REFUGEE DETERMINATION IN THE THIRD WORLD

Formally recognized refugees in the Third World. What are the criteria for refugee status and what rehabilitation assistance does it accord them in various national settings?

by

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ABSTRACT

The paper describes the universal refugee definition and demonstrates how it has been expanded through the extension of the UNHCR Mandate following Resolutions adopted by the UN General Assembly, and further through parallel developments in Third World regions. This new and widened refugee definition is found in documents like the African OAU Refugee Convention of 1969, the Latin American Cartagena Declaration of 1984 and the conclusions of an Asian Group of Experts in 1981.

On the basis of this definition the paper further discusses basic requirements and legislative and administrative arrangements needed for refugee determination in the Third World particularly in respect of mass influx situations.

The concluding observations focus upon the emergence of new concepts in Human Rights and refugee law, their interdependency with each other and with economic, social and cultural development and the developmental aspect of refugee assistance and thus of refugee recognition.
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BASIC ASSUMPTIONS

The author of this paper finds himself confronted with three questions: Who is a refugee in the Third World? How can that refugee be formally recognised? How does such recognition affect his prospects of being assisted?

The first question is the least complicated or difficult to answer. A refugee is defined as such through the provisions of international law, by treaty or by custom, sometimes confirmed in national legislations - which may even expand the definition further. Therefore and in order to put some constraint on the confusion in international debate, the term 'refugee' should be reserved for individuals who qualify as such under legal definition. A short expose over legal criteria for refugee recognition in the Third World will be given below. It will also dwell on those who are excluded from refugee status - because they have committed crimes against mankind for example - and on those who have ceased to be refugees according to the instruments of international legal agreements. In this connection an attempt will also be made to scan concepts like 'displaced persons', 'economic refugees', 'victims of natural disasters', 'uprooted' etc. with the purpose of indicating to what extent such categories could be distinguished from refugees of if there are cases of overlapping.

The second question on how formal recognition shall be processed and achieved is more difficult to answer. It involves issues such as differences between the considering of individual asylum seekers and the handling of a mass influx of refugees, how to establish functioning administrative machinery in developing countries, the safeguarding of refugees' and first countries' rights and duties in crisis situations. I will try to discuss and indicate a few solutions - good and bad in my opinion - drawing mainly from African experience. It is however important to remember that the right of
asylum in international law is the right of a state to grant asylum, not of the refugee to acquire it. By acceding to international treaties or by enacting domestic legislation a state may give the refugee a right to asylum but it is still done by an act of the sovereign state. Even though there is a most encouraging development in the world to develop such refugees' asylum rights, we have to be aware of the underlying principle to understand the following: The formal recognition of a refugee is an act of a state. Refugee determination is conducted by the government of its agencies in the country of asylum whether it is the question of temporary or more lasting asylum. International organisations can be helpful in the proceedings but they cannot take part in the decisions unless the state in question allows them to do so. Therefore, when discussing determination proceedings and their proper functioning, the different roles of governments, inter-governmental organisations (IGOs), and non-governmental organisations (NGOs), must be observed.

The most important international organisation in this area is of course the one headed by the UN High Commissioner for Refugees, UNHCR. Particularly intricate problems do arise in cases where a state refuses or abstains from recognizing as refugees persons who are such under the mandate of UNHCR or other organisations.

To the third question on what rehabilitation is accorded refugees upon their formal recognition in various settings, I cannot give any kind of simple answer. Anyone who considers for example UNHCR-refugee statistics over populations in need of assistance in various parts of the world and who compares these with the budgeted sums for assistance to the same areas in the same year and takes the trouble to break it down per capita of assisted refugees, will be astonished to say the least.

Thus - to take one striking example - in 1979 the assistance given in the UNHCR budget was US$ 11.3 per refugee in the Sudan while US$ 207.2 in Malaysia. There is as I see it
no automatical, law-bound or foreseeable relationship between recognition of and assistance to refugees. This however is not to say that formal recognition should not be of utmost importance for being accorded assistance. Without the international assistance given today probably the majority of the world's known and recognized refugees would have perished. Or would they not? I will however in the end of this paper try to meet the challenge of the third question with a few general observations.

In this connection and at the outset I feel the need to state that reliable refugee statistics or demographic descriptions of refugee populations hardly exist. Not even the figures from the countries of asylum in the First World are to be trusted, because they all use different methods of selection and categorization when they feed their registers and their computers. In most Third World countries where there are estimates instead of censuses of their own populations, there is not even the pretention of refugee statistics. Still, conditions can vary from a fairly clear grasp over the number of refugees in settlements as well as new arrivals to uncontrollable and uncalculable situations of sudden mass-influx. This, in my opinion unnecessary, confusion on refugee definitions adds to the errors. The governments in refugee receiving countries are often accused of inflating their figures while UNHCR has shown a tendency of underestimating while NGOs are somewhere in between. But inspite of this tangled state of affairs a certain consensus seems to have been reached through the years of international pre-occupation with the global refugee problem, the close watch over developments in single countries and international gatherings like the two conferences in Geneva on assistance to refugees in Africa in 1981 and 1984, ICARA I and ICARA II. But there is no solid base for being more exact than to say that there are between 12 and 18 million refugees in the world today. A few percent of them, almost entirely of urban background and
with resources such as finance, training, education, contacts, wit or will, can be found in the rich and industrialized countries, some of them as clandestines but most of them as individually recognized refugees. The millions are in the Third World. As far as we know the majority of these millions are children and most of the adults are women. This should not be forgotten even if I occasionally fall in to the habit of referring to the refugee as 'he'. It is further assumed that the overwhelming majority of these refugees are of rural or semi-rural background, that literacy is low, that they have in most cases settled near their country of origin in a neighbouring country seldom having crossed more than one international border - although in some cases several times - and that they want to return to their homes or what is left of them as soon as conditions allow a safe repatriation. That refugee repatriation shall be entirely voluntary is a basic and generally recognized principle in international refugee law.
WHO IS A REFUGEE?

Starting from the universal refugee definition we will then seek out the complimentary provisions in regional international instruments, customary law and in some cases domestic legislation in the following Third World regions: Africa, the Middle East, Latin America and South East Asia.

The 1951 Convention, the 1967 Protocol and the UNHCR Mandate.

The definition of a refugee as contained in the 1951 Geneva Convention relating to the Status of Refugees (189 UNTS 137), in this paper to be referred to as the Geneva Convention, is often said to be eurocentric and outdated. I would agree with this but I also have to agree with those experienced diplomats, politicians and international lawyers, who find it totally unrealistic to expect for the time being, that international consensus could be reached on amendments to the Geneva Convention. Therefore we are bound to continue our support and promote another development: The Geneva Convention is the universal basic definition which can pragmatically be expanded, when need arises by extending the mandate of the UNHCR through resolutions by the UN General Assembly and by the adoption of regional instruments complementary to the universally respected Geneva Convention.

The central part of the Geneva Convention's definition says, that

...the term "refugee" shall apply to any 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.

From the beginning the Geneva Convention was limited only to events in Europe and having occurred before 1 January 1951. With the adoption of the 1967 Protocol relating to the Status of Refugees (606 UNTS 267) a possibility was made available to abolish the geographical and the time limit. Most of the states have made use of this opportunity. It was with the 1967 Protocol that the Geneva Convention became the universal instrument of refugee law. The Convention has been ratified by about one hundred states and enjoys its strongest support in Western Europe, Latin America and Africa. The USA, which has signed the Protocol but not the Convention, nevertheless respects the latter. Finland has ratified it and so has Jugoslavia. On the other hand, no country in the Eastern Block has acceded to it. In the Middle East the only signatories have been Iran and Israel. In the Far East progress of refugee law has been slow but since 1980 the important ratifications of Japan, the Peoples' Republic of China and of the Phillipines have been made. Even states which have not so far acceded to the Geneva Convention do generally respect the principles enshrined therein. These have therefore taken on the dignity of international customary law in territories which are not directly bound by them as by treaty law. This is an important aspect when considering refugee determination in the Third World.

In addition many developing countries have hesitated to become contracting parties to the Geneva Convention not because they are not willing to receive and protect asylum seekers but because of the far-reaching rights and favours it accords to refugees, favours that these countries cannot always grant their own nationals - for instance education or social security. In other cases Third World countries have been very negative towards receiving refugees on their soil.
A comparison between some countries in South East Asia and some countries in Africa is very flattering for the latter in this respect. Such different attitudes to the phenomenon of refugees are of course decisive for the penetrating force of the Geneva Convention as customary law in various places. Still however I maintain that it is a question of customary law directly related to universal standards of humanitarian and civilized behaviour. I will allow myself a small digression to illustrate this.

As already stated, the Soviet Union and the other countries in the Eastern Block - except Jugoslavia if it should be included in that group - have not acceded to the Geneva Convention. Nor do they participate in international refugee work like funding the UNHCR or sending delegates to conferences of ICARA-type, etc. But there are refugees in these countries, though in the cases I know about always as students. They might even be refugees from regimes which the Soviet Government enjoys friendly relations with, like Eritrean students from Ethiopia or Kurdish students from Syria. As long as these students do not make a nuisance of themselves however, they can live and study in peace at the expense of the host country whether they are at the university in Prague or Moscow or elsewhere. Only if they enter into political activities, are they told to leave. They are not sent back to their country of origin where they may risk persecution however. They are free to seek asylum in another country. I have met many of them in Sweden.

But let us turn back to the refugee definition in the Geneva Convention. This classical definition based on the concept of "well-founded fear", which seems to be an objective criterion until one realises, that a certain fear may be less well-founded in one individual than in another, which brings us back to the subjectivity of the asylum seekers, and so on. This approach is very much focussed upon the individual even if the reasons of race, religion etc. can open a way to more collective refugee recognition of a prima facie character. Persecution is not defined in the Geneva
Convention. It is supposed to define itself in a circular way. Persecution is at hand when it is of a nature to inspire well-founded fear and the fear is well-founded, when it is caused by the danger of persecution. When this definition was drafted - on earlier patterns - more than thirty years ago the authors probably had less difficulties with the interpretation and the application of this text, than we do today. What they had in mind was the European experience from the second world war and the refugee situation in Europe thereafter. The eurocentricism of the Geneva Convention therefore was not only tied to the geographical limitation prevailing before the 1967 Protocol. It lies instead imbedded in the very construction of the instrument itself not least in the refugee definition. The world was soon forced to realise that people were compelled to leave their home-countries and seek safety elsewhere for many other reasons than the fear of individual persecution based on race or political opinion or any of the other three classical causes. Armed conflicts of one kind or another, serious disturbances of public order and many sorts of pressure and oppression can make life so dangerous and unbearable that people cannot stand it any more. They have to flee to save themselves. Such safety-seekers who were refugees but who were not covered by the Geneva Convention became the centre of much debate, often under the name "de facto refugees". Most of them originate in Third World Countries and most of them also have found refuge in such countries. They are a typical Third World phenomenon.

After much hesitation and discussion the de facto refugees came to be recognized as such in most First World countries either directly by legislation granting them asylum or by generous practice in issuing residence permits. Besides, as de facto refugees, they may be referred to as B-refugees, safety-seekers in a refugee-like situation, etc.

In some regions of the Third World the problem was approached in a more realistic way and, particularly the African solution, to which we will shortly return, has had a considerable impact also on the international
discussions and developments in this area. What we see here is the growth of refugee law based on the Geneva Convention but still outside its framework.

A few more things have to be said in this paper about the Geneva Convention's refugee definition. As pointed out the Convention does not give any direct guidance as to the interpretation of the concept of persecution. But persecution can be understood in terms of denial of basic Human Rights. If a person in the country where he is living risks being subjected to torture or to cruel, inhuman or degrading treatment or punishment; or if he can be arbitrarily arrested or detained there; it is obvious that he is in danger of being persecuted in the sense of the Convention. This was clear from the very beginning and such opinion could find support - if ever needed - in the Universal Declaration of Human Rights (GA Res.217(III) 10 Dec. 1948). During the nearly forty years since the adoption of the Declaration, the international law of Human Rights has grown to a very complex and comprehensive body of rules and principles. One has to assert with a sigh that the world would be a happy place to live in if all these instruments of Human Rights were to be held in respect and implemented, but on the other hand we can not measure the preventive effects of all these efforts and the endless discussions around them and we do not know how much worse things would be or how much more suffering there would be without them. Anyway, the established interrelationship between basic Human Rights and the concept of persecution in the form of the denial or the violation of these rights remains. The more detailed and sophisticated the Human Rights' system turns out to be, the better we can discern the evil methods and compositions of persecution, so that we can recognize its escaping victims and grant them asylum. To give a few examples there are the international Convention on the Elimination of All Forms of Racial Discrimination 1966 (660 UNTS 195), the International
Covenant on Civil and Political Rights also of 1966 (GA Res. 2200(XXI)) and the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 (GA Res. 3068(XXVIII)). There are agreements against slavery, terrorism and torture. There are others in order to protect the victims of war such as prisoners of war, the wounded and civilians, etc. The expression "basic" Human Rights has been used in reference to them as means for establishing what shall be considered as persecution under the Geneva Convention. The Human Rights law has undergone a rapid and extensive development. Scholars now refer to first generation rights, second generation and also rights of the third generation. What is a "basic right" is a question that is met with different answers from time to time and from place to place. Not to be subjected to torture is a basic Human Right everywhere. Where torture occurs it is one of the most serious violations of the international law of Human Rights. But if someone is denied education in a country which has not yet been able to build up an educational system, it does not of course constitute a breach of the law. But on the other hand, if someone is discriminated against and refused to enter school because he belongs to a minority, then again it is a different matter as the principle of non-discrimination is one of the most important and most often repeated in a number of international Human Rights instruments. Such discrimination can eventually in combination with other circumstances constitute persecution.

International refugee law is not separated from the international law of Human Rights. It is a part of it and it grows and develops with it.

Brief mention should here be made to the existence of complimentsaries to refugee law on the universal level. There is the 1957 Agreement relating to Refugee Seamen (506 UNTS 125), which has nothing to do with so called boat-refugees, but which adresses itself to some specific
problems relating to refugees who earn their living serving on mercantile ships. Further, there is the 1954 Convention relating to the Status of Stateless Persons (360 UNTS 117) aiming at according to stateless persons, defined therein, very much the same protection and favoured treatment as given refugees under the Geneva Convention.

Among the universal instruments we also find the Statute of the Office of the United Nations High Commissioner for Refugees (GA. 428(V)) of 1950. Already during the inter-war period at the time of the League of Nations a Commissioner had been appointed. Art. 6 of the present Statute outlines the extension of the UNHCR and offers inter alia a refugee definition, which resembles but is not identical to the one contained in the Geneva Convention as quoted above. This part of the Statute reads:

The competence of the High Commissioner shall extend to:...

...Any person who...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...

What has happened however - and this is very important - is that in addition to refugees as defined in the Statute and in the Geneva Convention many other categories of persons finding themselves in refugee-like situations, have in the course of years come within the concern of UNHCR in accordance with a great number of General Assembly and Economic and
Social Council (ECOSOC) resolutions.\(^1\) When the UNHCR offers protection and assistance to such safety-seekers all over the world it does so because the UN has brought them under the mandate of the UNHCR, in accordance with decisions of universal implication. Such mandate-refugees have sometimes gained UN recognition in this manner after previously having been given refugee status under regional instruments. In other instances they have enjoyed the good offices of the UNHCR before they were given refugee status on the regional or national level. In this way the international community has step by step expanded the universal concept of refugeehood to cover even those who need that cover but who would not be fitted into the original definition of the Geneva Convention, which however remains the basis for all these subsequent additions and expansions.

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Those who are excluded from refugee status and those who have ceased to be refugees.

We have dwelt upon the most important positive elements in the universal criteria for refugee determination. They tell us who shall be included in the refugee definition and be accorded refugee status. Such rules are called inclusion-clauses. But there are circumstances, which can exclude a person from refugee status although he might otherwise qualify and be eligible. They are regulated in exclusion-clauses. Finally the conditions which once turned someone into a bone fide refugee by definition, might have changed and ceased to exist so that there is no more ground for the former refugee to enjoy refugee status and rights. Therefore there are also cessation-clauses. We shall have a brief look into the exclusion- and cessation-clauses in the Geneva Convention.

The exclusion-clause in the Geneva Convention names three categories of persons to which the provisions of the Convention does not apply. The first group are those who receive - or who are supposed to receive one is tempted to say - protection or assistance from organs of the UN other than UNHCR. Today the only category of this kind is the Palestinian refugees in the Near East, who ought to be assisted by the UN Relief and Works Agency for Palestine Refugees in the Near East, UNRWA. It should be noted however that according to the Convention:

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the General Assembly of the United Nations these persons shall ipso facto be entitled to the benefits of this Convention.

This means among other things that a Palestinian refugee lawfully staying in a country outside the UNRWA operational
area shall be treated according to the Geneva Convention and the above mentioned Convention relating to Stateless Persons.

The second category in the exclusion clause are such persons who by the competent authorities in their country of residence are recognized as having the rights and obligations of nationals.

The third category is reserved for certain malefactors. Thus the Convention shall not apply to any person with respect to whom there is serious reason that he has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge and prior to his admission to that country or, finally, acts contrary to the purposes and principles of the UN. A refugee who commits a crime in the country of asylum shall be punished according to the law of that country following a conviction reached through due legal process.

The cessation-clause lists the following circumstances leading to that the Convention shall cease to apply to a person: if he has voluntarily re-availed himself of the protection of his country of nationality or re-acquired such nationality: if he enjoys the protection of a country of new nationality: if the circumstances in connection with which he was first recognized as a refugee have ceased to exist. These are the most important items on that list.

These exclusions and cessation clauses in the universal instrument of refugee law can be found in similar form also in other refugee law instruments, but we will not come back to them in this paper.
Africa.

There are more refugees in Africa than in any other continent. The African peoples and governments have received them with a generosity which is also without parallel. Finally Africa: as a region has been leading the Third World in adopting international legal instruments to redress the plight of the refugees. A few glimpses of the historical background are therefore motivated preceding the presentation of the African refugee definition.

Early history in Africa is so much more than ancient Egypt. The Nok and Ife terracotta sculptures from present Nigeria and dating from several hundred years BC, the architecturally and metallurgically skilful Kingdoms of Kush in present-day Sudan and Axum in Ethiopia, the mediaeval centre of learning and science in Timbuktu in today's Mali, the powerful Obas of Benin, their artful smiths and mounted knights in heavy armour meeting the astonished European visitors only recently emerged from the Middle Ages, East Africa's coastal swahili-culture connected in trade with the Arab world, India and even with China, the enormous castle Great Zimbabwe probably erected between 1100 and 1500, should be sufficient to illustrate the point.²

One cannot know what turns the history of Africa would have taken, if slavery and colonialism had not deeply affected the continent. During some 300 years Africa was deprived of its human resources and its civilizations were destroyed or deeply perverted by the slave trade, which flourished under the protection of European, American and Arabic powers. This is one of the root causes underlying the instability of Africa and which cannot be overlooked as a generator of the traditional African response of fleeing the home village at the mere rumour of approaching danger.

². Without necessarily going as far as some writers who see the roots of all cultures in Africa. See for example Cheikh Anta Diop, Nations nègres et culture, Présence Africaine 1979.
The dark centuries of slave-trading did not come to an end until Africa found itself firmly in the irons of colonialism. By the beginning of this century, seven European states had practically divided all of Africa among themselves, while the descendants of the eighth still have their teeth dug deeply into South Africa. Only Ethiopia and Liberia remained free. Frontiers in Africa were drawn with straightedged rulers at conferences in Europe, cutting through peoples, tribes, clans and families and splitting up ecological units, pasture grounds and market areas. For their own gain and profit, the distant European countries firmly controlled the African colonies, steering the establishment and development of administrations and structures.

The decades following the second world war were those of decolonialization all over the world. As Africa emerged from colonial domination, it was with a legacy of unresolved conflicts, territorial disputes, latent and acute economic crises, unnatural frontiers and ethnic combinations and also in some cases brutal military leaders, who had been trained as non-commissioned officers in colonial armies. The peoples expected more from independence than just political freedom, but there were few means or adequate tools to satisfy these expectations. Impatience, dissatisfaction and instability added to the problems of innumerable refugees to all other concerns burdening the leaders of new Africa. They in their turn sometimes aggravated the problems with intolerance because of concern for national security of their own and exaggerated fears for competition and political rivalry.

During the 1960s about two thirds of the present member States of the OAU won their independence. The numbers of refugees although modest compared to what is seen today were alarming. By the end of that decade about one million people needed protection and assistance. This was the background to the

3. This description of the background is essentially taken from the author's paper, Refugees, Law and Development in Africa, 1982, Michigan Yearbook of International Legal Studies.
first Conference on the Legal, Economic, and Social Aspects of the African Refugee Problem, held in Addis Ababa in October 1967.4

At the time of the Addis Ababa Conference it was generally assumed that almost all African refugees had originated in countries still under colonial or white minority regimes. The Conference considered that the solution to the problem increasingly depended "on the abolition by all possible means...of racist regimes and policies of repression practised in the Southern part of the continent, the non-independent territories and by minority governments." No other causes to the refugee exodus were directly reflected in the statements made at the Conference. This is one of the explanations to why the Conference did not have much to say as far as the question, 'who is a refugee' is concerned. The other explanation is that at this time there was only the definition in the Geneva Convention in existence. The 1967 Protocol which had expanded the validity of the Geneva definition had been adopted a few weeks before the Addis Ababa Conference. Therefore it is not surprising to find that the Conference concentrated on recommending the OAU Member States which had not already done so to accede to these two instruments. Many of them did.5

But there is (in. Rec. II) an interesting reminder that African States in addition to the Geneva definition as extended by the UN Protocol of 1967 "should take into account the specific aspects of African refugee situations with regard in particular to the definition of an African refugee".


This emphasis on an African refugee points forward to concepts wider than those in the Geneva Convention. The Addis Ababa Conference went further (in Rec. III) in noting that this Convention does not contain provisions for the right of asylum, and recommended African States to use their best endeavours consistent with their laws and constitutions to admit all refugees and to promote the settlement of those refugees who, for well-founded reasons, do not wish to return to their country of origin or nationality. No person should be subjected by an African State to measures like rejection at the frontier, forcible return or expulsion, which would compel him to remain in or return to a territory where his life, physical integrity or liberty would be in danger for reasons spelled out in the Geneva Convention.

Although the assumption that the majority of the refugees in Africa had been driven out by white minority or foreign colonial rule dominated the public political statements, there was knowledge in many quarters that reality was in fact more complex. During the late 1960s almost half the African refugees originated from Angola, which did not win independence until 1975. Other major refugee-groups came from Congo, Rwanda and Sudan however, countries which had been independent for many years. The direct causes had to be sought in internal political change in Congo, violent ethnic conflict and persecutions in Rwanda and for Sudan's part, in the civil war in Southern Sudan, that was not settled until the Addis Ababa agreement in 1972. Facts like these were in fact known to those engaged in the preparations for the Addis Ababa Conference.6

Also at this time a group of African expert lawyers were labouring with the 'travaux préparatoires' for an African refugee convention. The Addis Ababa meeting stimulated this process and in 1969 the Heads of State and Governments adopted the OAU Convention Governing the Specific Aspects of Refugee

Problems in Africa, which entered into force in 1974, hereafter to be referred to as the OAU Convention (UNTS No. 14, 691). It is within this instrument that the most important step is taken in international law to expand the refugee definition from the eurocentric and individual-oriented one of the Geneva Convention and into a concept that can correspond to the demands of the massive groups of safety seekers in the Third World and the causes of their fears.

The positive elements, the inclusion clauses, of this African refugee definition are presented in two parts. The first part simply repeats the well-known definition of the Geneva Convention with its "well-founded fear" of being persecuted for any of the five classical reasons of race, religion etc.

The second part shall be quoted in extenso:

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. (Art. 1.2.)

This part does not speak of the subjective fear of the individual but of objective criteria: unbearable and dangerous conditions which set entire populations on the run. This is the legal basis for admitting refugee masses upon a group determination of their status. The wording "events seriously disturbing public order" should adequately cover a variety of man-made conditions which do not permit humans to reside safely in their countries of origin and certainly also natural disasters if aggravated by violence or political action or neglect. The African definition solved much of the problem, which has so often
been discussed under the term *de-facto* refugees, by including among the refugee-generating factors the warlike or suppressing events or serious disturbances of public order which are tragically common in the world today. It also avoids other difficulties sometimes encountered under the Geneva Convention's definition, when the refugee generating conditions are only found to prevail in a part of the country of origin. The African definition therefore has had an impact in many parts of the world outside Africa. For refugee definition in the Third World it is the obvious platform.

There are reasons to believe that the refugees of Africa have benefitted from the OAU Refugee Convention, but it has not diminished their numbers. In the ten years after its adoption the refugees in the continent redoubled several times resulting in estimates in 1979 of more than four million refugees in Africa. This time only about one-fourth of them were assumed to have originated in white minorityruled countries and consequently around three million in OAU member states. Since this estimate was made the differences in these proportions have become even greater as most Zimbabwean refugees could return in early 1980 following the independence of their country while the total numbers of refugees in Africa continued to grow in the 1980s. In 1977 a specialist described the situation like this:

...it is known that refugees in Africa belong, generally speaking, to two categories:
- massive, very often numerically important refugee groups of rural origin, and
- scattered individual refugees or refugee families living in urban areas.  

The latter category is similar from the refugee determination point of view, to refugees in Western European countries or earlier in Latin America, while the description on the whole, including both categories, should be relevant also in Asia and in present-day Central America.

The drastic and never-ending increase in the numbers of refugees in Africa led to a new major meeting, the Conference on the Situation of Refugees in Africa, held at Arusha in Tanzania in May 1979. The participation on ministerial level of thirty-nine OAU Member States, five African Liberation Movements recognized by the OAU, and a large number of Non-African States and International Organizations, made it an important gathering. The Arusha Conference adopted a considerable number of action-oriented and far-reaching recommendations, based upon the findings and the conclusions of the conference documents. The conference (in Rec. 2.1 and 2) recognized the definition in two parts as contained in the above-mentioned Art. 1, paragraphs 1 and 2 as the basis for refugee status in Africa and stressed the need for ensuring that African refugees are identified as such, so as to enable them to invoke the rights established for their benefit in the international instruments.

The conference also recommended (in Rec. 7.5.) that the United Nations and all its organs as well as non-governmental organizations in dealing with refugees in Africa should apply the 1969 OAU Refugee Convention including, of course, its refugee definition. The OAU Council of Ministers thereafter in a resolution expanded this recommendation to include also other International, Inter-governmental and Regional Organizations having specific refugee programmes. The General

Assembly of the UN finally in a particular resolution fully endorsed all the recommendations of the Arusha Conference. With this the African refugee definition of the OAU Convention has gained universal recognition legally and politically.

However, for a refugee who, after having crossed a border, and is then confronted by the national authorities of the country into which he has fled, international law, conventions and universal instruments are of little value if they are not reflected in valid law of this country and even instructions to its officers in charge of border control. If international conventions are to be implemented, their rules must be transformed or incorporated in the national legislation of each state party to the convention. Almost thirty African states have enacted national refugee legislations of one kind or another. There are different solutions to the problem how a refugee shall be defined in these domestic legal instruments. Their usefulness in implementing the international African refugee definition shall be discussed in the next chapter on refugee determination. In this connection I will only quote the Sudanese refugee defintion because it merges in a practical way the two parts of the African refugee definition and adds something which bears testimony to Sudan's own experience of who those are who have to seek safety in that country:

"Refugee" means any person who leaves the country of his nationality owing to fear of persecution or danger by reason of race, religion, or membership of any social or political group, or owing to fear of military operations, occupation, outside aggression, foreign domination or internal disturbances, and is unable or owing to such fear is unwilling, to return to his country, or if he has no nationality and has left the country, where he habitually resides, by reason of such events and is unable or

10. GA Res. 34/61 on 29 November 1979.
unwilling, by reason of fear, to return thereto. The term "refugee" includes also children who are not accompanied by adults, or who are war orphans, or whose guardians have disappeared and are outside the countries of their nationalities.¹¹

Before leaving the important and inspiring development of refugee law and definition in Africa, we shall only recall the Eighth Session in Bangkok in 1966 of the Asian-African Legal Consultative Committee, where a definition of the term "Refugee" was adopted. To this definition and various views expressed in connection with it by Asian countries we shall turn shortly.

First however it should be mentioned that the Heads of State and Government of the OAU meeting in Nairobi in June 1981 adopted The African Charter on Human and Peoples' Rights, also referred to as the Banjul Charter after the city where the OAU Council of Ministers approved of the final draft of the instrument. This is the most recent of the regional Human Rights treaties. Considering the topic of this paper it is of interest to note art. 12 of the Charter, which gives every individual the right to leave any country including his own and to return to his country, and the right when persecuted, to seek and obtain asylum in other countries in accordance with their laws and international conventions. This Charter will come into force three months after the ratification of a simple majority of the OAU Member States, currently 26. The progress of accessions has reached about half was.

The Arab countries and the Middle East.

The Arab countries along the northern coast of Africa are all members of the OAU. They are also members of the Arab League. This double affiliation brings them in under both African refugee law and its refugee definition as lengthily dwelt on above and under the particular positions of the Arab League with respect to the Palestinian refugees. The Arab policies towards the Palestinian refugee problem has resulted in - as has already been noted - the exclusion of this category of refugees from the definition and the UNHCR mandate under the Geneva Convention. The responsibility for the Palestinian refugees has instead been given to a specific UN organ, the UNRWA. The North-African Arab states in consequence are dealing with Palestinian refugees as Arab states, and with all other refugee categories as African states.

There are Palestinian refugees in Northern Africa but the overwhelming majority of them are in the Near East, where they constitute the dominating refugee problem in the area and the oldest refugee situation in the modern world. Among them a third generation are now being born as refugees. The determination of their status as Palestinian refugees seems to be one of the few things in their tragic destiny that has not offered any specific difficulties. But the presence for decades of this tremendous refugee situation in the Near East, its importance for the politics in the area in war and in peace, when such could be said to prevail, its impact upon Arab thought and motivation are such that it tends to dominate the concept of refugeehood in most Arab minds in such a way as to exclude other categories of refugees. This could explain why the Arab States in the Near East have not ratified the Geneva Convention unlike most of their Northern African brother states.

12. Sudan is the most Southerly African state to be a member of the Arab League. In March 1979 the Baghdad Conference of the League suspended Egypt's membership from the date of the peace treaty with Israel.
This however is not to say that there are no refugees other than Palestinian in these Arab countries. There are. It is well known for example that a considerable number of Eritrean refugees from Ethiopia have found refuge and employment in many Arab countries and that also refugees from other Arab countries and from Iran have likewise been received. Their true numbers are unknown however and their legal status is vague in outline and can not be summed up under any easily-made formula.

Nevertheless, humanitarianism and generosity in the Arab world is based upon the ethics of religion. Going back, even in pre-islamic tradition there is a Koranic injunction to protect those who seek protection and convey them to a place where they can feel safe and secure. A legal survey over the Arab states in this respect also shows that a great number of constitutions of Arab states advocate the respect of Human Rights and especially the right of asylum. But it is also recognized that the protection of refugees could be improved in these countries however, if these countries to a greater extent should ratify and implement the international instruments relating to the status of refugees.

At the end of the above section on Africa, mention was made of the Eighth Session in Bangkok of the Asian-African Legal Consultative Committee in 1966, which adopted a set of 'Principles Concerning Treatment of Refugees'. These principles, emanating from a consultative committee, which did not even serve what could be regarded as a strictly inter-governmental organization, are of course not legally binding for the participating countries in the way a ratified convention would be. Nevertheless they are of interest as they contribute to the development of international law on refugees particularly in the Asian region. They are


also the reflections of experience and the expressions of decent and humanitarian norms of behaviour.

Art.I of the Principles gives a definition of the term "Refugee".

A refugee is a person, who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group:
(a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or
(b) being outside such State or Country, is unable or unwilling to return to it or to avail himself of its protection.

To this is added a note that the delegations of Egypt (The United Arab Republic), Iraq and Pakistan were of the opinion that the definition of the term "Refugee" includes a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such a State, wholly or partially, by an alien with a view to occupying that State. One cannot help wondering whether the delegates from Pakistan had among them the gift of prophecy, considering that thirteen years later neighbouring Afghanistan was invaded by an alien, which has for all practical purposes occupied most of that country. A result of this is the presence in the beginning of 1985 of almost three million Afghan refugees in Pakistan. Another note to the principles informs us that the delegation of Ceylon (now Sri Lanka) and Japan wanted to clarify the expression "persecution" stating that it should mean something more than discrimination and unfair treatment but include "such conduct as shocks the conscience of civilised nations".
As already mentioned, Iran and Israel are the only States in the region which are parties to the Geneva Convention and the 1967 Protocol. If, for geo-political reasons, Turkey should be included in the region, then the above mentioned group would include three countries, as Turkey is also a party to these two universal instruments, but it should be noted, that Turkey maintains the geographical limitation and thus does not recognize as refugees any asylum seekers from outside of Europe. The sad fact is that these three countries generate more refugees than they receive. During the present decade most of the countries in the Near and Middle East have been affected in some way by foreign aggression, war between states or civil war, military dictatorship, religious, cultural, ethnical and political intolerance and persecution so as to create an abnormal situation. In the most extreme cases the international law of Human Rights including refugee law has been suspended due to anarchy, political authoritarianism or religious fanaticism.

But in many other countries where refugees have found a safe haven either in the name of traditional Arab and Islamic ethics or under the protection of heavily burdened UNHCR Branch Offices, I think it is correct to say that the question who is a refugee in the Near and Middle East is answered according to the basic guidelines of the Geneva Convention amended with principles derived from experience, which if formulated should be close to the African refugee definition and reflect also the observations of the Pakistan delegation at the 1966 meeting in Bangkok of the Asian-African legal experts, which have been cited above.
Latin America.

Latin America has a long legalistic tradition. As the case has been in Europe, dictators rise and fall having temporarily or partially suspended the rule of law. But the demand that the verdicts of courts and the decisions of authority shall have been reached in accordance with the law survives.

Latin America has also long been familiar with the concept of asylum and with a particular form thereof which is hardly practised outside this region, namely diplomatic asylum. The beneficiaries are usually defined as being sought "for political reasons" or "for political offences".  

Already in 1954 in fact—three years after the adoption of the Geneva Convention—the Organization of American States, OAS, adopted in Caracas the Convention on Territorial Asylum (OAS T.S. No. 34 at 89) and the Convention on Diplomatic Asylum (OAS T.S. No. 34 at 82). They are the important regional complementaries to the Geneva Convention in as much as they grant asylum. Essentially however they show that regulations of requests for extradition of fugitives from one state to another are the background for the growth of refugee law in the Americas. The rule of non-extradition of those accused of political crimes clearly is one sector of the wider aspect of asylum. These instruments can not even be said to focus a great deal on the concept of refugees as such. Only in two places in the Caracas Convention on Territorial Asylum does one find the term "refugee", political asylees or refugees" (art. 6) and "political refugees and asylees" (art. 9). Still in search of an answer to the question who is a refugee in Latin America the correct step is to study the definition of the beneficiaries of these two Conventions on asylum. In art. 2 of the Convention on

Territorial Asylum we read:

...persons who enter it (the Contracting State) proceeding from a State in which they are persecuted for their beliefs, opinions or political affiliations, or for acts which may be considered as political offences.

Art. 1 in the first section of the Convention on Diplomatic Asylum refers to:

Asylum granted in legations, war vessels, and military camps or aircraft, to persons being sought for political reasons or for political offences...

There has however been a tendency to expand protection beyond the limitations suggested by the notion of political crimes. This can partly be seen as the result of the impact of the Geneva Convention and its universal refugee definition. The Geneva Convention has a strong position on the South American continent but less so in Central America.

From the second world war and to the beginning of the 1980s the numbers of Latin American refugees were never negligible but neither were they very close to what was seen in Africa and Asia. It was more a question of thousands than of hundreds of thousands. The main concern was Human Rights and the appalling ways in which they were frequently violated in several Latin American Countries. Constant efforts to check this evil were made inter alia within the framework of the Organization of American States.

16. The authors explanation within brackets and not part of the treaty-text.
18. Still however in July 1985 Brazil and Paraguay although also parties to the 1967 Protocol, were exceptions to this pattern.
The Inter-American Commission on Human Rights was established in 1959. Its statutes had already been strengthened twice when, in 1969 the adoption of the American Convention of Human Rights (OAS T.S.No. 36), the "Pact of San José, Costa Rica" was enacted. It contains a comprehensive catalogue of rights limited only "by the rights of others, by the security of all, and by the just demands of general welfare, in a democratic society" (art. 32.2.). This Convention endowed the Inter-American Commission on Human Rights with power to receive individual complaints about violation of Human Rights, to make recommendations to member states and also to make reports to organs within the OAS. Thereby the Commission became a principle organ of the OAS. The reports on conditions in specific countries as well as the annual reports of the Commission have not seldom offered outspoken criticism against Member States in respect of lacking implementation of Human Rights and further to the point these reports have been published. The next stage took place when a Court of Human Rights was established having competence in and respect of matters relating to the fulfillment of the commitments made by the States Parties to this Convention.\(^\text{19}\)

The American Convention on Human Rights and the two organs created through it and for the implementation of its rules and principles, have of course contributed to presenting a clearer picture in Latin America on the nature of Human Rights and when and how a violation of such rights amounts to persecution. Thus it has also contributed to the definition of a refugee in this region, and as we shall soon see, to the development of that definition. So too have the new dimensions of the Latin America refugee problem, which made their début in the 1980s.

In April 1980 the Government of Peru made an urgent appeal to the international community to mobilize an effort to move more than 10,000 Cuban nationals who had clustered around the

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premises of the Peruvian Embassy in Havana. This certainly was a utilization to the utmost of the specific Latin American concept of diplomatical asylum. Since Costa Rica had allowed the Inter-governmental Committee for Migration, ICM, to operate from San José, an airlift started transporting the refugees from Cuba to San José and from there eventually further on to countries of resettlement. Upon this, the Cuban Government ordered the departure by boat to the United States of over 120,000 Cubans including those still lingering around the Peruvian Embassy. This incident although undoubtedly causing a mass-exodus, stands isolated in its nature from the more serious developments in Central America. Here hundreds of thousands of nationals of particularly El Salvador, Guatemala, Honduras and Nicaragua, find themselves as uprooted or internally displaced persons in their own country or abroad. Becoming a refugee in this area does not mean that individuals have found security as refugees and refugee settlements here are frequently the targets of the most brutal attacks of armed forces or death squadrons from neighbouring countries from which the government of the country of refuge cannot offer adequate protection. According to some serious reports there is in some instances even a lack of will to protect.

Obviously the majority of these sufferers and seekers of safety are not sought in their countries of origin "for political reasons or for political offences". Neither are they persecuted for their political or other beliefs or for any reason related to the individual. This might be true of a few but most of them certainly are not. No, they have been compelled to leave their homes for reasons similar to those in Africa and Asia. The conditions have become so unbearable and so dangerous that they cannot stand it any more. They have to leave. This is the background to the next step in the development of the Latin American refugee definition.

In November 1984 an important Colloquium on International Protection of Refugees in Central America, Mexico and Panama, was convened in Cartagena in Colombia. Under the auspices of the Government of Colombia it was sponsored by the Law Faculty of the University of Cartagena de Indias, Centro Regional de Estudios del Tercer Mundo, and UNHCR. All the Governments of the Ten States concerned in the area participated as did the United Nations Development Programme, UNDP.\textsuperscript{22}

The Colloquium, finding its starting point in the Contadora Act on Peace and Co-operation in Central America, was naturally aware of the fact that Central America is a region, where large-scale refugee situations exist but where some States had not acceded to the Basic and Universal Refugee Instruments. The Delegates therefore concluded that the Countries of the region should adopt national laws and regulations with a view to facilitating the application of the Geneva Convention and the 1967 Protocol. This should include also the adoption of the terminology of the Convention and the Protocol so that refugees can be distinguished from other categories of migrants. The most interesting and far-reaching conclusion from the point of view of refugee definition reads like this:

\begin{quote}
... in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as is appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in
\end{quote}

\textsuperscript{22} The States were Belise, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela, all represented by senior government leaders.
addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.\textsuperscript{23}

The conclusions of the Colloquium as found in the Cartagena Declaration on Refugees is an important contribution to refugee law and definition in Latin America.\textsuperscript{24}

\textsuperscript{23}Declaracion de Cartagena, trilingual publication in Spanish, French and English by UNHCR, Geneva in January 1985. The 1951 Convention mentioned in the above conclusion is identical with the one in this paper referred to as the Geneva Convention.

\textsuperscript{24} See UNHCRs Note on International Protection, July 1985, A/AC.96/660, to Ex.Com.s' Thirty-sixth session, p 13.
Before 1981 no Asian State had become a party to any international treaty on the protection or recognition of refugees, except Iran. National legislation related to refugees is found only in a few of these States and then often as limited provisions, like constitutional references for the granting of asylum or "established law of nations" or in regard to the non-extradition of political offenders. The impression I get upon having consulted a couple of cursory surveys is one of strict immigration control through the requirement of entry visas and sharp control at borders with little or no reference to refugees. Asian countries have not adopted any regional instruments relating to refugees or Human Rights. Except for a few Arab States in the Middle East no Asian countries are found among the signatories to the 1966 International Covenant on Civil and Political Rights, mentioned in the first section of this chapter, the most important universal Human Rights Treaty. Asia in other words has not been influenced by or contributed to the development of international refugee law or the international law of Human Rights.

However, Asia has during the last fifteen years seen what is with all probability the largest refugee movements in history and also seen most of these group disperse again. Unlike the African situation, Asian Governments have not conducted an open door policy towards refugees or tolerated refugee settlements of long duration. Resettlement elsewhere or repatriation seem to be the only solutions. Perhaps in Asia there is an historical unwillingness to absorb alien minorities. There have been incidents of ruthlessness and brutality shown by Asian Governments, criminal individuals and nota bene international shipping, in the case of the boat refugees from Vietnam. Other tragedies are less well known.

When considering this gloomy picture and contemplating the possible development of international refugee law in Asia, due account must be taken of the tremendous problems of large-scale influx and by the particular conditions existing in the Asian region. It should be remembered that Asia is more of a geographical designation than a homogeneous continent. It is indeed less homogeneous than the African and the Latin American regions. It is not even a continent strictly speaking. It consists of sub-continents, isolated landmasses and island realms. It has thirty percent of the world's landmass and nearly two-thirds of its population. In this enormous area, as a whole, culture, religion, ideology, language, history and ethnic questions are powerful factors for political and economic differences and for diversity and separatedness. A legal system that has emerged satisfactorily in another region is not by necessity adapted to Asian realities. If transplanted in Asia it must develop also on Asian contributions.

But let us go back some time in order to find a starting point of a chronology highlighting some of the events, which have brought the concept of refugee into Asian settings, with the purpose of seeing whether there is today an Asian refugee definition and what the nearest future might hold in this respect.

In November 1957 the UN General Assembly (GA) adopted a Resolution after having considered the problem of the Chinese refugees in Hong Kong and the need for emergency as well as long term assistance, appealing to the international community for assistance and authorising the UNHCR to use its good offices to encourage arrangements for contributions. In December 1962 the same category of refugees were still on the agenda of the GA, which then appealed for increased contributions and all possible aid to those refugees. The serious and long lasting refugee situation

26. 1167(XII).
27. 1784(XVII).
reflected in these resolutions and in the headlines and newsflashes during these years, have however failed to leave any imprint on Hong Kong legislation. No provision of domestic law recognises refugees. But refugees arriving by boat from Vietnam have been admitted and granted temporary asylum under a provision in the 1972 Immigration Ordinance giving the director of immigration certain discretion to make exemptions from the immigration control provisions.28

In 1966 the Asian-African Legal Consultative Committee adopted a definition on the term "Refugee", which we have already quoted in extenso. Its key-concept being "persecution or well-founded fear for persecution", which bears of course a strong resemblance to the definition of the Geneva Convention. The Pakistan and two other delegations wanted to extend it, as I have accounted for above. In the three following years three very important landmarks of international refugee law were erected: The 1967 Protocol, the Declaration on Territorial Asylum of the same year and thirdly the 1969 OAU Refugee Convention. The 1967 Protocol and the OAU Convention have been introduced earlier in this paper. Let us therefore consider the case of territorial asylum.

As pointed out at the very outset of this study, the right of asylum is a right of the state to grant it and not a right of the individual to acquire it. As was indicated earlier, the Geneva Convention does not regulate the questions arising as to where a refugee shall enjoy a more than temporary asylum. It does not answer the question on what territory the refugee shall be allowed to settle in awaiting a lasting solution. Hence the concept of "territorial asylum" and the efforts under this umbrella to solve a number of serious problems. So for example, states cannot agree upon a harmonised application of "the principle of the country of first asylum" and as a consequence try to throw the asylum seekers into "someone else's backyard", which, of course is not accepted, whereupon the refugee is sent further on becoming

a refugee in orbit going back and forth as a ball in a racket game between different states. Or, if a state grants refugees only temporary asylum under threat of expulsion — or worse refoulement — under so hard conditions and restricted time limits that the more humanitarian and compassionate members of the international community feel themselves victims of extortion.

Against this background, reading the 1967 Declaration on Territorial Asylum might appear slightly disappointing. Recalling a couple of articles in the Universal Declaration of Human Rights, there derives from them a few principles. The articles state, that anyone has the right to leave any country including his own (art. 13, para 2) and that the granting of asylum is a peaceful and humanitarian act which cannot be regarded as unfriendly by any other state (art. 14). The principles aim at the individuals rights to invoke these rules and the obligation of the states to respect each others acts in implementing them.

There was a hope however that the Declaration on Territorial asylum should in its day be followed by an international convention on the subject, complimentary to or eventually amending the Geneva Convention. Thus the Asian-African Legal Consultative Committee at a session in Kuala Lumpur in 1976 stated that the efforts towards the eventual adoption of a Convention on Territorial Asylum constituted a positive development and an important step in the consideration of humanitarian law relating to territorial asylum. But the UN diplomatic conference on Territorial Asylum failed to reach an agreement on a treaty and demonstrated that these were not the right time for amendments at the universal level. Development instead, as already seen in Africa and Latin America, is advancing in the regions

29. GA Res. 2312 (XXII).
30. For an analysis see A. Grahl-Madsen, Territorial Asylum, Stockholm, New York etc. 1980.
and through pragmatic ad hoc decisions of the kind illustrated by the GA Resolutions which are continuously extending the mandate of the UNHCR.

It was the nine-month war between East and West Pakistan resulting in the creation of the state of Bangladesh, which caused what must be assumed to have been the largest single refugee exodus in known history. Very near to ten million people were reported in India in early December 1971. The GA in a resolution adopted at that time, called for a statement that the international community had, "seldom been confronted with a refugee problem of such enormous dimensions as that of the refugees from East Pakistan in India", and endorsed the designation of the UNHCR to be the focal point for the co-ordination of assistance of East Pakistan refugees in India. The Indian government insisted on a maximum stay of six months and by February 1972 over ninety percent of the refugees had in fact returned to the newly independent state of Bangladesh. All parties concerned endorsed this repatriation including the GA and as things turned out it was with all probability an essentially voluntary return. But what would have happened if Bangladesh had not gained independence? The UNHCR still has a branch office in India dealing nowadays mainly with refugees under the UNHCR mandate.

The end of the war in Vietnam in 1975 led to a total political change in that country. It also generated the large exodus of new categories of refugees, many of them as "boat-refugees", with all the sufferings and dangers which are now associated with that word. Political events and armed conflict also in Laos and Cambodia through terror, hunger and disease added to a new horrible and dramatic refugee crisis of extreme complexity. I believe that more than 250,000

32. 2790(XXXVI).
33. Goodwin-Gill, supra note 15, p 111.
Vietnamese have been given asylum and settlement in the People's Republic of China. This important country since then has joined those States in the world which actively try to alleviate the sufferings of refugees and find solutions to their problems. The numbers of the boat refugees, the cruelty of their voyages and refusals from a few Asian states to receive them led to international response. The then UN Secretary General reacted on the emergency by calling a conference in Geneva in summer 1979 resulting in a structured burden sharing. Australia, Canada, France, Switzerland and, in this particular case, above all the US took upon themselves the most generous quotas. Intergovernmental organizations as well as voluntary agencies played important roles. In the beginning of the 1980s about half a million Indo-Chinese refugees had been resettled in fifty-seven countries through the programme of the Intergovernmental Committee for Migration, ICM. It should be noted that these refugees came from the entire area and that far from all of them belonged to the category of Vietnamese boat refugees. The 1979 conference also led to an agreement with the Vietnamese Government about a certain regularized departure of refugees. Under this arrangement a few thousand have left their country legally.

A different set of problems of a most intricate and difficult character were encountered in Thailand where, at the beginning of the 1980s about 300,000 waited for resettlement and assistance in makeshift camps near the border to their country of origin, under heavy guard from the Thai army which enforced a restriction of movement and sometimes also under brutal discipline from inside the camps where the forces which the refugees had fled from still held control. There was no official recognition of refugees in Thailand. Their status remained that of illegal migrants although forced repatriation did not take place on a large scale and UNHCR and other international

34. Carlin, supra note 20, p 18-19.
35. For a vivid description of these events and not least the problems of the UNHCR, see W. Shawcross, The Quality of Mercy, Andre Deutsch, London 1984, particularly p 302-328.
organizations were allowed to operate in the country *nota bene* although facing frustration testified to by many observers. Not until July 1985 do we hear about formal determination procedures for asylum seekers arriving in Thailand from Laos. The procedures are carried out by Thai officials in the presence of UNHCR representatives in the quality of observers. When these proceedings were introduced there were in UNHCR-assisted camps in Thailand 89,000 Laotian refugees, 32,000 from Cambodia and 6,000 from Vietnam.\(^{36}\)

It could be noted that individuals who left Vietnam after the end of the Vietnam war first had difficulties in being recognized as refugees. Thus the GA in a resolution referred only to "Indo-Chinese displaced persons", and the need for humanitarian assistance "resulting from events in the Indo-Chinese peninsula".\(^{37}\)

In April 1980, the Manila Round Table on Current Problems in the International Protection of Refugees, established a group of experts, drawn from a number of Asian countries. This Working Group of Experts met with UNHCR representatives at the International Institute of Humanitarian Law in San Remo in the beginning of the following year. The Group noted that a substantial body of international practice had established that the concept of "refugee" was one known to international law in general and that the GA and other bodies of the international community had established that refugees were persons of concern from a humanitarian and social and non-political point of view and above all that these refugees should be protected by the principle of *non-refoulement*. The Experts further noted that the concept of "refugee", and "displaced person" was found in domestic law and administrative practice of Asian States and since 1975 the GA in its resolutions have explicitly linked the term "displaced person" to the term "refugee" when referring to the general responsibilities of the UNHCR. It was believed that "displaced persons", who had

\(^{36}\) UNHCR-publication Refugees No. 21 Sept. 1985, p 7.  
\(^{37}\) 3455(XXX), 9 December 1975.
been compelled to leave their country of nationality or habitual residence as a result of armed conflict or other man-made disasters were entitled to international protection through the UNHCR. Reference was also made to the African definition of the OAU Convention. Many who were called "displaced persons" were statutory refugees. The Working Group was also of the opinion that though there was some justification for a distinction between a "refugee" and a "displaced person" it related in practice and principle to the question of durable solutions. The refugee then should be more likely to need settlement in the full sense of the word than "a civilian who was simply escaping the dangers of an internal armed conflict." Though I sympathise in general with the observations of this Working Group of Experts, I can not accept the view that the prospect for a durable solution should be the corner-stone for distinguishing between "refugees", and "displaced persons". There are many examples where there has been no doubt about an individual's status as a refugee under the Geneva Convention where they have been able to return to their homes after a short time in exile. We will return to these questions in a later section of this chapter.

However - and to finish the section on Asia - the Working Group came to the conclusion that:

"... in relation to Asia the definition of the term "refugee" which should be adopted was the definition contained in the Statute of the High Commissioner for Refugees and which should include every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either whole or part 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." 38

Now China, Japan and the Philippines are parties to the Geneva Convention.

Conclusion on a Third World Refugee Definition.

We are now in the position to compare the African refugee definition of the 1969 OAU Convention with the Latin American definition recommended in the Cartagena Declaration and with the one suggested for Asia by a Working Group of Experts. The African definition was the first and has alone among them so far reached the rank of treaty-law. It has also been shown that the other definitions have been influenced or rather inspired by the solution contained in the African instrument. But nevertheless each attempt at defining the concept of "refugee" is a reflection of the experience of the refugee problems as they have appeared in that specific region. Therefore, seeing the striking resemblance between the three definitions it is justified to conclude that there is a common refugee definition which does function in the Third World, in Africa by the force of a convention while in Latin America and Asia mainly according to international law by custom to some extent supported by regional and national legislations and administrative practices. International humanitarian standards are the basis of the structure.

The common elements of the Third World refugee definition can be listed like this:

A. Cases of well-founded fear of being persecuted for any of the reasons mentioned in the Geneva Convention and/or the Statute for the office of the UNHCR.

B. Cases where lives, safety and freedom are threatened by events seriously disturbing public order like external aggression, occupation, foreign domination, massive violations of human rights or generalized violence in the whole or part of the country of origin.

This interpretation is in harmony with a conclusion adopted in 1981 by the Executive Committee of the UNHCR Programme. The somewhat richer text of the Cartagena Declaration compared to

39. No.22(XXXII) Protection or asylum-seekers in situations of large-scale influx.
the OAU Conventions as repeated in this summary does not reflect any material difference - only exemplifications in the former as to the interpretation of the latter.

Finally it should be remembered that no one is a refugee under international law until he has managed to leave his country of nationality or origin.
Categories of "uprooted" not to be confused with the concept of "refugee".

In the title of this section I have made use of the word "uprooted" because it has no specific legal meaning and could therefore be useful in covering all categories including the refugees, who have been forced to leave their homes without having found a lasting solution to the problems caused by this predicament.

The term "displaced persons" (Fr. deraciné, Germ. entwurzelt) is bound to have some legal implications as it appears frequently in international documents like GA resolutions of which examples have been given in this paper. There is no international instrument containing any definition of the term "displaced person" however, which could be universally recognized, nor one according such a person any particular status or right. But a few observations can be made.

There is a distinction between internally displaced persons, IDPs; and externally displaced persons, EDPs. An IDP finds himself displaced inside his own country and is still within the territory of his country of origin or habitual residence. As long as he remains within that territory he can never be a refugee although the causes of his displacement, as is often the case, may be such events or circumstances which will make him recognizable as a refugee as soon as he crosses the border of his country.

Drought, famine, earthquake, tempest, floods, fires and epidemics can displace people. In some countries orphans and other unaccompanied children constitute large portions of the displaced persons. Military force, coercion or misleading information can be used by governments to remove populations from areas where they once lived. Such action may be taken in order to implement programmes decided on in accordance with the law and to the benefit of the people, for instance like urgent land reform. They can also constitute violations of the international law of Human Rights if ordered in tyrannical fashion, for instance in the case of forced labour.
One category of IDPs deserve particular attention. I am thinking of a former refugee who has returned home on his own or under a programme of voluntary repatriation, but who did not manage to resettle because his home has been destroyed or in the possession of others or because he does not receive the assistance required towards resettlement satisfying the criterion of a durable solution. Such returnees are bound to add to the problems of displaced persons and eventually that of urbanisation and growing slums in the country of return. Forced repatriation of refugees is strictly against the fundamental principles of international refugee law and is, when it occurs, in most cases aggravating the problems here indicated.

Externally displaced persons are those human beings who have compelled by the same variety of reasons beyond their control as mentioned in the internal situations, to cross one or more international border in quest of safety, but who do not however qualify for recognition as refugees. If they are refugees under the definition found in operation in all continents they should be recognized and treated as such. It is most unfortunate for the refugees themselves as well as for any organized efforts of assistance if they are not. International refugee law has been developed as a humanitarian achievement, which should not be taken out of play because of incorrect omission or refusal to apply it. This does not always happen wilfully but sometimes because of ignorance or confusion over the elements of the refugee definition or the procedures of determination.

Situations when refugees are incorrectly defined as displaced persons can occur when for instance the host country for political reasons, will not accept the fact that the country of origin is a generator of refugees. This can follow from sympathy with the political system in the country, or anxiety not to disturb the relations between the two governments or because of fear of irritating a powerful regime. It is not

40. In the Meeting of the OAU-Secretariat and Voluntary Agencies, Arusha, March 1983 and the ICARA II Conference in Geneva in July 1984 it was recognized that projects of reintegration and rehabilitation of returnees should be drawn up in a realistic perspective until the returnees are not merely brought back but actually re-established in their country of origin.
always in reality easy to live up to the principle that the granting of asylum is a peaceful and humanitarian act, which should not be regarded as an unfriendly act by any other state. It can not be denied that there is an element of hypocrisy in that principle, as the act of granting a person asylum upon having found him eligible for refugee status under international definitions, by necessity implies the assertion that the government in his country of origin does not abide by the international code of civilized conduct. Refugees can also be denied refugee status and fall under the group of EDPs because the host country or the international donor community lacks the resources or the will to give these refugees either the rights and favourable treatment granted them under international legal instruments or the assistance needed.

There is much talk about "economic refugees" and "economic migrants". The more we hear about the economic problems in the present day world, the more we hear about economic refugees. Particularly those who speak in favour of sending asylum-seekers back and cutting down on refugee-assistance seem bent on bringing this issue up as often as possible. This tends to magnify the problem of distinguishing the "economic refugee" from what is then preferably called the "political refugee". I am critical about this last expression because it can make some people forget that there are not only strictly political causes for refugeehood but others as well, like ethnical or religious persecution. If using the word "political" in this context, it must be in a very broad sense.

Man-made disasters and natural catastrophies often aggravate each other in a vicious circle. Famine stricken areas become the scene for violence, disorder and unstability, while armed conflict and political upheaval disturbs food-production and transport of necessities and accelerates the distruction of the environment. Such conditions may add to the confusion in some minds as to who is a "real" refugee and who is an "economic" refugee.

Sometimes politicians and diplomats of the Rich World have been heard expressing the opinion that the large refugee-
-populations in the big settlements near crisis areas in Africa and Asia remain there only because they receive international assistance there and that consequently they would return home if that assistance is phased out. The problems are then discussed in terms of economic and social push and pull effects. But except for eventual marginal cases there is in my knowledge no support for this kind of view in past experience of repatriation, whether successful or not, or in scientific surveys undertaken among large refugee-populations.

To conclude, if there are those man-made elements of the refugee definition behind the safety-seekers' exodus, he shall be determined to refugee-status, without allowing economic or natural disaster causes to confuse the issue.

This leaves us with three categories of uprooted people: Internally displaced persons, externally displaced persons and refugees. A refugee is recognized under the refugee definition. An externally displaced person is the one to which the refugee definition does not apply.

Theoretically there should be no difficulty in distinguishing between the two. The difficulties in practice lead us to the next chapter on refugee determination.
REFUGEE DETERMINATION IN THE THIRD WORLD

Basic Requirements.

In October 1977 the Executive Committee of the UNHCR dealt thoroughly among other things with the Determination of Refugee Status. It endorsed a set of recommendations which have become widely known as the 'Basic Requirements' for refugee determination. 41

Slightly abbreviated and in a somewhat simplified language they contain the following recommendations:

1. Border police, immigration officers or other competent officials receiving applicants for asylum should have clear instructions for dealing with such cases, and they should be required to act in accordance with the principle of non-refoulement and should refer such cases to higher authority.

2. The applicant should be advised as to the procedure to be followed.

3. There should be a clearly identified - if possible central authority responsible for the examination of requests for refugee status and decisions on them in the first instance.

4. The applicant shall be given competent interpretation and other facilities necessary for submitting his case to the competent authority, and an opportunity to contact a representative of the UNHCR.

5. Everyone recognized as a refugee shall be informed about this and issued with a document certifying his status as a refugee.

6. If the application is turned down, the applicant should be given reasonable time for appeal.

7. The applicant should be allowed to remain in the country pending decision on his first request

41. No. 8(XXVIII). See also Official Records of the GA of the UN,(XXXII), Suppl. No. 12A (A/32/12Add.1, para. 53 (6)(e)).
or on his appeal, unless it has been established by the competent, central authority that his request is clearly abusive.

The 1979 Arusha Conference in its authoritative recommendations (2.3,4) in a way that should be valid also in Third World regions outside Africa, recommended that individual applications for asylum should be examined with application of these Basic Requirements. But it was also considered that such procedures might be impractical in the case of large-scale movements. Such situations call for special arrangements for identifying refugees by procedures of group-determination. In any case it should be clear that the principle of non-refoulement must be respected in all situations. In consequence no asylum seeker should be rejected and sent back to his country of origin or to another country from which he risks being sent back to that country from unless it has been established by means of a procedure meeting with the Basic Requirements, that the request for refugee status was manifestly unfounded or — as the case may be — clearly abusive.

42. On the Arusha Recommendations and their international adoption see supra notes 8-10.
Specific conditions of the Third World.

As stated above there is a difference between situations where the asylum seekers appear as individuals, family-groups or other smaller groups of individuals and events of large-scale influx of asylum seekers. Though mass-influx is by no means unknown to several countries in the First World it is basically and typically a Third World phenomenon. Characteristic is that the overwhelming majority of these people are rural and of rural background and that they have not covered more distance than they deem necessary to save themselves. In most cases they have not crossed more than one border to the neighbouring country and they stay as near to that border as they dare and indeed are allowed to, living on the hope of being able to return. Determination proceedings resulting in the formal recognition of each individual refugee is an absolute impossibility in all those cases in the Third World, where a sudden influx can be of such a scale that it is uncountable, leaving it to open dispute whether the new arrivals are numbered in tens or in hundreds of thousands.

Apart from the problem of mass-influx, developing countries do not have the administrative structure, legislative machinery and traditions required for the careful examination and consideration of every single request for refugee status, if they are submitted in anything more than very moderate numbers. Third World countries who find themselves burdened with more than rather limited numbers of refugees must employ methods of group refugee determination based upon assumptions of refugee qualifications for the categories in question. Only for very specific cases can they resort to individual refugee determination in a proceeding designed to satisfy the Basic Requirements.

Four specific cases for individual refugee determination can be discerned. First - as already indicated - if the question
arises of subjecting an asylum seeker to measures such as rejection at the frontier, return or expulsion; secondly if a refugee, who has been recognized as such through group determination, is subjected to a request for his expulsion by police or other competent national authority or such authority challenges his refugee status; thirdly, if such a refugee applies for a travel document according to the Geneva Convention art.28 or any other kind of travel document reserved for refugees; and fourthly, if a foreign state demands the extradition of an alien when that alien maintains that he is a refugee from that state or other circumstances which under international law protect refugees from being extradited.

43. Cf. OAU Convention, Art.II.3.
44. The Tanzanian Refugees (Control) Act, 1965 (in the process of being amended) in such cases also places the burden of proof on the person who raises the question whether "any person is a refugee or not".
Problems arising from Large Numbers of Asylum-Seekers and Determination of Status.

The problem arising from mass influx situations are different from those occurring in cases of more limited numbers of asylum-seekers, not only in quantity but in quality as well.

Wage-earning, professional and possession opportunities may be in such shortage that there is little prospect for the refugees to become self reliant. The presence of large numbers of refugees might cause the collapse of the local system of education and health-care. The refugees might even spread diseases among the nationals of the country of asylum as in some cases their livestock might. They can endanger public order and national security to the detriment even of international peace and security. They can consume meagre resources such as wood for cooking-fires and of drinking water at such a rate and quantity so as to destroy the very land on which they have found refuge. Overgrazing by unsuitable concentrations of animals add further to the disaster of desertification. Hence an unacceptable influx can produce serious reactions endangering the entire international system of protection.¹⁴⁵

If certain states feel left without support from the international community in the face of a mass influx of refugees, they may refrain from rejection at the frontier, expulsion or such measures only if given explicit guarantees that the refugees will be resettled in a second country of asylum within a limited period. In the meantime the asylum-seekers may be subjected to a number of restrictive conditions. The country's concern may also primarily be that they receive shelter, food, clothing and medicine to meet the requirements of the inflow of needy human beings. They may however be equally concerned about international support towards satisfactory long term solutions.46

This is just to give a few examples of the endless variation of problems posed by large-scale influx situations. Considering all this we can do no other than feel deep respect for the humanitarian spirit and true generosity with which Third World countries, some of which are among the poorest countries in the world, have received, protected and assisted enormous masses of refugees.47 If they shall be expected to continue to shoulder this burden they must be able to trust international solidarity to give adequate assistance and join in burden-sharing.

46. Coles, supra note 45, p9-11.

47. It is not generally known, that Malaysia, just before refusing to settle permanently the boat refugees for reasons of delicate internal balance, had provided asylum for 90,000 muslims from the Southern Philippines. See Coles, supra note 45, p 10.
It may happen that a state fails or refuses to recognize a group of persons crossing its borders as refugees, but refers to them as "illegal immigrants" or "prohibited immigrants" or some other term designed to throw the persons in question at the discretion of that state; but that at the same time UNHCR is satisfied that the members of that group are of its concern and mandate under the widened refugee definition previously examined in this paper. Thereby the persons also become the concern of the international community leading to actions taken by various international bodies as well as other states. The receiving state will then find itself under considerable pressure to grant the group protection and treatment according to humanitarian standards even if it still refuses to give them formal recognition. In the long run such situations will with all probability promote a general universal acceptance of the wider refugee definition.

In June 1981 the International Institute of Humanitarian Law in San Remo convened a Round Table on the Problems arising from Large Numbers of Asylum Seekers. The participants represented the Governments of Australia, Canada, the USA, five Western European countries, India, Kuwait, Nepal and Sudan. A number of Inter-governmental organizations, voluntary agencies and senior experts also contributed. Their deliberations resulted in observations of great interest to the subject at hand.

It was stated that the first act of protection needed by the asylum-seekers was admission into the territory of the state of arrival, in accordance with the principle of non-refoulement and therefore, of non-rejection at the border. The same principle should even protect him in

48. The Report from the Round Table is published by the Institute in San Remo 1981.
relation to subsequent expulsion or return. Therefore, even in cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge. An asylum seeker in quest of a durable solution should not be refused asylum solely on the ground that it could be sought from another state. The last two principles are found already among Conclusions adopted by the Executive Committee in 1979 of which it is worth quoting in particular:

Regard should be made to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links another State, he may, if it appears fair and reasonable, be called upon first to request asylum from that State.49

To turn back to the Round Table it was recognized then that there was nothing objectionable about group determination provided that it conferred refugee status on all members of the group. In the case of a negative decision in respect of a group on the other hand any member of that group should have his case considered on its individual merits (as found above in connection with cases for individual refugee determination). Persons whose refugee status was not recognized should nevertheless be treated in accordance with humanitarian principles. The Round Table found it very important that a country receiving a large-scale influx should be regarded as acting on behalf of the international community. International solidarity and co-operation must then be manifested at all levels, world-wide, regional and bilateral.

49. No. 15(XXX) particularly (f) and (h)(iv) - here quoted.
Some of these observations and principles were again reiterated by the Executive Committee of the UNHCR in 1981. On this occasion the Committee also adopted "minimum basic human standards" for the treatment of asylum seekers who had been admitted temporarily pending arrangements for a durable solution. They aim at respect for the refugees' Human Rights, humanitarian treatment, non-discrimination, family unity, protection of children, freedom of movement and of communication with the outer world and finally of help to them in finding a durable solution.

**National legislation.**

With national legislation or national law in this context I mean any written or printed statute, law, decree, ordinance or regulation enacted by a sovereign state or issued by its government with the purpose of directing the actions of the government, the administration and individuals of or within that state or under its jurisdiction. Many authors use the term "municipal law" and in American Conventions we find "domestic law". "National law" is preferred here as it seems easy to handle and difficult to misunderstand.

Up to now this paper has concentrated on international legal instruments, principles and recommendations adopted by various international bodies and gatherings and observations of a rather universal scope. It is time to focus on the very scene of action, the country where the asylum seeker is arriving. It is the question of the implementation of international law at national level.

50. No. 22 (XXXII).

51. II.B.2. (a) - (p).
There is no doubt of the duty of a state to insure the conformity of its national law with its international obligations including first those who are based on an international convention acceded to by that state. However, the international refugee conventions like most treaties have little to say about how they are going to come into effect in reality and they do not include an obligation, per se, to incorporate the treaty-provisions into national law.

Clearly however a government having processed its country's accession to a refugee convention, sincerely intending the full implementation of that treaty will have to take various steps and measures. Officers and agencies for the administration of the provisions agreed upon, must be appointed and instructed. The rules involved must be made known to those who are going to administer them and preferably also to as many as possible of those even more directly concerned. Methods and proceedings have to be drawn up. The transplantation of the treaty-provisions in the national context necessitates observations of the specific conditions and traditions of the state in question. In most cases translation is needed as well. All this can be achieved by national legislation. International law, by custom or by treaty, and universal declarations are of little use to the refugee if they are not reflected in the valid law of the country into which he has fled - or to that country.

52. See Goodwin-Gill, supra note 15, p 140 - 148 on "State Responsibility, Treaties and Municipal Law".

National law regulating refugee determination must contain a clear definition of the concept of refugee. The following discussion will revolve around the Third World refugee definition in its clearest form as contained in the OAU Refugee Convention. The refugee laws of Senegal, Tanzania and Sudan offer illustrations of the problems of law-making and three different solutions to discuss.  

Senegal enacted a refugee law in 1968 inspired by the Refugee Conference in Addis Ababa the previous year. It is representative for the legislations in a number of francophone countries in Africa. Without giving any definitions of the term refugee it states that it applies to persons under the mandate of the UNHCR and defined as refugees in the Geneva Convention. An amendment later on added to this persons meeting the definition of refugee in the 1969 OAU Conventions. This approach leaves no doubt about the intention of incorporating the international definition into national law. Such legislation presupposes that the national authorities on all levels have a thorough knowledge about these international criteria however. As such knowledge is in fact rare, there is in my mind a weakness in this technique of law-making and it is as such not well-designed to bring about the implementation of international refugee law.

Tanzania’s Refugees (Control) Act of 1965 was (it is now being reviewed) the first and most comprehensive national refugee law in Africa and it has inspired and influenced similar enactments, e.g. in Botswana and Zambia. The Act had no general definition of refugees nor any reference to the Geneva Convention or any other international or domestic body.

regional instrument. "Refugee" according to this law meant one of a class of persons declared to be refugees by the responsible minister. A number of such declarations have been issued and gazetted in Tanzania. The classes are restricted both by geographical and time limits, covering persons from a specific country having arrived after a fixed date of certain events there. This legal construction strongly resembles the pragmatic **ad hoc** solutions adopted by the League of Nations when dealing with the European refugee problems between the two world wars. It could however be one or part of a solution to problems posed by mass movements of refugees but the system must be supplemented to cover those refugees who are not included in the "classes".

The Sudanese solution has already been introduced to the reader who has found the definition from the Sudanese Asylum Act at the end of the section of Africa in the previous chapter. This represents in my opinion the ideal solution, as it offers all the elements for refugee determination in the international definition but adds criteria from national experience.\(^ {55} \) Of course it is not necessary to incorporate the international refugee definition into the national law quite so completely as has been done in Sudan. If the process involves changing or rephrasing the international articles it might even include the risk of producing a conflicting deviation from the proper wording. It is sufficient to offer the text of the international instruments in the national legislation as preamble, schedule, quotation, appendix or whatever technique might be preferred. The text however must be complete.

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55. See further discussion in Nobel, supra note 45 on refugee law in Sudan and supra note 53 on national law etc.
It could be of interest to see how the Sudanese Commissioner for refugees and his co-workers are handling the refugee definition. According to an experienced official of the commissioner's office the intricacy and legal complexity of terminology during years of daily work have led to the summing up of certain parameters or established guidelines for the carrying out of practical work. Thus Sudan grants territorial asylum in group cases to safety-seekers who have entered the country because of conflict in their country of origin between the government and a local political, ethnic or religious group leading to instability; or where instability is the result of conflict or competition within the power-elite or between the regime in power and opposing groups responded to with suppression; or external aggression, occupation or military operations disturbing internal order; whereby in any of these cases the flight should be tied to a group cause. This approach makes irrelevant the cumbersome and seen in a realistic view artificial distinction between so called political refugees and economic migrants. Another principle adhered to in the Sudan for allowing refugee recognition on a collective basis is that the country of origin must necessarily be neighbouring Sudan. Others will have to seek asylum individually.

This example shows how the international refugee definition through national law can penetrate the arrangements for refugee determination in a country extremely burdened by mass influx of refugees.


57. Individual refugees from interalia Afganistan, Angola and Poland have been given asylum in Sudan.
National Authorities and Procedures.

This section can only be a rough outline or sketch. Administrative rules, structures, routines and traditions are one of the areas where States differ most from one another. I must therefore restrict myself to a brief mention and comment on some elements to my knowledge found common in most Third World countries confronted with a refugee problem.

The ultimate responsibility for a country’s refugee policy should lie with the government. A cabinet minister is usually appointed to co-ordinate assistance to refugees and guarantee protection in accordance with international laws. But it is not recommendable that the government or the appointed minister shall decide as the first instance in refugee recognition cases, as this leaves the asylum seeker without a possibility of appealing in the case of a negative decision.

To the governments service there is usually a national board, commission or delegation for refugees with the task of following the situation and its development closely and reporting on it and suggesting action to the the government or the minister. This body is composed of representatives for those branches of government and administration, to which the refugee problem in the country is of concern. It should also co-ordinate with the national efforts the contributions of the international community including those of the voluntary agencies. Refugee determination could be delegated to this body. But it could also be delegated to provincial governors - or states in federal cases - local authorities or missions dispatched to areas of temporary crisis. All these solutions open a possibility of granting the individual the right to appeal, eventually to the minister in cases of non-recognition. Wherever refugee determination is taking place be it on an individual basis or in group cases, the representative of the UNHCR shall be allowed to be present but only in an advisory
capacity. It is very important in my opinion that UNHCR is never called upon or accepts the offer of participating in the decision. This is because the office is bound on certain occasions to take part in negative decisions which may deeply affect the life of the individual without giving him any possibility of review and in a way damaging to UNHCR's role as a humanitarian organization.

Practical guidelines must be issued for border police and all other authorities likely to meet asylum seekers and in the first instance responsible for the safeguarding of their rights and protection. There is a tremendous need for easily available handbooks. Recognized refugees shall be issued with identity-cards showing their status.

If local authorities are not equipped for adequate reporting on newly evolved refugee-situations it is necessary to set up machinery for the sending of special missions for quick assessment of such new influxes. They could be composed of national administration, UNHCR and in some cases voluntary agencies. Thereby and by the issuance of identity-cards an opportunity opens to improve registration and statistics on refugees.
The Role of International Organizations.

The UNHCR shall promote international law on refugees including regional instruments and conferences. The office gives advice to governments in the process of enacting new refugee laws or amending the one already in force. It has an advisory function in theory in every proceeding of refugee determination and it shall promote the harmonization in this respect of national practices to bring them in full compatibility with a bona fide interpretation and application of international refugee law. In fulfilling its tremendous duties the office is hampered by lack of money in relation to the magnitude of today’s refugee problem and by its dual role as an inter-governmental organization and a member of the UN family. The UNHCR officials are not free to speak their minds and they cannot move and act in the countries of operation without the consent of the governments. However, acting often as the focal point for international assistance in countries invaded by refugee masses and considering the impressive development of the international law of Human Rights including refugee law, the UNHCR has, it is hoped, strengthened the platform for more progressive language and action.

The role of the non-governmental organizations, particularly the voluntary agencies which have refugee programmes in various parts of the Third World, has been touched upon in various places in this paper. This role can hardly be exaggerated. Only one particular aspect of their role should be mentioned here. The voluntary agencies are working practically everywhere in the developing countries. They are found in areas where Human Rights are violated. They are in refugee-settlements and they assist in repatriation programs where they are carried out. They are also in fact - like the massmedia where it is present - the eyes and the ears of the world conscience. Thereby their existence
has a preventive effect, which can not be measured. I believe however that it can be improved with a better awareness of this extremely important "side-effect". This also covers their contribution to correct refugee determination, but for this to be true even these devoted Third World workers must be better educated in international refugee law as well as in other aspects of Human Rights.
Is there a relationship between formal recognition and assistance as indicated in the above sub-title? To give a full answer to this question would require world-wide field research and the processing and evaluation thereof in a manner bound to consume enough time to allow the patterns to change so much as to render the research useless. But everyone can speculate given the empirical evidence available. At the very outset of this paper I for my part expressed the view that there is no automatic, law-bound or foreseeable relationship between recognition and assistance, but that formal recognition could nevertheless be of utmost importance for the possibilities of being assisted.

Formal recognition in this context is any procedure by which a state confers refugee status on a person, whether this is a result of consideration of an individual case or group determination. The latter procedure is the one of overwhelming quantitative importance in the Third World. Refugees in organized settlements as a rule do receive assistance, which in fact is the main reason for organizing them in settlements. Usually they are recognized on a group basis one way or another, in some cases more through passive acceptance than by any conducted procedure. The Sudanese Asylum Act has even codified passivity on the side of the authority as a legal method of granting asylum: "If he does not decide upon the application of the matter during such period, the permission of asylum in respect of the refugee who actually entered the Sudan shall be deemed as granted,..." 58 Speaking about refugees in settlements means referring in the first place to rural refugees.

58. Supra note 11, in art. 6(1)
If refugees in organized settlements are generally recognized and assisted, a fact which I believe is not disputed, the question then arises in respect of rural refugees outside organized settlements. Are they recognized and/or assisted? The answer here must be negative as there is no report or budget giving any amounts to the assistance of such refugees, who are sometimes critically referred to as "spontaneously settled". The problems of these unrecognized outsider-refugees can be well illustrated by a quotation from an account from the 1979 Arusha Conference on the African Refugee Problem:

Estimates that more than 60% of all rural refugees are not in settlements...were noted..., along with claims that many rural refugees have integrated "spontaneously" and that their problems have been solved...Obviously this is a convenient belief as it absolves agencies and governments from identifying and doing something about problems which are potentially large...If the refugees are not causing any political problems, the temptation is to leave "well" alone.59

Having listed a number of disadvantages the Conference concluded that "spontaneous" integration far from being an ideal solution, may mean extreme poverty and insecurity and the eking out of a precarious and marginal existence through casual labour and migration. Researchers too have warned against the concept of happy spontaneous settlement.60


Having a slight feeling that the 60% unsettled, unrecognized and unassisted rural refugees assumed at the Arusha Conference is an exaggeration but realizing that I possess no tool for taking stock of the problem, I am inclined to take it very seriously. The conclusion is that there is little expectation of being assisted if unrecognized and outside an organized programme of settlement.

I think that most governments in the world have a strong notion that the recognition of an alien as a refugee brings with it an obligation to protect him and to assist him. I do also believe that most of the peoples in the countries concerned share this notion. The preparedness to recognize refugees will then be the outcome of a large number of variables in complex combinations. The number of asylum seekers in relation to the size of the national population is one. The more refugees arriving in a country the less generous will be the attitude of both the people and the government. The resources available are of tremendous importance. It is not only a question of whether the receiving country is rich or poor. It is a matter of commanding the specific kind of resources need for the kind of refugees entering the country; cultivable land free for farmers, pasture for cattle-herders, job-opportunities for townspeople, educational institutions for students etc - and then, on top of this, the money, tools and instructors to get them started, which in any case cannot be until after the first phase of emergency, when they are newly arrived. The stage of advancement from the legal aspect is another factor of importance. There are developing countries where all authorities are well aware of international Human Rights and refugee law and who act accordingly. There are others where there is no knowledge of this kind and where border police and military authority react with perplexity or even with brutality when faced with a sudden influx of refugees. Ethnic, linguistic, cultural and religious
factors are not likely to be forgotten in this context. Politics are essential. The official and the popular attitudes which are not always identical, towards the political opinions of the refugees or towards the regimes in their country of origin can be decisive for the kind of reception accorded to the refugees. International politics are equally significant. If the international donor community is sympathetic towards the refugees and their host-country, international assistance will flow in. If that is not the case the refugee situation in question is likely to develop into one of the world's hidden or forgotten tragedies. Even for the sufferers and the victimized, there is hard competition for space in the international massmedia. A disillusioned UN official said to me some time ago: "If you really want to get assistance to the refugees, you must treat them badly and see to it that the massmedia are there to observe it." The expectation in relation to international solidarity and assistance is one of the determining factors in the willingness of a state to recognize refugees and give them initial assistance with the resources immediately available. On the other hand, the tendency to recognize refugees can be enforced or urged on by international assistance particularly if it is extended under the kind of international officialdom of being based on a GA Resolution of through the UNHCR as the focal point. In such cases the operations and protective activities of the UNHCR are unduly hampered simply because the UNHCR has recognized the refugees under its mandate while the receiving country can create all sorts of difficulties emanating from their refusal to recognize the refugees.

The voluntary agencies are a heterogeneous family. They have been established by idealistic people for a variety of reasons. They are bound by their mandates as laid down in their statutes or conditioned by their contributors.
Many of them have been given the mandate to assist refugees, others not. For the possibilities of this sector of the donor community to help refugees it may therefore in many cases be of consequence that the refugees are formally recognized.

The - not seldom exaggerated and artificial - distinctions between refugees on the one side and victims of natural disasters and "economic refugees" on the other, is frustrating. This could also be said of the different interpretation or rather priorities, which have been attached to the concept of Human Rights in, let us say, the Western Countries, the Soviet Block and in the Third World. The distinguished Senegalese lawyer Judge Keba M'Baye has been quoted as asking: "What difference does it make to an African if he is beaten to death or starving to death?"[^1]

But such distinctions and frustrations do not, it seems to me, take into account the rapid growth of the international law of Human Rights of which refugee law forms a part and the change in thinking of the international donor community, saluted by developing countries burdened by a refugee problem, in relation to refugee assistance and assistance towards development. Thus the international debate and work of progressive lawyers has centered increasingly around the right to development and the right to food as important in Human Rights. The African Charter on Human and[^1]

[^1]: Keba M'Baye is a Judge of the International Court of Justice in The Hague. He used to be the President of the Supreme Court of Senegal and the Chairman of the group of experts, who drafted the African (Banjul) Charter on Human and Peoples' Rights. Regrettably I can not locate the quotation.
Peoples' Rights in art. 22 wants to ensure that; "All peoples shall have the right to their economic, social and cultural development...." The right to development as a legal concept has been considered and elaborated by international lawyers particularly under the auspices of the International Commission of Jurists, ICJ. 62 Both the Universal Declaration of Human Rights, in art. 25(1), and the 1966 Covenant on Economic, Social and Cultural Rights, in art. 11, refer to the right to food. The latter instrument even obliges the States to improve and develop the production, conservation and distribution of food and to ensure an equitable distribution of world food supplies. These examples may suffice to illustrate the direction of change in the international Human Rights concept, or rather its growth.

The same trend, i.e. of growing understanding of realities, has marked the development of refugee law. As I have tried to demonstrate in this paper, an almost parallel development in the UN through GA Resolutions; in the rich countries' discussions on de facto refugees', and in all the Third World continents, has produced a widened refugee definition designed to cover most mass movements of safety seekers in the Third World. It has also become successively clear that Human Rights and refugee law are interdependent parts of the same Human Rights system. To illustrate this, there is

in the recommendations from the 1967 Refugee Conference in Addis Ababa no reference to Human Rights, which however are very clearly expressed in those from the 1979 Conference in Arusha.

In 1983 there was in Arusha, Tanzania, a meeting on African Refugees between the OAU-Secretariat and Voluntary Agencies. In his opening address President Julius Nyerere among other things had this to say:

...refugee needs have to be integrated with the equally urgent needs of other people. A man starving in his home may have less suffering than a starving refugee - I do not see how we can know. But in any case he is still dead if he does not get food. -I make this point because, when planning, it is essential to think of ALL the people involved - those in the receiving areas as well as those who are seeking refuge. ...I remain conscious of the danger that refugees...can become scapegoats...This can happen if facilities for the refugees are made better than those available to the desperately poor people to whose area they move.

Nyerere's observation is very accurate. The conclusion is that refugee assistance can hardly be separated from assistance towards development of the entire area of refugee settlement. This conclusion became universally recognized at the ICSRA II Conference in 1984.


64. Ibid. p 8-9.
The Meeting thus addressed by President Nyerere also found that many refugee situations are caused by violations of Human Rights at individual level and of Peoples' Rights on group level and further, that there is a link between the violation of Human and Peoples' Rights and the lack of adequate economic, social and cultural development. Thus the problems of refugees are closely related to those of Human Rights and of development and similarly those two are linked to each other. From every corner of the triangle there are lines to the other two.

It is important to promote the recognition of all refugees who are covered by the new and widened refugee definition making diligent use of the principle of "the benefit of the doubt when meeting vague cases in the grey zone. The developments hitherto both of Human Rights and the refugee law sector thereof, clearly indicate that if we do so fewer and fewer of the uprooted will be left unassisted.

The end.

65. Ibid. p 23, Recommendations 58 and 63.