measures may be at variance with Article 31 of the 1951 Convention.

In many reported cases, thousands of individual refugees in all areas of the world are detained for no other reason than that of illegal entry or for having overstayed the validity of their entry visas, and without regard to the circumstances that such irregular entry or presence was due exclusively to the need to find asylum.<sup>16</sup>

It is accepted that while it may be unavoidable in certain cases to detain individual asylum-seekers during the initial period after entry to enable the authorities to establish their bona fide character and identity, the indeterminate deprivation of liberty beyond such an initial period is unjustifiable except for serious reasons of: national security or public order, a criminal record, or the likelihood that the asylum-seeker may abscond before the claim can be adjudicated or processed. The Office,

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<sup>16</sup> Telephone interview with Goodwin-Gill on 21 April 1987. States such as Holland, Malaysia and the UK.

therefore, has sought to stress the importance of asylum-granting countries refraining from applying measures of detention to persons of its concern, save as an exceptional and temporary measure. The treatment of refugees with particular reference to the detention of asylum-seekers was the subject of a seminar on the Problems of Asylum-Seekers in Zeist, the Netherlands, on 20-22 January 1982, held by the European Consultation on Refugees and Exiles<sup>17</sup> and adopted resolutions.<sup>18</sup>

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17 With over 32 participants, which included representative of UNHCR, Council of Europe, Amnesty International, UKIAS, BRC, and many foreign ministries.

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1. The Seminar notes with concern that, in certain European States, the instances of detention of asylum seekers are increasing. Detention occurs while consideration is being given to the asylum application, or pending the execution that practice in this respect varies from State to State.
  2. The Seminar notes that in several countries police or immigration authorities, when dealing with asylum seekers and more particularly at the border or port of entry, appear to consider them as mere illegal immigrants, with the result that detention may become the rule rather than the rare exception.
  3. The Seminar considers that, as a general rule, asylum seekers should not be subject to detention. It nevertheless recognises that there may be exceptional circumstances in which an individual measure could be justified. The need to ensure that asylum seekers should not be placed in detention otherwise than in exceptional circumstances results from the principle of Article 31 of the 1951 Convention.
  4. In a number of countries asylum seekers are, as a notion of general practice, placed in detention because they lack proper documentation or identification. This contravenes the principle of Article 31 of the 1951 Convention. In this context, it is noted that certain European countries only very rarely find it necessary to hold asylum seekers in detention while their identity is being established.
  5. National authorities often justify detention by

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reference to alleged threats to public order and national security. The Seminar is concerned that, in certain European States, these concepts are too loosely interpreted thus providing a pretext for detaining asylum seekers. It believes that an asylum seeker should only be detained in exceptionally serious individual circumstances, for example if he/she is liable to prosecution for a serious non-political offence other than an offence under the aliens legislation.

The Seminar considers that the detention of asylum seekers is not justified where:

- (i) there is concern by the authorities that they will not be able to trace an asylum seeker;
  - (ii) an asylum seeker has inadequate financial support;
  - (iii) an asylum seeker lacks valid identity or travel documents.
6. Grave concern is expressed at reports of the detention of minors in a few European States. It is felt that accompanied or unaccompanied minors should not be detained under any circumstances.
  7. In the exceptional circumstances where the asylum seeker is detained, he/she should:
    - (i) receive all necessary assistance and be treated in a manner as favourable as possible, taking into account his/her special situation and the reasons for which he/she is detained;
    - (ii) be given the name and address of, and the facilities to contact: a refugee agency, a lawyer or the Office of the UNHCR in accordance with the Conclusions of the Seminar on pre-screening and immediate refusal (recommendation 1); and be allowed to contact friends and relatives;
    - (iii) be detained for a period no longer than necessary and have the right to take proceedings in accordance with Article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."
  8. The Seminar also recommends that the police or immigration authorities in each State file all cases of asylum seekers detained. The information should include the place, the circumstances of the detention, and its duration. This information should be forwarded to the competent authority for the determination of refugee

The Office had encountered several problems. Firstly, that in some countries there was a lack of access to asylum-seekers or refugees in detention; in other words, these detainees had not been informed of the Office and the representative, and the valuable assistance that the Office can give to the detainees. Secondly, the conditions of detention were also a cause for concern in several countries; these conditions were extremely harsh and inhumane. Thirdly, some detainees had been severely tortured and needed medical treatment. Fourthly, some countries adopted and maintained a blanket detention policy under which all "legal" or "excludable" entrants were automatically detained even if their identity and the bona fide character of their asylum claim had been established. And, fifthly, some countries were detaining asylum-seekers and refugees as a measure of deterrence, that is, deterring further arrivals.

The Office has noted that a number of refugees, whose status as such was not in question, were detained in some countries for illegal or irregular entry and/or in connection with intended measures or expulsion or deportation to a third country, where they were supposed to have found protection.

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status and should be made available to UNHCR and the voluntary agencies concerned.

9. The Seminar believes that upon final refusal of asylum the person concerned should be given reasonable time, without being detained, to proceed to another country which is willing to admit him/her and where he/she is willing to go.

However, in some of these cases, expulsion measures could not be implemented or enforced because the so-called "countries of first asylum" were not willing to readmit such refugees, and also they could not be returned to their country of origin, where they had reason to fear persecution and also the prospect of being kept in detention for an indeterminate period. In one country, refugees in this situation went on hunger strike to highlight their predicament and problem.<sup>19</sup>

What would the practice of the Office be regarding a large-scale influx of refugees? As has been explained above, individuals are being kept in detention but would this still happen in the case of a large-scale influx of refugees? Several countries are automatically confining refugees and asylum-seekers (in large-scale influx situations) to camps in conditions equivalent to those of detention camps. In fact, a distressingly large number of refugee camps in all parts of the world have acquired the characteristics of detention centres, where refugees have to live for an indefinite period in closely-guarded locations with no possibility of leaving the confines of the camp without risking the punishment of "hot-pursuit" or "measures of reprisal"; in some countries, such "measures" included the loss of asylum and subsequent expulsion or deportation (even to any country), the risk of physical violence and even loss of life. Currently, several thousands of refugees are living in these conditions and many

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<sup>19</sup> West Germany. Information from the West German Embassy, London, 21 September 1985.

know of no other world, children having been born and brought up in such camps. The Office stated that this issue must receive world-wide prominence and attention from the international community as a whole. International pressure via the international community and Office would be an ideal start for these countries to remove the "Nazi" type camps.

#### 10.2.4 Protection Against Expulsion <sup>20</sup>

The Executive Committee recognised that, according to the 1951 Convention, refugees lawfully in the territory of a Contracting State are generally protected against expulsion and that in accordance with Article 32 of the Convention, expulsion of a refugee is only permitted in exceptional circumstances.<sup>21</sup>

It is recognised by Article 32 of the 1951 Convention that circumstances may arise justifying the expulsion of a refugee who is lawfully in the territory of a Contracting State. Though expulsion may not have a serious implication as refoulement, nevertheless it is highly evident that such a measure may involve considerable hardship for a refugee and his immediate family members residing with him.<sup>22</sup>

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20 For general protection against Expulsion, see Chapter Seven.

21 Para (a) at Executive Committee, 28th session, No.7: Expulsion, "conclusion".

22 Ibid., para (b).

It is noticeable that Article 32 of the 1951 Convention limits the ground on which a refugee may be expelled:

- (i) National Security
- (ii) Public Order.

It is generally accepted that expulsion measures should be taken only in extremely serious cases. In line with this view, the Executive Committee recommended that:

"... in line with Article 32 of the 1951 Convention, expulsion measures against a refugee should only be taken in very exceptional cases and due consideration of all the circumstances including the possibility for the refugee to be admitted to a country other than his country of origin ..."<sup>23</sup>

Refugees in Member countries are subject to expulsion measures for reasons not justified by Article 32 of the 1951 Convention. Refugee delinquents, sometimes after serving their sentences, were given expulsion or deportation orders by application of ordinary national legislation or administrative regulations concerning prohibited immigration and influx, without regard to their special status.<sup>24</sup> It is noted that refugee status does not afford any immunity from criminal process and trial, but once a refugee has been tried, found guilty and been punished for an offence, he then should not be subjected to expulsion except on grounds of

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<sup>23</sup> Ibid., para (c).

<sup>24</sup> Egyptian Embassy, 27 March 1986.

national security or public order. One disquieting aspect which the Office noted was that there was a tendency on the part of a number of States to altogether refuse or withdraw asylum for some refugees in order to maintain and adhere good relations with their countries of origin which, in turn, were seeking to have them returned or expelled. When expulsion measures were adopted in such cases, the Office was usually given a short period of time within which to secure admission to another country for the refugee affected. If no time was given to the Office, a representative of the Office would urgently contact the countries of asylum and origin respectively, to try to obtain some time for the sake of humanitarian values. There were some States who, on short notice, admitted such refugees. This has occurred when hundreds of refugees had to leave their countries of asylum where some had lawfully resided for as long as 15 years, due to the conclusion of security arrangements between their country of origin and neighbouring countries.<sup>25</sup>

There are a number of States who resort to measures of expulsion with respect to asylum-seekers without regard to their possible refugee character, merely on the ground of their illegal entry or presence.<sup>26</sup> These States do not ask the representative of the Office for advice or assistance on the matter and they continue to say that it is an internal affair and no external intervention should apply, even by the

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25 South Korea, Thailand and Argentina.

26 United Kingdom, France, Holland and Belgium.

representative of the Office. The Office continues to express that such expulsion measures are contrary to Article 31 of the 1951 Convention.

The Office insists that violating States must place emphasis on the above article, and that refugees and asylum-seekers should be informed of three aspects: (i) the refugees must come directly from a country where their life or freedom is threatened; (ii) they (refugees) must have made their presence known; and (iii) they must show good cause for their illegal entry or presence, as mentioned in Chapter Seven

#### 10.2.5 Aspects of Violence and Physical Safety of Refugees

A very serious problem of the physical safety of refugees continues to exist in the late 1980s. There are some regions which are affected more than others. Africa, Asia and Central America are the main culprits (these regions also contain the largest concentrations of refugees). It is primarily the responsibility of the country of asylum to ensure the safety of refugees or asylum-seekers on its territory; the Office (in the exercise of its international protection function) has a clear and direct interest in ensuring, on behalf of the international community, that the safety of persons under its mandate is not threatened or violated.

In some cases, refugees were allegedly subject to violence

and degrading treatment during their flight to safety and even in camps and settlements; in other instances, camp guards were responsible for such abuses.<sup>27</sup> In a few countries, prolonged and extensive confinement in closed refugee camps has led to acts of lawlessness and violence.<sup>28</sup> In recent years, military and armed attacks have occurred on refugee camps and settlements which have resulted in the deaths of thousands of innocent persons.<sup>29</sup>

The Executive Committee at its 23rd session,<sup>30</sup> expressed its profound concern at the problem of continuing military attacks on refugee camps and settlements, as illustrated by the tragic, cruel and inhuman events in the Lebanon which have been unanimously condemned, and expressed the hope that measures would be taken to protect refugees against such attacks and to aid the victims. Due to the problem of military attacks on refugee camps and settlements of concern to the Office, the High Commissioner appointed a former High Commissioner, Ambassador Schnyder to carry out a survey of the problem.<sup>31</sup> On the basis of the report, the Executive Committee studied various aspects including the respective

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- 27 In Singapore, camp guards abused many asylum-seekers, UNHCR, London, interview with Mr S Loutit on 26 Jan 1984.
- 28 Contained in UNGA Doc. No.12A (A/37/12/Add.1), No.27 (xxxiii) Military attacks on refugee camps and settlements in Southern Africa and elsewhere, "Conclusion".
- 29 For instance, on the borders of Botswana, Sudan, Ethiopia, El-Salvador, Nicaragua and Pakistan.
- 30 UN Doc. No.12A, op.cit.
- 31 Ibid., para (d).

responsibilities of the country of asylum, the country of origin, the international community, and the refugees themselves in avoiding such attacks.

The Executive Committee met at its 34th session and once again:

"(a) Expressed profound concern at the continuation of military or armed attacks on refugee camps and settlements which was causing untold suffering to refugees, including women and children and elderly persons;

(b) Stressed the utmost importance and urgency of responding to their grave humanitarian problem;

(c) Took note of the report ... which includes a draft statement of principle on the prohibition of Military and Armed Attack on Refugee Camps and Settlements." <sup>32</sup>

The Executive Committee was unable to reach a concession on these principles in the time which they had.

At the 35th session, the Executive Committee established a Governmental Working Group to continue consultations regarding the prohibitions on the military or armed attacks on refugee camps and settlements and to report on the results of these consultations to the Executive Committee at its 36th session. The Executive Committee unanimously adopted a resolution which, inter alia,:

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32 Contained in UNGA Doc. No.12A (A/38/12/Add.1), No.32 (xxxiv) Military attacks on refugee camps and settlements in Southern Africa and elsewhere.

"3. Condemns all violations of the rights and safety of these refugees and asylum seekers, in particular those perpetrated through military or armed attacks against refugee camps and settlements and other forms of brutality ..."

The Executive Committee at its 36th session (1985) could not agree upon a set of principles that could be adopted by States to deal with the problem effectively. The Executive Committee:

"(g) Noted that the General Assembly had adopted by consensus resolution 39/140 of which paragraph 3, inter-alia, relates to military and armed attacks on refugee camps and settlements;

(h) Stressed the importance of the question of military and armed attacks on refugee camps and settlements being kept under constant review by the Executive Committee and requested the Chairman to continue consultations on this matter;" <sup>33</sup>

It is very disturbing to note that military or armed attacks on the camps and settlements of refugees not only came from across international borders but also from within. In a few countries armed elements were casually and routinely allowed access to refugee camps with the ostensible object of maintaining security, but on a number of occasions they proceeded to resort to serious acts of violence against refugees and rob them of their possessions.<sup>34</sup> In another country, heavily armed groups continued an earlier practice

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33 Contained in UNGA Doc. No.12A (A/40/12/Add.1) No.36 (xxxvi) General: conclusion adopted by the Executive Committee on International Protection of Refugees.

34 Mozambique.

of illegally entering a UNHCR camp in order to harass refugees and asylum-seekers, some of whom were killed, raped or robbed.<sup>35</sup> In this type of situation, the Office has taken the matter up with the authorities of the country concerned.

Violation of the physical integrity and safety of refugee women and girls has received attention by the Office and the subject has been discussed by the Sub-Committee at its 36th session,<sup>36</sup> which noted that refugee women and girls constitute the majority of the world's refugee population and that many of them are exposed to special problems in the international protection field. The Executive Committee recognised that these problems resulted from their vulnerable situation which frequently exposes them to physical violence, sexual abuse and discrimination. The Office and governments were strongly requested by the Executive Committee to take "appropriate" measures to protect these women and girls against violence, threats to their safety or exposure to sexual abuse or harassment. Though the definition of "appropriate" was not made clear (and both Office and governments seem very vague about the definition), the point which comes across was that something had to be done to protect women and girls against violence, rape and discrimination. In different areas of the world, there have been numerous instances where refugee women have been

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35 Swaziland.

36 Contained in UNGA Doc. No.12A (A/40/12/Add.1) NO.39 (xxxvi), Refugee Women and International Protection: "conclusion".

subjected to sexual abuse in the course of their flight to safety and even following their arrival in camps.<sup>37</sup>

Women refugees were almost invariably the victims of rape and abduction in the course of pirate attacks on asylum-seekers on the High Seas. The problem of such attacks in the waters of South East Asia are still a serious concern, even though, more recently, the total number of boats attacked have decreased. In 1983, 43% of boats were attacked; in 1984, 34%; and in 1985, 25% were attacked, indicating a gradual decrease.<sup>38</sup> However, the level of violence during these attacks did not similarly decrease. In 1985, the number of deaths resulting from such attacks was recorded at 73 persons, an increase from 59 in 1984. In addition 111 persons were abducted and another 110 women were the victims of sexual abuse and exploitation.<sup>39</sup>

Efforts to curb such attacks which continued during 1985, under an enlarged anti-piracy programme established by the Royal Thai Government, was extended for a fourth year. Measures currently undertaken under this arrangement include:

- (i) Preventative sea and air patrols.
- (ii) Follow-up investigation.

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<sup>37</sup> Ibid., eg. in South East Asian waters.

<sup>38</sup> Figures for 1989 are still unavailable from Geneva (UNHCR).

<sup>39</sup> Figures in ORGA, 41st session, Supp. No.12 (A/41/12).

- (iii) Prosecution of suspects on land.
- (iv) Nationwide registration of fishing boats.

It is also worthwhile to note that there is a marked increase in the number of individual suspects brought to trial during the last two years.

Another aspect of ensuring the physical safety of asylum-seekers to which the Office has continued to devote further attention; this is the rescue of asylum-seekers in distress at sea.

In 1983, The Executive Committee in its 34th session:<sup>40</sup>

"(a) Noted with concern that, according to available statistics ... significantly fewer numbers of asylum-seekers in distress at sea are being rescued;

(b) Welcomed the initiatives undertaken by the UNHCR to meet this grave problem by promoting measures to facilitate the rescue of asylum-seekers in distress at sea and expressed the hope that those initiatives would receive the widest possible support of governments;

(c) Recommended that States seriously consider supporting the efforts of UNHCR to promote the Rescue at Sea Resettlement Offers (RASRO) scheme providing the necessary quotas and other undertakings to enable UNHCR to initiate the scheme on a trial basis."

Similarly, in 1984 the Executive Committee at its 35th

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<sup>40</sup> Contained in UNGA Doc. No.12A (A/38/12/Add.1) No.31 (xxxiv), Rescue of Asylum-Seekers in Distress at Sea: "Conclusion".

session<sup>41</sup> strongly recommended that the Rescue at Sea Resettlement Offers (RASRO) scheme be implemented on a trial basis as soon as possible and that additional resettlement places be provided as a matter of urgency.

The objective of the (RASRO) scheme is to facilitate the disembarkation of asylum-seekers by setting an annual maximum resettlement in take for each participating country. The scheme provides for an equitable sharing of the burden of resettlement arising from rescue. While the Executive Committee at its 35th session were thinking of commencing the scheme, the General Assembly meanwhile adopted Resolution 39/140:

"3. Condemns all violations of the rights and safety of refugees and asylum-seekers ... and the failure to rescue asylum-seekers in distress at sea;"

On the influence of the unanimously adopted resolution (above), the Executive Committee at its 36th session (1985):

"(d) Welcomed the fact that the provision of an appropriate number of resettlement places had made it possible for the Rescue at Sea Resettlement offers (RASRO) Scheme to commence on a trial basis as from May 1985" <sup>42</sup>

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41 Contained in UNGA Doc. No.12A (A/39/12/Add.1), No.34 (xxxv), Problems Related to the Rescue of Asylum-Seekers in Distress at Sea: "Conclusions".

42 Contained in UNGA Doc. No.12A (A/40/12/Add.1), No.38 (xxxvi), Rescue of Asylum-Seekers in Distress at Sea: "Conclusions".

On 1st May 1985, the RASRO Scheme commenced with a contribution of almost 3,000 places by 15 participating countries. Very soon thereafter, the Office announced a project designed to reimburse shipowners' costs directly related to the rescue of refugees. The Office has indeed actively promoted rescue at sea in a booklet entitled "Guidelines for the Disembarkation of Refugees", which was widely distributed to ships masters in the South China Sea. The Office is also in constant contact with the International Maritime Organisation (IMO) with regard to the rescue of asylum-seekers in distress at sea and the question of piracy. In fact, recently, the IMO have employed an expert to study the general problem of piracy in South-East Asian waters. The decline in rescue activities reported in 1982, 1983 and 1984 was reversed in 1985 when 3,018 individuals were disembarked from 87 ships.<sup>43</sup>

#### 10.2.6 Aspects of Documentation

Most State parties to the 1951 Convention issue travel documents to refugees in the form and under the conditions provided for in Article 28 of that instrument, as was stated in Chapter Three.

Although such documents are generally issued with a clause

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<sup>43</sup> GAOR, 41st session, Supp. No.12 (A/41/12). Report of the UNHCR.

enabling the holder to return to the issuing country within the period of the travel documents' validity, they are issued in some cases without a return clause or with one of a more limited duration. This practice has given rise to considerable difficulty for the holder and in fact this has necessitated representations by the Office to the concerned authorities. This issuing of identity documents is of the utmost importance and refugee identity documents continue to be issued to refugees, sometimes on a large scale in a number of countries where obviously the refugee numbers are great.

The Office can arrange for the printing of these identity documents and make them available to the countries concerned. In some cases, these documents are printed locally with the Office's financial assistance. The registration of refugees has proved to be of great value both to the UNHCR and the countries concerned. This enables the authorities of the countries concerned to keep records of the refugee population (see statute above) residing within their respective territories and has also facilitated their efforts to organise appropriate assistance measures for refugees. The role of the identity document is not only to establish the holder's identity, but to attest to his refugee status. Such evidence of refugee status is of value in enabling the refugee to take advantage of the various rights established for his benefit under the international refugee instruments and national legislation or municipal laws. It has proved to be of special value in situations where refugees may be

caught up in police operations directed against aliens whose presence is considered unlawful. During 1986, the Office received requests from a number of Palestinian refugees holding Lebanese travel documents and living in areas outside the area of operations of the United Nations Relief and Works Agency (UNRWA) for assistance in securing the renewal of their expired documents. The Office is now referring the matter to the attention of the authorities.

#### 10.2.7 Aspects of Economic and Social Rights

It is important that refugees should be granted basic economic and social rights when they have received durable asylum. This is necessary, not only for human rights, principles and humanitarianism, but also for local integration. In cases of temporary asylum, the enjoyment of these rights is necessary in order to preserve the human dignity and self-respect of refugees, especially by being able to engage in some productive and creative activity. The 1951 Convention and 1967 Protocol provide for a range of social and economic rights for refugees. Some rights, inter alia, include rights to wage-earning employment, self-employment, public education and public relief, artistic rights and industrial property. However, when acceding to these instruments, 26 States have entered a reservation in respect of Article 17, dealing with the right to wage-earning employment. Whether States have made reservation or not, they do, in fact, treat refugees in accordance with the

standards defined by international instruments, whilst States which have not entered reservation may find it difficult to comply with the obligations assumed, due to the absence of the necessary economic and social infrastructure. In the former situation, the Office can provide assistance programmes which are useful in creating the necessary facilities which may be of benefit not only to refugees but also to the local population.

In most developed countries, the treatment of recognised refugees, as regards access to gainful employment, remains on a par with that accorded to nationals. The Office has noticed that in some of these countries, cultural and linguistic barriers make it very difficult for refugees to compete on the labour market for reduced job opportunities. In practice, the Office has found that refugees are facing a great deal of difficulty in obtaining and retaining employment because the employers tend to give preference to their nationals. In some countries, whilst refugees are formally allowed to take up employment, they find themselves in a "Catch-22" situation, whereby the authorities could only issue the refugees work permits if they had a firm job offer which prospective employers were reluctant to make before the refugees had obtained a work permit!<sup>44</sup>

In the developing countries, the possibility of refugees gaining employment have remained precarious. The fact is

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<sup>44</sup> Italy, France, Germany, Thailand and China.

that the majority of the world's refugee population remains concentrated in poorer countries with extremely high levels of under-employment or unemployment.<sup>45</sup>

On matters of access to public relief, the Office has noted that refugees were not accorded the same treatment as nationals, contrary to Article 23 of the 1951 Convention (see Chapter Three).

The practices of States in this area vary widely and sometimes within the country itself (especially in those having a federal structure). The differences are in many cases a reflection of the general availability of facilities, which is dependent on the level of economic activity and the degree of development of public welfare and social security structure.

The Office has noted that the general situation regarding the education is very unsatisfactory. Many asylum-granting countries are amongst the world's poorest countries and have a scarcity of educational institutions, such as schools, colleges and universities for their nationals, let alone the refugees. In camp and settlement situations, while some educational opportunities are provided, special educational programmes were not always recognised by the national

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<sup>45</sup> In one such host country, not a single refugee found employment during 1984 and in another, during the same period, the rate of refugee unemployment stood at 90% (Finland).

authorities with the result that a large number of refugee children were unable to obtain a certificate or diploma testifying to their education.

In developed countries, the refugees can usually take advantage of the secondary or post-secondary educational facilities in the same way as nationals, provided they have taken and language and any other preparatory courses which are required. But in developing countries, refugees have to compete with nationals in accessing limited educational facilities. In some of these countries refugees were therefore required to achieve a higher grade than nationals in order to be admitted to secondary or university level education. It is gratifying to note that efforts made by the authorities in co-operation and co-ordination with the Office, were to provide refugees with access to available educational facilities at all levels. Many countries do not differentiate between refugees (and asylum-seekers) and their respect and right to economic and social rights. But some countries, in an effort to discourage further arrivals, maintained or introduced new measures curtailing the granting of social and economic rights to asylum-seekers. Such measures are the subject of exclusive consultations between UNHCR and concerned States.

#### 10.2.8 Naturalisation Aspects

The acquisition of nationality by the refugee in the country

of asylum is an important feature of achieving integration in that country, and which is, in turn, a durable solution. The Office has welcomed and presently supported measures which are taken by a number of countries to naturalise substantial numbers of refugees for whom voluntary repatriation (the ideal solution) is no longer envisaged.<sup>46</sup>

It is encouraging to note that many States are in accordance with Article 34 of the 1951 Convention (Chapter Three) and refugees have continued to benefit from provisions permitting naturalisation after relatively short or reduced periods of residency. It may be appropriate to mention some examples. In the United States, naturalisation is possible after a residence period of five years and several thousand refugees have been able to take advantage of this. The situation in the United Kingdom is similar to that of the United States. In Canada, the naturalisation of refugees is possible after a

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<sup>46</sup> This, for instance, was the case of 36,000 Rwandese refugees in the United Republic of Tanzania who were offered naturalisation in 1982 and some of whom are still undergoing naturalisation proceedings in 1986. The Tanzanian authorities have also indicated their willingness to naturalise a large group of refugees from Brundi who have now resided in the country for over a decade. It is understood that a naturalisation programme for these refugees may be initiated once the present programme for the naturalisation of Rwandese refugees is completed. In Zaire, the authorities have assured the Office that a recent decree, repealing an earlier one under which thousands of refugees have been naturalised, would not be applied retroactively to the detriment of the beneficiaries. It is also hoped that other countries will give favourable consideration to the adoption of similar liberal naturalisation policies having regard to the importance of full integration and to the possible establishing consequences of maintaining successive generations of refugees for whom voluntary repatriation cannot be envisaged.

three-year period of residence - many thousands of "landed" refugees were naturalised in 1986. In Australia, an amendment to the Citizenship Act which came into effect in November 1984 has facilitated naturalisation of refugees in as much as it reduces the qualifying period for citizenship from three to two years in the case of persons who were or are permanent residents of the country.

During 1984, the Committee of the Minister of the Council of Europe adopted Recommendation No.R(84) 21 on the acquisition by refugees of the nationality of their host country. The Committee of Ministers, inter alia,:

"(1) Called upon governments of Member States to consider the fact of refugee status as a favourable element for naturalisation purposes and to make use of existing legislative possibilities to reduce the required period of residence and the cost of naturalisation proceedings.

(2) Called upon government Member States to facilitate the acquisition of their nationality by refugee children born or habitually resident in the host country."

In many countries, however, refugees are still effectively excluded from acquiring the nationality of their host country, either because the nationality laws do not permit this<sup>47</sup> or because of the very high financial charges and costs of naturalisation.<sup>48</sup> However, in some cases,

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<sup>47</sup> Or no identifiable naturalisation procedures exists for aliens.

<sup>48</sup> £170 per person for people residing in the UK.

naturalisation may not present an appropriate solution. Refugees may be anxious to maintain their national links as well as their cultural identity, and may wish to return to their homeland as soon as the circumstances which led to their flight have changed.

#### 10.2.9 Family Reunification

Very often the circumstances which force a refugee to leave his country of origin do not permit the organised departure of the whole family. Separation from close family members is indeed a tragic aspect of a refugee's plight. The splitting up of families can involve great hardship for the dependent family members who are left behind and may also render a difficult situation for integration into their new surroundings.

The Office has confirmed the universally agreed principle of family unity, and guidance by the statute of the Office and the conclusion of the Executive Committee adopted at its 32nd session, recommends that:

"1. In application of the principle of the unity of the family and for obvious humanitarian reasons every effort should be made to ensure the reunification of separated refugee families.

2. For this purpose, it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that reunification of separated refugee families takes place with the least possible delay."

The practice of the Office has always been to promote family reunification in all cases which have been brought to its notice and attention. The Office has been instrumental in facilitating the reunification of separated refugee families in every part of the world and has thus contributed to the integration within new national communities of a great many refugees. In such situations, the Office's practice is to approach either the authorities of the country of asylum to secure entry visa for the close family members of the refugee and/or the authorities of the country of origin to obtain exit permits and if necessary to obtain transit visas and to arrange for the payment of travel costs. Some governments have subscribed to the principle of family reunification between refugees and their immediate families (spouses and young children) and these respective governments have co-operated with the Office on a bona fide basis. The efforts by the Office have enabled 107 close families to become unified. However, in some regions, the Office has been unable to secure any relaxation in existing restrictive attitudes and in other regions the Office has faced new restrictive attitudes where formerly the principle of family

reunification was generously applied.<sup>49</sup>

The Office has certainly encountered severe problems with regard to the admission of family members who are handicapped and disabled, but co-operation between authorities can elevate this to some limit at least.

Attention has been drawn to the Office where the validity of certificates of marriage contracted outside the refugee's country of asylum has not been recognised by the authorities, despite the recommendation by the Executive Committee at its 32nd session:

"6. When deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment."

The Office has found family reunification very difficult, if not sometimes impossible, to bring about, especially in cases where the refugee applicant is **experiencing** economic difficulties and is unable to find suitable accommodation for

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<sup>49</sup> In one case, a number of minor children in possession of tourist visas, intending to join relatives in the country of asylum, were held up at the entry point and returned to the country of origin. In other instances, the formalities required from refugee parents seeking reunification with their minor children still in the country of origin were so exacting that compliance was difficult or sometimes even impossible. A case where repeated application for permission to join refugee family members abroad have remained without any response on the part of the competent authorities. The consequences of such restrictive attitudes for young children, many left with aged grandparents, certainly gives rise to serious concern.

the family members whose admission has been sought. The situation continues, despite the recommendation of the Executive Committee at its 32nd session:

"9. In appropriate cases, family reunification should be facilitated by special measures of assistance to the head of the family so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members."

#### 10.2.10 Voluntary Repatriation

It is generally recognised that in accordance with basic principles of human rights, a refugee is entitled, if he so wishes, to leave his country of asylum and to return to the country of his nationality. This is reflected in the Office's statute which requires the Office to facilitate and promote the **voluntary** repatriation of refugees as one of its primary tasks. The importance of voluntary repatriation as a solution (durable) to a refugee problem has also been reaffirmed in successive resolutions of the General Assembly.

In Resolution 37/195,<sup>50</sup> the General Assembly stressed:

"6. ... the High Commissioner's role in promoting durable and speedy solutions, in consultation and agreement with the countries concerned, to the problem of refugees and displaced persons facing his office, through voluntary repatriation or return ... and urges Governments to extend the necessary co-operation to support the High Commissioner's effort in this regard."

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<sup>50</sup> Report of the UNHCR, 3rd Plenary Meeting, 18 Dec 1982.

In Resolution 38/121,<sup>51</sup> the General Assembly emphasised that voluntary repatriation is the most desirable durable solution to the problem of refugees and displaced persons of concern to the High Commissioner and urged:

"8. ... all States to support the High Commissioner in his efforts to achieve durable solutions to refugee problems, primarily through voluntary repatriation ..."

Once again, in Resolutions 39/140<sup>52</sup> and 40/118,<sup>53</sup> respectively, the General Assembly emphasised that voluntary repatriation is one of the most desirable solutions to the problem of refugees and displaced persons and yet again urged all States to support the Office in achieving voluntary repatriation.

It is internationally accepted that voluntary repatriation is the most desirable durable solution but it is equally evident that it is not necessarily an easy solution to attain. In its normal state, it presupposes the elimination, or at least the substantial removal, of the cause of fear or danger which led to the departure of the refugees from their home country and, in many situations, the willingness of the country of origin to readmit its nationals and to co-operate with the

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51 100th Plenary Meeting on 16 December 1983.

52 101st Plenary Meeting on 14 December 1984.

53 116th Plenary Meeting on 13 December 1985.

country of asylum in arranging for their safe return. In many large-scale influx situations, voluntary repatriation seems a perfect solution provided of course the necessary conditions are established in the country of origin and that causal factors have been removed. In facilitating the voluntary repatriation of refugees, the primary role of the Office is to ensure, as a corollary to the principle of non-refoulement, that the voluntary character and definition of repatriation is respected in all cases without exception, and that no refugee is to be repatriated without his consent or will. The Office also seeks to ensure (preferably through direct access to areas where recently repatriated refugees are located in their country of origin) that safety guarantees which were offered by the authorities, prior to repatriation, are fully respected. On many occasions, the representative of the Office, preferably based in that country of origin, would travel to the area with his team and independent observers and would report back to headquarters.<sup>54</sup>

Has the principle of voluntary repatriation received special attention in a number of forums? In 1984, the Cartagena Declaration on Refugees recognised the importance of voluntary repatriation, especially in Latin America, and declared that repatriation must be "voluntary" and "declared to be so on an individual basis" and supported by the

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<sup>54</sup> The awesome task of repatriating some 5½ million Afghan refugees back into Afghanistan will certainly be worth noting.

establishment of "tripartite commissions" consisting of representatives of the countries<sup>55</sup> concerned and those of the Office.

The importance of voluntary repatriation as a durable solution was reaffirmed in the African context by the second International Conference on Assistance to Refugees in Africa held in July 1984. It was also reconfirmed by two intergovernmental seminars held in Addis Ababa, Ethiopia, and the Yaounde Republic of Cameroon, respectively, by way of follow-up to the recommendations of the 1979 Pan-African (Arusha) Conference on the situation of refugees in Africa, which had itself recognised the value and credibility of the solution to the problem of refugees.

Voluntary repatriation was also discussed by the General Assembly of the Organisation of American States,<sup>56</sup> which reaffirmed that this solution was an ideal one by adopting a resolution. Similar support was expressed at a meeting of the Asian-African Legal Consultative Committee (AALCC).

Perhaps at this stage, it is appropriate to indicate some facts and figures of refugees who have been voluntarily repatriated under the auspices of the Office. Refugees continued to return to a number of Latin American countries, especially Argentina, Bolivia, Uruguay and Chile, following

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55 El Salvador and Honduras.

56 OAS, Doc. AG/Doc.2000-85, of 7 December 1985.

political and social changes in the first three countries and a declaration of partial amnesty in the fourth. Many groups and individuals (refugees) have returned but a large number of Nicaraguans and some Guatemalans have also returned voluntarily to their respective countries of origin.

In Africa, over 80,000 Ethiopians, some 50,000 Ugandans have returned to their countries. Spontaneously, many from Zaire, outside the organised repatriation programme, returned to their country of origin. Some 300,000 Guinean exiles returned following the events in that country which took place in April 1984. Elsewhere, small groups of individuals also returned, most of them spontaneously, to their respective home countries. In Asia, however, the number of repatriated refugees has remained small, especially in the case of the Afghan refugees, although with the present Soviet withdrawal from Afghanistan, the opportunity for repatriation should increase.

Following consultation with the Chairman of the Executive Committee, the Office convened a seminar on voluntary repatriation in San Remo, in association with the International Institute of Humanitarian Law. This issue was discussed extensively by the Sub-Committee of the whole on International Protection and the Executive Committee at its 36th session, when the Committee adopted a conclusion on

voluntary repatriation,<sup>57</sup> which reconfirmed the significance of the conclusion adopted by the Executive Committee at its 31st session and stressed:

"(b) ... that the essentially voluntary character of repatriation should always be respected."<sup>58</sup>

The Executive Committee considered that when refugees wished to be repatriated, the following authorities should assist them as far as possible:

- (i) The Government of the country of origin.
- (ii) The Government of their country of asylum (within the framework of their national legislation).
- (iii) The Office.

They recommended that arrangements be adopted in countries of asylum for ensuring that the terms of guarantees provided by countries of origin and relevant information regarding conditions prevailing, are duly communicated to refugees; and also that such arrangements could be facilitated by the authorities of the countries of asylum and that the Office should, as appropriate, be associated with such arrangements. The Executive Committee considered that the Office could appropriately be called upon, with the agreement of the

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57 Contained in ORGA Doc. No.12A (A/40/12/Add.1), No.40 (xxxvi), Voluntary Repatriation.

58 Contained in ORGA, Doc. No.12A (A/3512/Add.1), No.18 (xxxix), Voluntary Repatriation.

parties concerned, to monitor the situation of returning refugees with particular regard to any guarantees provided by the governments of countries of origin. The Executive Committee finally recognised that it may be necessary in certain situations to make appropriate arrangements, in co-operation with the Office, for the reception of returning refugees and/or to establish projects for their integration in their country of origin.

10.2.11 Determination of Refugee Status <sup>59</sup>

The determination of refugee status is a crucial and important factor in ensuring that refugees are in a position to take advantage of their basic rights. Formal procedures of determining refugee status are essential and have been emphasised by the United Nations General Assembly and the Executive Committee. While neither the 1951 Convention nor the 1967 Protocol indicate the procedures which the Contracting States could adopt, there is a general consensus that procedures for determining refugee status should meet the basic requirement set out in the Conclusion on the Determination of Refugee Status, adopted by the Executive Committee at its 28th session.<sup>60</sup> The Committee expressed the hope that all government parties to the 1951 Convention and the 1967 Protocol which had not yet done so, would take

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59 See the Determination of Refugee Status in Chapter Three.

60 Contained in UNGA Doc. No.12A (A/32/12/Ad.1), No.8 (xxviii), Determination of Refugee Status: "Conclusions".

steps to establish such procedures in the near future and give favourable consideration to the UNHCR participation in such procedures in appropriate form.<sup>61</sup>

The Executive Committee did recommend seven procedures for the determination of refugee status.<sup>62</sup> The Office has published a Handbook which sets out the criteria for determining refugee status and it supplies the book to those who are interested in the determination steps. Governments can apply these criteria when they need to determine the status of a person entering their sea ports, airports or borders. During 1985, legislation and administrative regulations dealing with determining procedures for refugee status came into force in two additional countries, bringing the number of States which have adopted such procedures to 45.<sup>63</sup> Several countries are actively considering the establishment of such procedures. One point of concern is that, although considerable progress has been made, the majority of States' signatories to the 1951 Convention and 1967 Protocol have still not adopted formal procedures to determine refugee status, as was previously noted in Chapter Six. The Office is encouraging governments to adopt such procedures and it is hoped that more States will adopt measures to determine the refugee status in an efficient,

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61 Ibid., para (d).

62 See section on Procedures for Determination of Refugee Status in Chapter Six.

63 Telephone interview with Stephen Sinclair Loutit, Information Officer in the UNHCR in London, 31 January 1985.

fair and humane manner. Practicably, it would be far easier, both for the authorities and the refugees, if the same criteria could be adopted in all Contracting States.

#### 10.2.12 International Refugee Status

The primary task entrusted to the Office by the United Nations General Assembly consists of promoting the conclusion and ratification of the International Convention for Protection of Refugees, supervising their application and proposing amendments thereto. Prominent are the 1951 Convention and 1967 Protocol which define and elaborate the minimum standards for the treatment of refugees. The number of State Parties to one or both of the two basic refugee instruments has now risen to 105 and it is forecasted that more will ratify in the future.

The Office has also continued in its efforts to encourage the withdrawal of reservations introduced by States in respect of the 1951 Convention and 1967 Protocol. In particular, the Office has sought to obtain the withdrawal of the geographical limitations which are maintained by five States.<sup>64</sup> The 1951 Convention establishes a formal link between the Office and the national authority responsible for the protection of refugees by requesting the Contracting States, under Article 35, to co-operate with UNHCR in the exercise of its functions:

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<sup>64</sup> Madagascar, Monaco, Peru, Turkey and Italy.

"1. The Contracting States undertake to co-operate with the Office of the UNHCR, ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provision of the convention."

The standard treatments and rights of the refugees have been supplemented and further developed by provision contained in various instruments adopted at regional level. For instance, the Convention governing the Specific Aspects of Refugee Problems in Africa adopted by the Organisation of African Unity (OAU) in 1969 to which 33 States are new signatories and parties. The Office is also following with great interest the efforts undertaken by the League of Arab States to prepare a draft convention on refugees in Arab countries.

10.2.13 Promotion for the Advancement and Dissemination of the Principles of Refugee Law

The Office continues to strengthen its activities in the field of the promotion, advancement and dissemination of the principle of refugee law. As in previous years, the Office has continued in a close and extremely good collaboration with the International Institute of Humanitarian Law in San Remo, which has been commended by the Executive Committee at its 36th session: 65

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65 Contained in UNGA Doc. No.12A (A/40/12/Add.1), No.36 (xxxvi), General: Conclusion adopted by the Executive Committee on International Protection of Refugees.

"(m) Reiterated the importance of the Office's continued efforts to promote ... international refugee law in particular through its co-operation with the International Institute of Humanitarian Law in San Remo."

More recently, in July 1985, a seminar on Voluntary Repatriation was organised, gathering prominent experts in the field of international law who agreed on a set of principles which were later embodied in the conclusions adopted by the Executive Committee at its 36th session and subsequently endorsed by the United Nations General Assembly at its 40th session. In August 1986, a meeting of experts from European socialist countries was convened at Budapest in co-operation with the Hungarian Red Cross. Experts discussed various issues including matters affecting refugees. The role of the Office is to continue to maintain close contact with regional intergovernmental organisations with a view to promoting the development of refugee law at regional level. For this purpose the Office collaborated closely with, inter alia, the Council of Europe, the Organisation of the Islamic Conference, the League of Arab States, the Organisation of African Unity (OAU), the Organisation of American States (OAS) and the Asian-African Legal Consultative Committee (AALCC).

In Geneva, Switzerland, the Office holds training sessions for high governmental officials who are responsible for refugee affairs in their respective countries. A great deal of promotional activity is undertaken by the UNHCR field

office which, inter alia, includes organised training for government officials, seminars and discussions on refugee law at local colleges and universities, publishing information brochures relating to the protection of refugees in international law and informing the media of the refugee situation.

#### 10.2.14 Co-operation with Other Bodies

In accordance with paragraph 8 of the Office's statute, the work of the Office is intended from the outset to be undertaken jointly by all members of the international community. With the increase and diversification of the Office's activities, relationships with the member agencies of the United Nation System, as well as with inter-governmental and non-governmental organisations (NGOs) have continued to strengthen. In planning, co-ordinating and structuring programmes, the Office seeks vital assistance and advice from a host of other bodies, whose tasks are complimentary to its own efforts, namely protection and national assistance. The Office draws on the expertise of other organisations within the UN, as mentioned earlier. It is perhaps appropriate to list the various bodies and their expertise and assistance:

1. FAO: Food and Agricultural Organisation of the UN. Experienced in matters of food and production.

2. ILO: International Labour Organisation. For vocational training.
3. UNICEF: UN Children's Fund, which has continued to support to various refugee programmes in fields related to care and maintenance and community development. Emergency rehabilitation, water supply and sanitation, health care and education for refugee children.
4. UNDP: United Nations Development Programme. In 1983, guidelines and procedures between the Office and the UNDP (in relation to long-term assistance to refugees) were set up. UNDP provides assistance, for example, in Sudan (1986) and it administers various projects on behalf of UNHCR in those countries where UNHCR is not represented.
5. UNESCO: United Nations Educational, Scientific and Cultural Organisation. A memorandum of understanding is established between UNESCO and UNHCR, which has been renewed until 31 December 1987. In accordance with the terms of the memorandum, UNESCO associate experts continue to work both at UNHCR headquarters

and in the field.

6. UNFPA: United Nations Fund for Population Activities. This has been involved with UNHCR in family planning programmes in Hong Kong; similarly, the arrangement between the United Nations Centre for Human Settlements (Habitat) and UNHCR for secondment of a physical planner/construction engineer to provide technical advice on matters relating to refugee settlements continued in 1985 and 1986.
7. UNV: United Nations Volunteers. These volunteers have participated in refugee programmes in Djibouti, Honduras, Malaysia, Somalia and the Sudan.
8. UNDRO: United Nations Disaster Relief Development Organisation. This office has worked in close contact with UNHCR, especially in Africa during 1985, 1986 and 1987.
9. UNIDO: United Nations Industrial Development Organisation. Close contact is maintained between this office and UNHCR.
10. UNRISD: United Nations Research Institute for Social

Development. This has undertaken a survey of the social conditions of Guatemalan refugees in Mexico.

11. UNETPSA: United Nations Educational and Training Programme for Southern Africa.
12. UNTFSA: United Nations Trust Fund for South Africa.  
(11) and (12) continue to assist UNHCR with regard to training facilities and assistance to refugees from Southern Africa.
13. WHO: World Health Organisation. Deals with world health matters.
14. WFP: World Food Programme. Important for the supply of food until such time the refugees become self-sufficient in producing their own food.
15. WORLD BANK: There is cooperation between UNHCR and the World Bank, particularly regarding a proposed second income generating a vocational training projects in Pakistan.

In addition to these members, the Office also co-operates with international organisations. The European Economic Community (EEC) is instrumental in providing contributions,

both in cash and in kind, and in implementing legal instruments. The Office continues to co-operate with the Intergovernmental Committee for Migration (ICM) in all regions. Substantial budgetary savings were achieved in the transportation of refugees accepted for resettlement in third countries due to ICM access to concessional rates for travel fares and to other arrangements provided by the organisation. There is also a long-standing tradition of co-operation between the Office, the International Committee of the Red Cross (ICRC) and the League of Red Cross Societies (LRCS).

The Office co-ordinates activities with the OAU within the framework of the joint working group to establish and monitor progress in the implementation of the recommendation adopted at the Conference on the Situation of African Refugees held in Arusha in 1979.

The International Conference on Assistance to Refugees in Africa (ICARA), held in Geneva in April 1981, was sponsored jointly by the Secretary-General of the UN, the OAU and the Office. The second International Conference on Assistance to Refugees in Africa (ICARA II) took place in Geneva in July 1984 and were under the same auspices, except that the UNDP also participated in the steering committee in recognition of the development aspect of many of the projects submitted to the Conference.

Relations with the Organisation of American States (OAS) have

continued with special emphasis on the movement of UNHCR's programme for Central American refugees. There was particularly close co-operation with the OAS Under-Secretary for Legal Affairs and the Inter-American Commission on Human Rights. The Office was represented at the ceremony in Washington commemorating the 25th anniversary of the Inter-American Commission on Human Rights in September 1984.

For the first time, a UNHCR delegation attended the session of the Arab League Permanent Committee on Human Rights, where the refugee situation was discussed in general. Contact with the Organisation of the Islamic Conference have led to an exchange of visits at a senior level. There are a number of countries which have governmental or semi-official organisations dealing with refugees. The Office continues to maintain close contact with a number of agencies involved in refugee assistance; these include, inter alia,

- (a) AACC: All Africa Conference of Churches.
- (b) AUSTCARE: Australians Care for Refugees.
- (c) BRC: British Refugee Council.
- (d) CCSDPT: Committee for Co-ordination of Service to Displaced Persons in Thailand.
- (e) ICVA: International Council of Voluntary Agencies in Geneva.
- (d) WCC: World Council of Churches.

#### 10.2.15 Brief Analysis of the Changes in the Organisation

In 1986, changes took place within the Organisation. Although the changes did not affect the aims and objectives of the Organisation, it did, however, change the infrastructure. This change has primarily been brought about by the new High Commissioner (Mr Jean Pierre Hocke) and since the change does not affect the practice of the UNHCR, in relation to the protection for refugees in international law, the detailed study of this change is therefore beyond the scope of this thesis. However, a brief analysis can be made.

The Organisation now consists of five Regional Bureaux which have become organisational units primarily responsible for operational activities. They report directly to the High Commissioner and are themselves in direct contact with the field offices. The Regional Bureaux are:

- (i) Africa.
- (ii) Asia and Oceania.
- (iii) Europe and North America.
- (iv) Latin America and the Caribbean.
- (v) Middle East and North Africa.

There is now a new bureau within the organisation - the Division of Refugee Law and Doctrine. This bureau consists mainly of lawyers who are engaged in the promotion and research of refugee law and doctrine. Many of the protection

officers (legal) have now been transferred to this area. This area is of great importance and concern especially in the field of protection for refugees in international law. Support services have been reorganised and now they report directly to the Deputy High Commissioner. The Procurement Service has been reinforced and it is envisaged that Technical Support Service will also be shortly reinforced (see diagram).

The High Commissioner has explained the reasons why the changes were needed in a report of the Sub-Committee on Administrative and Financial Matters,<sup>66</sup> and at present there is a general consensus (both by the delegates of the Executive Committee and the staff themselves) that the changes are for the better.<sup>67</sup> The High Commissioner has stated that outside consultants were required and that expert advice was available for the changes which, the High Commissioner stated, were used extensively.

The existing staff have made their contribution by co-operating with these consultants, some 15 working groups, comprising almost a fifth of the staff at the Headquarters, had been formed. Why was the organisation reorganised? Quite simply to make better use of human and material resources made available to assist refugees.

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<sup>66</sup> UNGA Doc. No.A/AC 96/986.

<sup>67</sup> However, several staff have left the organisation.

At the present moment, the United Nations in general is in a financial depression, and the Office seems to have been hit very severely. A total of 101 posts, under all sources of funds, have been discontinued, of which  $\frac{4}{5}$ ths have been redeployed to strengthen certain other factors. The remaining posts will be redeployed shortly to further reinforce the bureaux and in particular the field. There are weaknesses in the Technical Services, but more specialists are to be assigned such as in the fields of health sanitation, nutrition, information systems, transport and insurance. These posts will be located in Geneva, while their incumbents will be at the disposal of field offices and will visit the field frequently.

There is now a principle of zero-growth in staffing, indicating that no more "external" recruitment will take place ("external" implies people who are outside the organisation). The High Commissioner has stated that this "non-growth" should not impede the accomplishment of the required changes in the UNHCR, for which additional and improved resources are necessary to examine, prepare and train for the changes. One can note the substantial increases in administrative expenditure,<sup>68</sup> which can be explained by the dollar's decrease in value against the Swiss franc. Mr Jean Pierre Hocke has stated that management needs to be improved<sup>69</sup> and one way of achieving these improvements

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68 Report of the UNHCR, 41st session, Supp. No.12 (A/41/12), pp.31-40.

69 Op.cit., p.27ff.

is to develop available resources. With new structures and procedures, the staff will require new skills. Management is wholly dependent on the "wide" geographical distribution (as is the case with all UN agencies and subordinate bodies); this is to benefit from the broad range of backgrounds and experiences.

#### 10.2.16 Some Comments and Observations

1. Can improvements be expected from reorganisation in accordance with the policy of zero-growth in staff?
2. Since the UNHCR is in a period of financial crisis, can management efficiency be reflected in a decrease in the number of posts?
3. There seemed to be a growth in the number of project personnel,<sup>70</sup> and since the UNHCR is not recruiting for other posts, this growth should cease.
4. The Executive Committee should be fully consulted on post reclassification<sup>71</sup> that may result from the reorganisation.
5. There have been some changes in the budgeted levels of

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70 These are the projects with a temporary duration.

71 Posts are being reclassified and the Office should not take it upon themselves to classify or reclassify as they wish. The Executive Committee must be informed and consulted.

posts which had the effect of increasing the number of P4 posts<sup>72</sup> by two and P3 posts by one, while decreasing the number of P2 posts by three. Though the number of posts remained constant, the average grade level increased. It seems remarkable especially in a time of financial constraint.

6. Within the UNHCR, there has been a rotation system<sup>73</sup> which is applied to the staff. But the Board which rotates the staff is virtually unknown. The composition of the Ad Hoc Advisory Board is not known, and the powers and competent are virtually not published and again the Appointments and Promotion and Posting Board is virtually invisible. This should be highlighted and more details should be published in various reports and statements.
7. For the first time in the UNHCR's history, a women has been appointed as Head of a Regional Bureau. More women

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72 P indicates Professional Level, which ensures the applicant of a permanent post within the organisation. Numbers start from 1 and advance to 5: level 1 is a junior professional while level 5 is a senior professional; after the fifth level the posts of Assistant Directors, then Deputy Directors and finally Director of the Branch.

73 The Rotation System ensures that all staff except very senior people are posted to "hard" and "soft" areas. "Hard" area implies where conditions are very difficult such as in Africa (Sudan) while a "Soft" area implies conditions are very good, as in New York or London. There is an in-between area known as a Category II area, as in places like Islamabad (Pakistan) or Manilla (Philippines). These staff are sent for posted for a certain number of months. Increases in salary and facilities are usually obtained in "hard" areas.

should be appointed and promoted.

8. More Third World staff should be promoted to senior levels as either Head of Bureaux or Deputies.
9. If the training programmes are going to be effective, these should then result in lower expenditure in the future which, in turn, could assist the refugees in need.
10. Although there is representation by 93 countries on the UNHCR staff, efforts should be maintained for wider geographical distribution. Could the High Commissioner increase the representation of his staff of nationals of countries of first asylum, in view of their experience in dealing with refugee situations?
11. Eight countries with the highest representation of their citizens on the UNHCR staff have had significant increases in representation through recruitment over the past three years.
12. Can the above factor be related to the financial assistance which these eight countries donate to the UNHCR? Is there a link?

	Financial Dollars <sup>74</sup>	Amount \$ Dollars (US)
1.	USA	126,674,391
2.	JAPAN	47,021,317
3.	GERMANY	30,198,441
4.	UK	18,075,057
5.	DENMARK	14,280,794
6.	CANADA & NORWAY	12,324,824 12,350,537
7.	NETHERLANDS	9,745,098
8.	AUSTRALIA	5,851,864

13. Although 93 countries are represented (as in (10) above), the majority of the staff are still from the Developed Western World, especially the eight Western States listed above.

As we have seen earlier, the UNHCR assists in areas such as family reunion, non-refoulement, maintenance and material assistance, voluntary repatriation, assimilation or resettlement, supervision and co-ordination. The functions of UNHCR encompass 'providing international protection' and 'seeking permanent solutions' to the problems of refugees by way of voluntary repatriation or assimilation in new international communities.<sup>75</sup> Of the two functions, the provision of international protection is of the primary and utmost importance, for without protection, per se,<sup>76</sup> there

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<sup>74</sup> Figures from Report of the UNHCR, GAOR 41st session, Supp. No.12 (A/41/12), pp.37-39.

<sup>75</sup> Statute, para 1.

<sup>76</sup> Such as intervention by the UNHCR to secure admission of refugees.

can be no possibility of finding lasting solutions. Apart from defining refugees, the UNHCR Statute prescribes the relationship of the High Commissioner with the General Assembly and the Economic and Social Council (ECOSOC) makes provision for organisation and finance (see later) and identifies methods by which the High Commissioner is to provide protection.<sup>77</sup> These functions include:-

- i) promoting the conclusion of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
  - ii) promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number of requiring protection;
  - iii) promoting the admission of refugees;
  - iv) the enforcement of national laws and regulations benefiting refugees;
  - v) the development and adoption of appropriate national laws, regulations and procedures;
  - vi) promotion of accession to international instruments;
- and,

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<sup>77</sup> Statute, para 8.

vii) development of new legal instruments.<sup>78</sup>

A major part of UNHCR's protection work is concerned with the individual asylum-seeker. States do not object to UNHCR taking up individual cases,<sup>79</sup> although the asylum States may, and quite often do, question whether an asylum-seeker is indeed a refugee in accordance with the refugee conventions and, if non-members, then in accordance with their municipal laws and regulations. Nevertheless, the individual dimension to the protection function is a natural fusion to the declared task of supervising the enforcement of the refugee instruments. As mentioned earlier, there is a sense of individuality within these instruments, in other words, instruments designed for the single individual.

States in general acquiesce to the protection functions of the UNHCR for the individual, and this acquiescence delineates both the competence of the office and the refugee status in international law.

It is important to have a non-political international organisation such as the UNHCR, where States can express their views (with complete confidence) through direct communication between representatives of governments and

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78 See also UN Doc. A/AC.96/588, para 48 (i)(k).

79 Although they may resent the fact that expert legal advice is available for the asylum-seeker.

representatives of UNHCR. The UNHCR, as a subject of international law, can take these views and if it finds them assisting refugees, may then act to the process of law formation.<sup>80</sup> State Parties to the 1951 Convention and the 1967 Protocol have specifically authorised the UNHCR to be involved in the protection of refugees;<sup>81</sup> likewise, the OAU Convention on refugees has done the same.<sup>82</sup> There does not appear to be resentment among States in having the UNHCR within its territories. Surprisingly, in most cases, States are quite happy in accepting advice and assistance on the protection of refugees, although their domestic systems may still try to reinforce their political views and opinions.

Does the UNHCR enjoy international recognition?<sup>83</sup> The UNHCR is a subsidiary organ of the General Assembly and its character can be traced to the United Nations at large.<sup>84</sup> Moreover, it can be observed that the UNHCR Statute shows that the UNHCR was to act on an international level by the General Assembly.<sup>85</sup> The UNHCR's standing on an international level has been reinforced by successive General Assembly resolutions urging all States to support the UNHCR and its

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- 80 Whether domestic or international.
- 81 Article 35 of the 1951 Convention and Article II of the 1967 Protocol.
- 82 Article VIII of the 1969 OAU Refugee Convention.
- 83 Its capacity to possess international rights and duties.
- 84 See the Reparation Case, ICJ Rep. 1949, 174, pp.178-9.
- 85 For instance, paras 8(a),(b), 16.

authorities.<sup>86</sup> Although one can say that General Assembly resolutions are not binding, nevertheless the UNHCR does possess a central role of supervision.

The individual is not considered to rely on his obligations in international law; he cannot, for instance, enforce his rights through diplomatic channels, quite simply because his State of origin would not consider representing an individual who was, prima facie, fleeing from their jurisdiction. The refugee instruments provide for settlement of disputes to be referred to the ICJ or other organs, depending on the regional instrument.<sup>87</sup> However, no limitation has been observed which involved refugees. The 1951 Convention and the 1967 Protocol lack effective investigation, adjudication and enforcement procedures, so the UNHCR can claim to be a representative of international public order and, since no States have objected to the presence of UNHCR, it can be said that the UNHCR tries to implement and enforce these investigative, adjudicative and enforcement procedures.

The UNHCR faces a massive task in providing international protection as well as durable solutions to the refugee crisis. The infrastructure has enabled the staff to carry out its aims and objectives even more efficiently than before. The durable solutions, mentioned above, involve

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86 For instance, granting of asylum, observing the principle of non-refoulement.

87 For instance, see the 1969 OAU Convention in Chapter Five.

securing voluntary repatriation or integration in countries of first asylum. The task of the UNHCR is complicated by States (parties and non-parties to refugee instruments), by inconsistent, flawed application, enforcement and implementation of the 1951 Convention and the 1967 Protocol. The restrictive admission policies of many States makes resettlement very difficult. Additionally, the non-operational nature of the UNHCR requires it to rely on voluntary agencies and governments for the emergency care and maintenance of refugees.

The co-ordinating role cannot be effectively performed because of the voluntary nature of the UNHCR's financial sourcing which also prevents effective planning for future months and years.

It seems quite essential that the UNHCR Statute should be strengthened and the UNHCR assured of adequate finances without having to rely on voluntarily financed budgets. The creation of a special UNHCR fund for durable solutions would provide some form of assistance to UNHCR and its operation and, in effect, the developing countries in their efforts to aid refugees. In 1986, the UNHCR went through a financial crisis, like the UN itself, when the United States reduced its contribution towards investment in the UN. This is the reason for the special UNHCR fund. The UNHCR and, one can suppose, the UN must not and cannot rely on dominant countries, if good practice is to continue. However, the

setting-up of the fund would not be sufficient. It should be proposed that grants and loans be made from international financial institutions to developing countries (if they are asylum States) as a part of a development programme to these States. For the resources of such States may not be able to withstand the costs associated with providing permanent residence, long-term settlement or settlement to large-scale influxes of refugees. The UNHCR could effectively supervise the implementation of such finances.

Countries compel groups of people to leave that country because it wishes to get rid of what it perceives as being undesirable elements. The Vietnamese 'boat people' fall into this category. The UNHCR Statute might be strengthened by specifically designating the High Commissioner's Office as an agency to initiate all necessary steps.<sup>88</sup> It can also be important to note that the conditions that cause refugees to flee - for instance, serious economic deprivation,<sup>89</sup> natural disasters,<sup>90</sup> or violation of human rights<sup>91</sup> - must be eliminated. The UNHCR cannot advise comprehensively on how these problems are to be eliminated because of its non-political nature. If it did so, it would lose its apolitical role and this must be avoided.

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88 Such as mediation, negotiation, good offices, advice, etc.

89 Haiti, Ethiopia.

90 Sudan.

91 Vietnam, Chile.

The UNHCR plays an important role in persuading States to grant initial asylum to persons fleeing from neighbouring States for fear of persecution or violation of human rights.<sup>92</sup> As stated in the Statute section, Article 8(d) of the Statute of the UNHCR empowers it to promote the admission of refugees to the territories of States. The UNHCR role in assisting the 'boat people' was excellent, especially when they were also struggling to find asylum for refugees arriving from Kampuchea and Laos. The UNHCR used its good offices with South-Asian States to see that refugees got initial asylum in neighbouring States.

The large-scale influx of refugees causes political, economic and social problems for the States granting asylum and States of origin sometimes consider it an unfriendly act and intervene. The State of origin often argues that if the burden of "their" refugees is so great, then why do the States of asylum take this burden?<sup>93</sup> The UNHCR can step in to see that there is no undue burden on bordering States and try to remove misapprehension through diplomatic dialogue, explaining that the granting of refuge and asylum is not an

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92 Although it is never easy - interview with Iqbal Ali Mohd, representative of UNHCR, Japan, on 5th June 1985. Many States, such as the UK, disregard the advice given UNHCR representatives and follow their own advisers.

93 The Soviet Foreign Minister speaking on Newsnight, BBC Television, 2 Feb 1980. One can suppose that in the case of Pakistan, offering refuge was purely on religious grounds, along with humanitarian grounds. This has been reiterated by the Pakistan Embassy in London on many occasions: Press Releases inter-alia 16 March 1980, 27 Jan 1981.

unfriendly act or an act of intervention.<sup>94</sup> The UNHCR's efforts to divert refugees from Indo-Chinese States by calling conferences of various States did bear fruit, with the result that refugees were accepted by a non-bordering State.

In cases of large-scale influxes of refugees, States are generally reluctant to accept and keep refugees. When this happens, the UNHCR tries to arrange temporary asylum in other States. For instance, through the UNHCR's successful efforts, the Philippines, Australia and some States in Africa have accepted a number of refugees. These States would not have done so if it had not been for the UNHCR. It has also evolved a policy of refugee acceptance which is not merely the act of individual States. UNHCR has advocated international co-operation and solidarity in the acceptance of refugees. It exhorts, therefore, burden-sharing on the part of States to reduce the burden on any single State or group thereof.

Nevertheless, the UNHCR does lack a certain "punch". As is often the case with humanitarian organisations,<sup>95</sup> the UNHCR relies considerably on moral persuasion and persistence rather than a solid power base. However, it is still a force to be reckoned with. The UNHCR can collect international

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94 The 1969 OAU Convention has catered for this, while the 1951 Convention and the 1967 Protocol lack any such provision.

95 ICRC and Amnesty International are other good examples.

support and condemnation in equal part, but need not unduly worry about the latter, purely because the international community is in full support of the organisation and States are quite reluctant to accept international condemnation.<sup>96</sup> Additionally, UNHCR seems to prefer to keep a low profile throughout the world.

Apart from the States which are intimately affected by refugees, the Office is virtually unheard of in comparison with other subordinate United Nations bodies, like WHO, UNICEF or UNESCO. The Office needs to reach out to all the populations of the world and not merely to those countries most affected by refugee problems.

The present recruitment unit should be improved. Recruitment officers (such as the Head and his immediate assistants) have been very "aggressive" towards Third World candidates, whereas candidates with less experience and qualifications have been recruited from the developed nations. In fact some Third World employees have substantiated this claim in Geneva.

As already mentioned, countries which have been more fortunate in wealth should pay more towards the financial support of the organisation. The constant blackmail by the top seven countries should be stopped. Perhaps it could be a

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<sup>96</sup> Except countries which are used to such negative responses, such as Chile and South Africa.

more feasible and efficient idea to form more regional offices of UNHCR throughout the world. Instead of the Office functioning from the nerve-centre in Geneva, there could be more decentralisation to the regions. This would allow staff to quickly assess refugee problems and begin solving it 'on the spot', using valuable local knowledge and contacts, instead of flying various experts to parts of the world with which they are not familiar. Of course, funding such a network of regional offices would pose an acute resourcing problem, but with modest financial contributions from such countries as the USA, the UK, Canada, France, Germany, Holland, Saudi Arabia, Kuwait, the UAE, and the USSR - such a regional network could be set up.

The Office is virtually helpless in areas of civil strife and war as the Office has no real power to intervene between factions or States in order to present the case for the refugees. Perhaps it could be possible for the representatives of UNHCR to take part in talks between opposing factions and States and present the case for the refugees. Although one cannot really see this proposal being implemented, States will be most reluctant and indeed suspicious to allow the representatives of the UNHCR to take part in talks. If such practice was allowed, the UNHCR will find it extremely difficult to retain its non-political role.

### 10.3 POSTSCRIPT

The position of the refugee in International Law and the work of the UNHCR has been expounded, examined and analysed; it is now at a stage whereby a conclusion is required.

## **CONCLUSION**

## CONCLUSIONS

### 1. GENERAL CONCLUSION

The 1951 Convention reflected the situation of the refugees after the Second World War in Western Europe, although it had been formulated in general and global terms. It must be remembered that the definition of the refugee was drawn up with a specific problem in mind and in the context of the political situation prevailing at that time.

The situation of today's refugee is different. Refugees are not escaping the perils of war on the same scale as they did some forty-one years ago. The vast majority of refugees are no longer escaping persecution or fear of persecution,<sup>1</sup> they are escaping the perils of today's disasters, be they man-made or natural. These disasters are not covered by international refugee instruments, namely the 1951 Convention and/or the 1967 Protocol. The current legal refugee instruments, elaborated in a specific socio-legal-political climate, are clearly inadequate to meet contemporary needs. Given the present political climate and the reluctance of States to deal with complex issues which have long-term implications, it is not surprising that attempts to replace the existing legislations, have generally been met with reticence. This should not, however, produce an excuse for inaction for improving the current legislation to cater for today's and future

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<sup>1</sup> UNHCR Information Booklet, printed in Geneva. General release 1989.

refugees. There is a strong case to be made for a broader approach towards the refugees, as inspired by the current OAU Convention relating to refugees. The OAU Convention is currently the most suitable example of an international legislation.

It is said that where an asylum-seeker's life, liberty or safety is threatened, it is immaterial whether that threat was the result of persecution, civil war, armed conflict, intervention or natural disaster. This may create problems to the States purely because, firstly, many States have no desire or inclination to widen their obligations towards displaced people and, secondly, some human rights organisations,<sup>2</sup> who would fear the watering down of established classic concepts such as "refugee" definition and "asylum", believe that the genuine political refugee might suffer as a result. The classical definition of a refugee is an outdated and a narrow one. The definition only relates to victims of persecution<sup>3</sup> or fear of persecution and once the asylum-seeker satisfies these criteria, then he or she may be entitled to received some limited benefits mentioned within the 1951 Convention and/or the 1967 Protocol. The majority of the world's refugees do not fulfil the persecution or fear of persecution requirement; they are more likely to be victims of natural or man-made disasters which the present legal instruments do not contain as criteria. Even the improved African Convention, which does cover refugees arriving from man-made disasters, does not

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2 UNHCR, ICRC and Amnesty International.

3 Even the term "persecution" is not defined in any legal refugee instrument.

cover natural disasters. In fact, some African refugees are produced from a combination of natural and man-made disasters. Millions of Asian refugees have been created through the intervention of a superpower, whilst the same is true in Latin America.

Reference to contemporary examples, such as the Tamils<sup>4</sup> or the Turkish Kurds,<sup>5</sup> has highlighted the fact that these examples are not covered by refugee instruments purely on the fact that they are not conventional refugees, simply because they originate from areas of civil disorder and civil strife, which are not covered by the refugee legal instruments, namely the 1951 Convention and/or the 1967 Protocol. One can say that these legal instruments have not responded to contemporary needs. Likewise, the African refugees who flee from areas of drought and famine are not recognised as conventional refugees, because drought and famine are not covered in these instruments or in the OAU legal instrument. These refugees are only de facto, which implies that the Member States to these instruments are no longer obliged to grant refugee status and asylum. Only on humane and humanitarian grounds can such a refuge be given. The refugee law is inadequate to cater for the contemporary refugee.

The 1951 Convention and/or the 1967 Protocol is very individualistic; the drafters could not predict the change from thousands to literally millions of refugees. It is true that the

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<sup>4</sup> Refugee Magazine, No.63, April 1989, pp.5, 19, 32.

<sup>5</sup> Ibid., No.65, June 1989, p.7.

population of the world has more than trebled since the second world war and many third world countries (due to very few programmes of birth control) have very high rates of births and the population is forecasted to increase.<sup>6</sup> The population of Africa and Asia have increased alarmingly. The present 1951 Convention and/or the 1967 Protocol do not cover instances of mass migration of refugees, they only cater for the individual refugee.<sup>7</sup> An inadequacy not foreseen by the drafters of the 1951 Convention and/or the 1967 Protocol.

The refugee law, per se, has not responded to the contemporary refugee. It is vitally important to take account of the dynamic character of the refugee law. The law or legal rules is/are not simply a set of abstract principles, in its totality, it is the formal international community response to actual refugee problems of today. While the law gives effect to certain fundamental principles, its utility is also determined by its capacity to solve problems. New problems are constantly occurring and they require that the law be responsive to change. This is not occurring. Refugee law is now static and is not responding to the current refugee problems. The international rules must be formulated to cater for the refugee of today. It has been realised that there are already positive developments (limited

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<sup>6</sup> Report for the Independent Commission on International Humanitarian Issues, "Refugees: The Dynamics of Displacement", 1986, p.68.

<sup>7</sup> To implement this successfully, this would involve screening all new arrivals even at times of mass exodus. In an under-developed country, it would be an impracticable and expensive task.

they are) which could provide a basis for promotion and dissemination of the refugee law. The OAU convention is one such example. Many States, either through multilateral treaties or domestic legislations, have accepted the principle enshrined in refugee convention and conduct their operations in accordance with their conventions. There is a need to consolidate and improve on the dispositions with more systematic, humane and effective policies.

The determination of refugee status and asylum can sometimes antagonise the state of origin, since it implies that the conditions of persecution exist there. By granting such a status and refuge, States could become distant in friendship and cooperation. What has to be made clear is the fact that the international community, or more specifically states granting asylum, must ensure that the granting of refugee status and asylum is to be regarded as a friendly act. There is no such legislation which provides for such an act.<sup>8</sup>

There is no doubt that the present legislation are inadequate for contemporary refugees; it must now be possible to seriously consider either formulating a new convention<sup>9</sup> by simply replacing the old existing one, or attaching another Protocol to the old existing convention. However, the former is preferred, because the whole laws and provisions need to be looked at. Within the

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<sup>8</sup> Except the OAU Convention which states that the "granting of asylum is not to be regarded as an unfriendly act by any Member State".

<sup>9</sup> See recommendation (vi).

new convention, a new category of "externally displaced persons"<sup>10</sup> could be formed, catering for victims of war, civil disorders, drought, famine, cyclone and so on.

An early warning system would be ideal in circumstances when refugee numbers are large. There now arises the obvious questions of why was such action was not taken at an earlier stage to prevent starvation, famine, death and why was the movement of refugees across borders not anticipated? There are two aspects to think about. Firstly, whilst many refugees are from man-made disasters such as civil wars, State interventions and civil disorders which are difficult to predict, natural disasters are to some extent more easily predictable. The recent examples of civil disorder in China<sup>11</sup> and the uprising of the Kurds in Turkey<sup>12</sup> clearly illustrate their unpredictability. Secondly, there are those who believe that the information required to predict refugee movements is very readily available.<sup>13</sup> The recent application of computers<sup>14</sup> has improved the collection and calculation of

- 10 See also Goodwin-Gill, The Refugee in International Law, op. cit., pp.4,8,9,10,18,21,71,73,152.
- 11 Whereby civil disorder occurred within the space of a few days and could not have been predicted (The Guardian, 5th, 6th and 7th June 1989).
- 12 The Guardian, 7th June 1989.
- 13 The spy network of the Superpowers is usually good in predictability.
- 14 They are now used in the offices of the UNHCR, NGO's and government departments. When a refugee leaves his home because of threat to his life and safety, he must consider many factors such as should he and his family stay or leave, if they leave where should they go, and would they be given refuge, shelter and safety? The answers are determined by many practical, cultural and psychological factors. It seems unlikely that these factors could be taken into account in

accurate information concerning involuntary migration. An analysis of the situation of the vulnerable groups and individuals on the basis of a sound knowledge of the area, its people, its history, the strength of its economy and political stability, are all needed. When refugee movements have been anticipated, there can be two courses of action: firstly, the diversion of new flows of refugees, and secondly, a better preparation to meet emergency situations.<sup>15</sup> Finally, early warnings must assess the capacity of the receiving area and relevant relief organisations to deal with the influx and should indicate when a mass displacement is about to take place.<sup>16</sup>

Who has a special responsibility for the refugees who flee from man-made disasters? Government of developed States have this special responsibility. From contemporary examples, the developed nations have acted with increasing intolerance towards asylum-seekers and refugees, especially those who arrive from the developing countries.<sup>17</sup> These governments are indirectly playing a major part in the creation of refugee instruments in selling

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the predictions made by mere scientific equipment.

- 15 Most mass outflows begin with a trickle of refugees. The weeks and months inbetween are the most important and critical periods which could be put to excellent use to prepare for emergencies when and where appropriate and to take suitable measures. For example, the logistics of chartering the necessary planes, ships and boats.
- 16 For instance, estimate the size and composition of the refugees concerned.
- 17 The latest example is that of the Turkish Kurds who from June 23 1989 will require visas in order that they may claim refugee status and asylum in the United Kingdom.

arms, holding down commodity prices and supporting (financially<sup>18</sup> and otherwise) repressive governments. The developed countries must therefore try to deal with causes rather than symptoms of refugee flow. For many governments, this would entail a major rearrangement of the current economic and foreign policies. It is indeed true to say that this will not be done in one night nor will it be achieved with constant public pressure from the Non-Government Organisations (NGO's), voluntary bodies and groups. One cannot see the results being achieved on merely moral public statements or foreign policy press statements. On the refugee question, the developed nations have categorically failed to influence and resolved to assist the poorer and less powerful nations.

The western developed States have been found to have adopted strict hostile and deterrent measures towards asylum-seekers arriving from the Third World. There has to be a balance between what critics call "hostile measures" against what these governments conceive as "control measures". These governments continually argue that the "control measures" are for the benefit of their nationals, the stability and the economy.<sup>19</sup>

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18 William Waldegrave's plan to spend up to £ 25M of taxpayers' money to spread "democracy" in such countries as Hungary, Poland and Czechoslovakia. Source: The Guardian, 2nd June 1989.

19 Mrs Thatcher stated that the influx of 3.28 million Chinese refugees into the United Kingdom, with many requesting political asylum, would double the immigrant population already in the United Kingdom. BBC1 News, 6 June 1989. The Guardian, 7 June 1989 issue, stated that "the government on the 6th June firmly shut the door on any prospect of Britain becoming a "last resort sanctuary" for Hong Kong's 3.28 million Chinese residents.

The problem is that these developed States now treat the refugee problem as a Third World problem and they will only grant few refugees the status and asylum on a purely publicity basis. These governments want to be seen as respecting human rights. The heart of the matter is that the western developed States show no sympathy or humanitarian values towards "Third World" refugees. These governments have gained an underlying impression that all asylum-seekers who arrive from the Third World are trying to improve their living conditions within the developed nations. However, generally, asylum-seekers from South America, parts of Europe, or the communist-bloc are given more sympathy and consideration.

European States have once again co-operated with each other, in restricting the number of asylum-seekers arriving in the West, have now adopted strict visa requirements for the asylum seekers,<sup>20</sup> and have imposed fines on the transportation companies who bring refugees without formal documents. This is motivated by the concept of "Fortress Europe 1992" protected from undesired immigrants which include unwanted refugees. Refugees often face very difficult situations, especially when they try to obtain visas to leave their countries and enter other countries.

The European States have argued that these measures are for controlling immigration and are not necessarily hostile. However, it has been noted that control measures should apply to all

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<sup>20</sup> The latest visa requirements are for the Turkish Kurds, beginning from June 23 1989 in the UK.

asylum-seekers and not just to those who seek entry arriving from third world countries. There are still some countries which have only a few hundred refugees, notably Finland, Iceland, Sweden and Scandanavia; surely countries such as these should be encouraged to accommodate more refugees.

States have the right to determine whom they admit within their borders, except as they may derogate from international agreements. States are clearly entitled to protect their economic and demographic interests in making such determinations. It cannot be expected that they would enter into international commitments that they would eliminate their right to do so or that they would interpret any legislation or agreement that they might make as having such an effect.

In the evolution of legal rules and provisions relating to "refugee" and "asylum", humanitarian concern must include consideration of the legitimate interest of the State of potential asylum and refuge. In their international agreements and legislation, States cannot be expected to renounce this important right. Obviously, beyond that, it is simply a question of bona fide and humanitarian moral values by the State in balancing the legitimate protection due upon its own citizens and nationals with the humanitarian consideration of the refugee case.<sup>21</sup>

The 1951 Convention and/or the 1967 Protocol have missed out the fundamental issue of asylum. Asylum was left out by the drafters

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21 A clear example is the boat people.

to these instruments and the discretion of whether to grant asylum or not was left entirely to individual States. How can an important aspect of refugee law be left out and why was it not an automatic right to grant asylum? There is a deficiency in the law relating to asylum. It is ironic that, on one hand, the Universal Declaration of Human Rights in 1948 was formulated and codified to give humans their basic human rights and yet, on the other hand, although the drafters of the 1951 Convention and/or 1967 Protocol followed the Universal Declaration of Human Rights in incorporating some rights for the refugees, the drafters did not want to offer refuge and protection for the individual who was escaping violations of these human rights. The concept of asylum was not mentioned or even defined in the text of these instruments. These problems were discussed in the preparatory documents of the Universal Declaration of Human Rights and it was discovered that the participating States did not want any persecuted person to claim the right of entry into any country he might choose.<sup>22</sup> States felt that the right of asylum was a sovereign right of States and that once asylum was granted and was to be respected by other States. The concept of asylum has not been incorporated in any recent international legislation affecting the refugees, except in the OAU Convention. The States have used the discretion granted by the drafters to their maximum use. States are reluctant to use words such as "... grant for asylum". Vague wordings are used deliberately when dealing with

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22 UN Document E/CN.4/713, p.3. States which agreed with this proposition were Belgium (UN Document E/CN.4/781, p.2); Czechoslovakia (ibid., p.3); Peru (ibid., pp.5-6); United Kingdom (ibid., pp.10-11); and India (ibid., Ad.1, p.2).

the right to grant asylum. Words such as " ... may grant asylum" and " ... could grant asylum" are very commonly inserted within the domestic laws and regulations. The law of asylum is unsatisfactory and it has not developed to cater for the contemporary issues. For as long as the concept of asylum is absent from the international refugee instrument, then a refugee cannot possess a guarantee of asylum or safety. The law must follow the 1969 OAU contention on the concept of asylum.

Very limited global developments have occurred in the field of human rights of refugees. Although there have been stalwart developments in the field of Human Rights.<sup>23</sup> The Universal Declaration of Human Rights in Article 14(1) stated that everyone has the right to seek and enjoy asylum from persecution, furthermore, the Declaration possesses various rights of importance to the refugees such as union of family; education<sup>24</sup>, property<sup>25</sup>, work<sup>26</sup> and health.<sup>27</sup> Influenced and inspired by these concerns, the international community adopted a number of instruments which included the 1951 Convention and/or the 1967

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23 For instance, the United Nation Charter pointed out that protection of human rights was one of its cardinal principles; The Universal Declaration of Human Rights is more emphatic and unequivocal; The International Covenants on Human Rights; Declaration on the Granting of Independence to Colonial Countries and Peoples; International Convention on the Elimination of all forms of Racial Discrimination; the European Convention on Human Rights; and the Torture Convention.

24 Article 26

25 Article 17

26 Article 23

27 Article 25

Protocol and the Statute of the UNHCR. Even the OAU Convention is inspired by the Universal Declaration of Human Rights, in Article IV which states that "Member States undertake to apply the provision ... to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinion". Article 27 of the American Declaration of the Rights and Duties of Man<sup>28</sup> is another such example. It is clear that there are positive developments (though limited), which could provide a basis for promotion and discrimination of the law of human rights of refugees. Many nations, either through multilateral treaties or domestic legislation, have accepted the principle enshrined in refugee conventions and conduct their operations in accordance with these conventions. There is a need to consolidate and improve on the dispositions with more systematic, humane and effective policies. As stated above, international refugee conventions do meet some rights. These conventions are further supplemented and complemented by regional conventions of refugees and in some cases by human rights conventions.<sup>29</sup> Refugees still lack basic protection through isolation of human rights. Article 14(1) of the Universal Declaration of Human Rights has not been taken up in the International Covenants and the asylum-seeker has still not acquired the automatic right of asylum. Refugees must be

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28 'Every person has the right in cases of pursuit not resulting from ordinary crimes to seek and receive asylum in foreign territory in accordance with the laws and with international agreements'.

29 For example, in the UK once a refugee has been granted the status and asylum, he is also covered by basic human right provisions in the European Convention on Human Rights.

protected internationally and they must be entitled to human rights such as right to life, right to liberty and so forth.<sup>30</sup> In fact, a person without a nationality, irrespective of whether he is a de facto or de jure refugee, is still unprotected in law.<sup>31</sup> The interests of the refugees must not be overridden and these interests must be resolved by a process that best describes and prescribes fundamental values. Today, human rights and its relation to refugees, has revealed a gap as to what international organisations such as the UNHCR perceives to be a matter of law and what governments (which are essentially centres of powers) are prepared to perceive as a matter of law. These governments will also dictate the powers for the foreseeable future. There are definite prejudices, mainly due to the politics of the States, especially in cases of selection of asylum-seekers to be granted asylum. Many States have put ethnic origins, the capacities of assimilation or integration, and historic and foreign policies above the fundamental human rights to which the asylum-seekers or refugees are entitled when seeking asylum.<sup>32</sup> The human rights law is not being allowed to respond and cater for the needs of the contemporary refugees simply because of governments who continue to insert a buffer zone between basic human rights and the refugees who need these rights. These governments must be held

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30 See Recommendation (xiv)

31 For denationalisation, see Williams, "Denationalization", 8, BYIL, 45, 1927; Goodwin-Gill, "The Limits of the Power of Expulsion in Public International Law", 47 BYIL, 55, 57, 1974-75; and see also Weis, P., Nationality and Statelessness in International Law, Sijthoff, Leyden, 2nd ed., 1979.

32 Examples for many states in Europe, the Middle East and Far East.

responsible for isolating human rights alongside those States of origin from where the refugee has escaped. There is a clear divergence between refugees and their entitlement to basic human rights.<sup>33</sup>

The principle of non-refoulement is embedded in Article 33 of the 1951 Convention and/or the 1967 Protocol and, encouragingly, in the Torture Convention of 1987.<sup>34</sup> The principle of non-refoulement, as formulated in general legal instruments, still accords legal recognition only to claims to protection and assistance based upon persecution or fear of persecution. The OAU Convention is certainly more advanced than the 1951 Convention and/or the 1967 Protocol, since the OAU Convention covers refugees fleeing from armed conflicts, especially in terms of non-refoulement. However, no legal instruments refer to the protection of non-refoulement for refugees who arrive from areas of natural disasters. The principle of non-refoulement needs to be broadened to cover refugees arriving from both man-made and natural disasters. Only then can one state that refugees are fully protected.

The principle of non-refoulement has been stipulated within the 1951 Convention and/or the 1967 Protocol and from analysis of the principle; it has been discovered that for the principle to be

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33 For instance, Kurds are being kept in detention centres, while their applications are being processed within the United Kingdom. In Sweden, many Tamils were kept imprisoned while the government was processing their application.

34 See Chapter Seven.

truly appreciated, the interpretation of Articles 31, 32 and 33 in the 1951 Convention must be taken together. A problem relating to this principle is that an asylum-seeker can enter a Member State to the 1951 Convention and/or the 1967 Protocol by deceiving the border official or by entering by some illegal means, the asylum-seeker is then safe from return or refoulement by the protection of these three articles. If, however, he presents himself to the border official and this official is unsatisfied as to the validity of the claim to refugee status, the official can then return the asylum-seeker back to his country of origin. So, should asylum-seekers enter territories illegally and still be protected from refoulement? From the 1951 Convention and/or the 1967 Protocol, it seems probable.

It is clear that all asylum-seekers who are determined as refugees within the provision of Article 1 of the 1951 Convention and/or the 1967 Protocol are also protected from refoulement by the provision of Article 33 of the 1951 Convention. Therefore, the refugee definition must be fulfilled if the protective Articles of 31, 32 and 33 apply. As stated above, the principle caters only for individuals and not for mass migrations. Non-refoulement of masses of asylum-seekers is not stipulated in the 1951 Convention and/or the 1967 Protocol - a serious deficiency which was not predicted at the time of drafting the refugee instruments. Since times have changed, masses of refugees have emerged in the contemporary world to whom the protection of non-refoulement must be granted. The principle of non-refoulement

does not cover de facto refugees.<sup>35</sup> States will only accept de facto refugees on a purely humanitarian basis.

There also appeared two important aspects: the refugee instruments do not contain an obligation for the Member States to allow refugees to be admitted into their territories, in other words, that admission be granted; the other aspect is that there are no obligations which forbid the Member States to reject the asylum-seekers when they arrive at their borders. So, clearly, the Member States can reject asylum-seekers and still not be in breach of the 1951 Convention and/or the 1967 Protocol. These two aspects must be incorporated in a new Convention. No current refugee law has responded to these two aspects. Nor is it likely in the foreseeable future that any such law will be developed.

The principle of non-refoulement forms a limited part of Customary International Law. Vague and ambiguous language is often used when discussing this principle, even at the level of the Executive-Committee meetings of the UNHCR; the United Nations General Assembly in adopting resolutions; regional conferences; State Practice; and in seminars and meetings. States that refoules refugees are seldom criticised or deplored by the international community. States should apply the principle of non-refoulement liberally and with a great deal of flexibility and only in very rare cases should refoulement take place.<sup>36</sup>

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35 Which by contemporary standards are the vast majority of the refugees of the world.

36 Such as in civil war, torture or genocide.

On the domestic scene, the eligibility for asylum needs to be developed. States are rather uncertain of the standard for eligibility for asylum. The case study of two cases have highlighted this uncertainty. On the one hand, the United States Supreme Court in the ruling on the Cardoza-Fonseca case produced a decision which was a welcome sight for refugee organisations, lawyers and refugees themselves. The Supreme Court had applied a test which was generous and liberal in its application to determine refugee status. However, on the other hand, in the United Kingdom the House of Lords had applied a different interpretation to the test in determining refugee status and asylum. These two cases have highlighted the need for standardisation for eligibility for asylum. Political influences also appear to have affected certain decisions. In the United States, the Congress is sympathetic to the cause of the Contra rebels in Nicaragua. Any asylum-seeker arriving from Nicaragua is to be given sympathetic consideration. Whereas in the United Kingdom, the British government are of the firm opinion and policy that no more immigration should take place, especially when the asylum-seekers are arriving from Third World countries. Once again, the British government and the judiciary have highlighted the problem of the traditional definition of the refugee. They agreed that "civil disorder" was occurring in Sri Lanka but that it did not constitute a condition for the asylum-seeker to be classified as a conventional refugee.<sup>37</sup> Once again this contemporary example has highlighted the deficiency in the refugee

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<sup>37</sup> As a result of the decision in Sirakumaran and others many hundreds of Tamils were deported back to Sri Lanka.

law. Furthermore, the interpretation does not acknowledge that civil disorder cannot be classified as a part of persecution, even though many Tamils are being killed by the Indian Army in Sri Lanka.<sup>38</sup> Similar examples are of the Turkish Kurds in Turkey, who continue to plead acts of persecution; however, the British government is still of the opinion that civil disorder does not constitute persecution and therefore that these Kurds are not refugees and subsequently cannot be granted refugee status and asylum. Can the developed nations continue to encourage the killing and persecution of genuine refugees on account that they do not fulfil a condition which was formed for refugees some forty-one years ago?

The international refugee legislation do not clearly accommodate this deficiency. These legislations are not responding to the refugee of today. The refugee law and regulations need to be developed to meet the needs of refugees today. The examples of the Kurds and the Tamils are prominent. A review of the refugee laws are urgently required.

There is also a need for each Member State to the existing international refugee legislation to set up an autonomous body which could assess and evaluate the decisions made by the High Courts.<sup>39</sup> The body could then recommend to the High Courts and possibly overrule any negative decisions made.

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38 Refugee Magazine, number 63, op-cit.pp.22-33.

39 For instance, it could look into the decision made by the House of Lords in the Tamils case.

The UNHCR is in a very difficult situation, since it is a non-political body; its reactions, condemnations and its work is closely scrutinised by the international community. The UNHCR is a body which represents the moral authority of the international community in implementing and incorporating refugee instruments. Governments must make sure that decisions on refugee status remain within the realms of a humanitarian context. States should give the UNHCR a role in their asylum procedure, and this will no doubt help strengthen the objectivity of the decision-making process. The UNHCR can improve its credibility as a neutral arbitrator in asylum applications and it can point out to various governments the deficiencies or problems when humanitarian principles are not respected.<sup>40</sup>

Many readers are unaware of the workings of the UNHCR or indeed whether the United Nations has a subordinate body which deals with refugees. The UNHCR must publicise itself more.

The UNHCR has been slow to respond to physical attacks on refugee camps and refugees themselves. However, the extreme sensitivity of governments to such delicate issues, which include security matters, makes the work of the UNHCR even more difficult. One criticism is that there are actually very few UNHCR personnel within the refugee camps, this suggests that the UNHCR rarely implements its own assistance programmes. The UNHCR should be

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<sup>40</sup> The NGO's and voluntary organisations can assist the UNHCR and the respected governments by collecting, collating and disseminating information.

allowed to possess an effective role in the supervision of the well-being and physical protection of the refugee in refugee camps.

The UNHCR must co-operate with members of the Soviet Bloc; it was only its cooperation, persuasion and conciliation which prompted Hungary to become the 106th State to accept the 1951 Convention and/or the 1967 Protocol.<sup>41</sup> The UNHCR has little or no power when refugees are expelled from States. The UNHCR should be allowed to participate in discussions of individuals or masses when expulsion is imminent. The UNHCR must establish and implement assistance programmes for refugees that return home. It is never easy for the returned refugees to settle back in their original way of life after having spent days, months or even years away from their homelands.

The staff of the UNHCR must increase in numbers in order to cater for the contemporary refugees. More protection or legal officers must be trained with refugee law background and it is not sufficient to recruit lawyers who have no refugee law knowledge. The role of the protection officer must be changed so that there can be more involvement between governments and the refugees. The protection officer must respond to a government's decision by informing it of the legal and humanitarian values. The UNHCR must also promote access to the 1951 Convention and/or the 1967 Protocol, since they are the only legal instruments available for the protection of the refugee by governments, and it is also

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41 As of April 1989.

important that the international community and States, in particular, should realize that legal instruments cannot guarantee that the refugee will be treated humanely; de facto law is not the answer, but the safety of the refugee depends on the morality of the Nations.

Not a great deal seems to be happening in the way of "standard setting". Many regional conferences, seminars and debates are held every month and every year, but nothing concrete has been achieved. Refugee law is not responding to the situation of the contemporary refugees. As stated above, the OAU Convention is probably the best legislation which is available, even though it is still not complete.<sup>42</sup> At present, refugee law is far from being adequate, it is static. There is a need for a major revision of the refugee legal instruments.

What about the future? Are the refugees going to increase in numbers or will they decrease? The Afghan refugees are forecasted to return to Afghanistan in the imminent future. Could there be an influx of a similar scale from Chinese refugees? Only time will tell. In general terms, the Superpowers are still intervening in the affairs of Third World countries and for as long as these Powers continue to intervene and interfere<sup>43</sup> then refugees will relentlessly appear.

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42 It does not cater for refugees from natural disasters, it is only confined to African refugees and so on. See Chapter Five.

43 For example, in Honduras, Nicaragua, Argentina, Afghanistan, Indonesia, Ethiopia, Somalia and Sudan.

Civil strife and ethnic conflicts will certainly create more refugees. The major colonial powers have left countries with fixed boundaries which did not take into account the ethnic origins, creeds, colours, languages, cultures and mixed populations. There is a trend for insurgents to campaign and use violent acts against these set boundaries. These campaigns, which create violence, repression and disturbances, will continue until governments are formed which will cater and satisfy the needs of the whole population. Constant challenges are being made to the existing systems which have produced substantial refugees. The colonial powers have a humanitarian duty to re-set the boundaries and agree to the wishes of the population if they do not want thousands of refugees arriving at their borders.

The current "greenhouse" effect on the world will create and produce many millions of refugees. The world will become warmer, affectively melting the ice-caps, and cause substantial flooding; and changes to the climate will also induce drought and famine. These factors will increase the flow of refugees.<sup>44</sup>

There is now a need for governments and the UNHCR to urgently convene another Conference of Plenipotentiaries to discuss the refugees of "today and tomorrow". There is now a need for a new Convention to be drafted which will give protection for the refugees. The international community must act now for the sake of human brotherhood and love.

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<sup>44</sup> Prediction is that within the next 30-50 years, the refugee population could result from 60 to 300 million. See Guardian 6th June, 1989.

## Postscript

There is a need to list below the possible recommendations which would form the basis for future development on the position of the refugee in international law and the work of the United Nations High Commissioner for Refugees.

## 2. RECOMMENDATIONS

It is recommended that:-

- (i) The existing definition of the refugee within the 1951 Convention and/or the 1967 Protocol should be broadened.
- (ii) The new definition of the refugee must cater for refugees fleeing from man-made and natural disasters.
- (iii) The new definition must include the old definition as well as the following:-

"The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order or drought, famine, earthquake, cyclones or any other natural disasters, in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek asylum and refuge in another place outside his country of origin or nationality."

- (iv) The new definition must cater for masses of refugees and not merely individuals.

- (v) The term "persecution" be defined.
- (vi) A new Convention must be formulated which would replace the existing 1951 Convention and/or the 1967 Protocol.
- (vii) The three basic solutions, namely, Voluntary Repatriation; Integration; and/or Resettlement in third States, be incorporated in the new Convention.
- (viii) The most favoured solution is Voluntary Repatriation<sup>45</sup> and it should be genuinely voluntary and without threats of coercion. The refugees should be allowed to return to their homelands without threat from their governments and with safety to life and limb. All refugees that have been voluntarily repatriated should enjoy the free choice of domicile and freedom of movement<sup>46</sup> within their homelands. These returned refugees should also enjoy the same rights and privileges including freedom of thought, religion, political and social opinions and should have the same obligations and responsibilities as any other citizen of their homelands without any discrimination.

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45 Integration and Resettlement in third States have caused practical problems which have resulted in violence and discrimination.

46 For instance, in Article 13 of the Universal Declaration of Human Rights and in Article 2 of the 4th Protocol of the European Convention on Human Rights.

- (ix) There must be installation of early warning systems in areas of high probability or possibly of refugees.
- (x) There is a need for international solidarity and co-operation if the refugees are to be given international protection and safety.
- (xi) Such a provision requesting international solidarity and co-operation be incorporated within the new Convention.
- (xii) There should be a provision, within the new Convention, which would allow the United Nations General Assembly to send teams of neutral lawyers to investigate refugee laws and regulations in the Member States.<sup>47</sup>
- (xiii) The richer States must contribute more in terms of money and logistics to those countries which are carrying the heavy burden of refugees.
- (xiv) A new Convention should establish an international code or rights and privileges for the refugees. These rights and privileges should contain the following: the right to family; right to adequate living; prohibition from torture or cruel inhuman or degrading treatment; protection for children; non-discrimination between refugees and nationals of the asylum State; work for

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<sup>47</sup> Prima facie, to investigate whether the laws and regulations are not detrimental to the refugees, and that the refugees do have access to basic human rights.

refugees (unconditionally); equality of treatment; right to join a trade union; right to living standard; right to adequate food; right to high standard of physical and mental health; right to motherhood; right to life; no-one shall be arbitrarily deprived of life; right to exemptions from slavery and forced labour; freedom of thought or conscience; right to recognise a person before the law; presumption of innocence unless rebutted by guilt; right to public trial; right to refrain from interference with his privacy, family or home, his honour or his reputation; if the refugee is arrested he or she should be informed of the reasons of arrest in the language he understands; right for a full and public hearing; the right to marry; right to conduct of public affairs; access to public service; and right to peaceful assembly.

- (xv) A provision of "temporary residence" be incorporated within a new Convention.
- (xvi) Governments should collect and collate information which affects refugee flows and refugees in general.<sup>48</sup>
- (xvii) A special "forum" be set up either universally or regionally, in which government offices, courts and

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<sup>48</sup> Although the Non-Governmental Organisations (NGO's) are doing such a job. For instance, the British Refugee Council have collected, collated and disseminated information on all regions of the world which are affected by refugees.

tribunals, human rights commissions, can be explored and perhaps exploited. The aim and objectives of such a "forum" would be to grant the refugees human rights and to ensure that these rights are not violated.<sup>49</sup>

- (xviii) A specially appointed Representative be set up, who could formulate reports on the regions which contain high concentrations of refugees. These reports would study situations which appear to reveal a consistent pattern of gross violations of human rights, as provided in Commission Resolution 8 (XXIII)<sup>50</sup> and Economic and Social Council Resolutions 1235 (XLII) and 1503 (XLVIII).<sup>51</sup>
- (xix) The example of the 1969 OAU Convention relating to refugees, should be followed. It is the most appropriate and suitable instrument which deals with the refugee issue. Areas of definition of refugee, asylum, voluntary repatriation and solidarity should be used as examples when formulating a new refugee Convention.

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49 Irrespective of red tape bureaucracy or whether the refugee and his human rights are separated by government institutions/bodies. This recommendation is quite different to recommendation (xii).

50 Commission on Human Rights.

51 This Representative would be designated by the Commission on Human Rights and his report would be presented to the Commission itself.

- (xx) The 1969 OAU Convention relating to refugees, should encourage its Member States to close the gap of policy and practice in Africa.
- (xxi) In Africa, a "forum" be set up, which would note and observe the various national legislations and laws in Africa.<sup>52</sup>
- (xxii) The OAU should set up guidelines which would cover instances where people have been displaced within their own territories, stricto-sensu, these people would not be classified as de jure refugees.
- (xxiii) The Member States of the OAU must exercise flexibility and pay attention to humanitarian requests from States who are suffering because of the refugees. The OAU must, once again, offer guidelines which would cover instances of flexibility in response to refugee definitions and its related problems.
- (xxiv) The domestic systems of the Members of the OAU must be reformed in order that they can cater for the masses of refugees. Individual assessment should be halted in

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<sup>52</sup> This "forum" would make sure that the Member States are forming national legislations and regulations in accordance with the 1969 OAU Convention relating to refugees. This "forum" could also offer advice, assistance and representation to individual Member States on various matters such as the definition of the refugee in Africa. However, little would be achieved by changing the definition of the refugee in examples where persons have been displaced within their own countries. See, however, the next recommendation.

order for the masses to be granted refuge, asylum and subsequently safety.<sup>53</sup>

(xxv) There should be a set of procedures for determination of refugee status and asylum,<sup>54</sup> within a new Convention. It is important that these procedures be codified and formulated to which Member States could follow. It is readily agreed that these procedures will not cover every situation but they will act as obligatory guidelines for States granting asylum and refugee status.

(xxvi) In the United Kingdom, several changes have to be made in connection with the procedures for determination of refugee status and asylum. There should be a set of procedures for determining refugee status incorporated within the Statement of Rules; there should be a substantive right of appeal to those who are refused refugee status and asylum prior to any action to remove the asylum-seeker from the United Kingdom; more administrative staff is required by the Home Office who could process the applications with speed and efficiency; where possible, the asylum seeker should be interviewed by a specialist staff member who must

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53 A similar recommendation would also apply to the 1951 Convention. The 1951 Convention also caters for the individual refugee and not masses of refugees.

54 Something akin to the guidelines found in Chapter 6 of the UNHCR Handbook.

possess refugee law knowledge; where it is not possible to obtain a person with knowledge of refugee law, then the officers must be briefed thoroughly on the political, cultural and religious background of the country in question from which the asylum-seeker has fled; the asylum-seeker should be provided with a copy of the record of the interview which could be signed by him as being a correct record and can be used in appeal; in all instances of refusal, the asylum-seeker should be given reasons for such a refusal at the time of refusal; the United Kingdom immigration officers must change their attitudes towards asylum-seekers from the third world, they must be more tolerant, patient and sympathetic towards the asylum-seeker; the adjudicator<sup>55</sup> must be selected from the Lord Chancellor's department and not from the Home Office; re-appointment of such an adjudicator must not be a political one, h/she should be chosen for his/her legal expertise, knowledge of refugee law and fairness of natural justice; neutral parties should be allowed to attend interviews at ports and airports and without formal approval and these parties should be allowed to take accurate note of the interview and be allowed to produce the record as and when required; and, finally, tape recordings of the interviews should be allowed, which could ultimately be produced as evidence in appeals.

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55 Who makes the decisions at immigration appeals.

- (xxvii) The principle of non-refoulement must be given fundamental importance by continued discussions in the United Nations General Assembly, international and regional conferences and seminars. More positive wording has to be used to enable States to incorporate and implement this principle.
- (xxviii) The principle of non-refoulement be applied to persons irrespective of whether they are de jure or de facto refugees.
- (xxix) The provisions of "non-rejection" and "admission" are to be incorporated in the new Convention.
- (xxx) States should be free to condemn States that are continually refouling refugees.<sup>56</sup>
- (xxxi) Likewise, as above, the United Nations General Assembly and perhaps, in severe cases, the Security Council should condemn States that continually refoule refugees.
- (xxxii) The General Assembly of the United Nations must monitor cases where refoulement has taken place.
- (xxxiii) Article 33 of the 1951 Convention and the 1967 Protocol should be broadened to cater for instances of mass migrations as well as individuals.

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<sup>56</sup> Strong diplomatic protests should be sufficient.

- (xxxiv) A provision be formulated which would prevent the refoulement of the boat people back to sea, where they may face dangers to life or limb.
- (xxxv) A clear definition of the concept of asylum is to be incorporated within a new Convention.
- (xxxvi) Asylum be a fundamental part of human rights.
- (xxxvii) An automatic right of asylum should be granted as long as the asylum-seekers are "genuine refugees".
- (xxxviii) Pressures should be exerted by NGO's, other organisations and groups,<sup>57</sup> upon governments to repeal various deterrent measures such as "visa requirements" and "transportation fines".<sup>58</sup>
- (xxxix) There is a need for standardization of eligibility for asylum.
- (xL) Governmental politics should not be allowed to influence judicial processes in cases of eligibility for asylum.

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57 Who deal with refugees.

58 Continued protests, campaigns and media pressure should be sufficient.

- (xLi) There is now a need for a higher body or tribunal<sup>59</sup> to be set up by each Member State of the 1951 Convention and/or the 1967 Protocol. This body or tribunal would be higher in authority than the highest court within the Member States. This body or tribunal could evaluate and assess decisions relating to eligibility for asylum.
- (xLii) The UNHCR be allowed to take part in proceedings before the International Court of Justice, although the UNHCR is not a State,<sup>60</sup> especially where refugees' lives are at stake.
- (xLiii) The UNHCR should play a more active role in promoting the solution of voluntary repatriation.<sup>61</sup>
- (xLiv) The UNHCR should increase its staff.
- (xLv) The UNHCR should promote itself more, especially in the media.

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59 Would comprise of lawyers who would possess specialist refugee law knowledge, along with members of the UNHCR. This body or tribunal would possess recommendatory powers which the courts could note.

60 The UNHCR, through the United Nations General Assembly, may ask the ICJ for advisory opinion on legal questions (Article 65(1) of the Statute of the ICJ). Article 34(1) of the Statute of the ICJ states that only States be allowed to be parties in proceedings before the ICJ.

61 As was the case in the Bilateral Agreement Between Afghanistan and Pakistan on Primarily the Voluntary Return of the Refugees. Done on 14th April 1988. See 27 ILM 577.

- (xLvi) The UNHCR must play a more active role on the physical security of refugees.
- (xLvii) The UNHCR be allowed to participate in talks between the expelling State and the expulsion victims.
- (xLviii) The UNHCR must establish and implement assistance programmes for returnees.
- (xLix) The UNHCR must continue the encouragement of States in order that they may accept the present refugee instruments.
- (L) The UNHCR must use its powers of persuasion, conciliation and advice towards States who are still uncertain of the acceptance of the refugee instruments.
- (Li) The UNHCR should hold "refugee days", "refugee weeks", training seminars for officials who deal with refugee status and asylum applications, training for judges and people involved in decision making, government officials in the departments of treatise in respective ministries, and refugee studies should be promoted in schools, colleges and universities.<sup>62</sup>

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62 Lessons, lectures on international refugee instruments, domestic laws and regulations which deal with refugees, along with supplements of the cultural, historical and political aspects involved in countries that are producing refugees.

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## CHAPTER ONE

### INTRODUCTION

A layperson is perhaps now more aware of the refugee and his problems than at any other time in history. The refugee is a person who has been driven from his home to a place where he hopes to secure safety, refuge and asylum. Whether the refugee escapes from war, intervention, civil war, persecution, drought, famine, earthquakes or cyclones, the most important point is that his life is in danger.

It is not an easy task to leave one's home and possessions and to escape without the certainty of refuge, safety and asylum. The sight of men, women and children escaping with the barest essentials indeed touches the hearts of many human beings.

Refugees are not comprehensively covered by international law and there is limited protection and assistance for the refugee. This doctoral thesis will examine, expound and analyse the position of the refugee in international law and the work of the United Nations High Commissioner for Refugees (UNHCR).

It is useful to begin with a brief note on the sources of international law. This note will not be an extensive study about the sources of international law but rather on the use of these sources in relevance to refugee law.

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