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The Development of the Refugee Definition in International Law

Legal formulations of refugee status are a product of recent Western history. Prior to this century there was little concern about the precise definition of a refugee, since most of those who chose not to move to the "New World" were readily received by rulers in Europe and elsewhere. The practice of sheltering those compelled to flight was not perceived as a burden, but rather as a necessary incident of power, and indeed as a source of communal enrichment:

> Central governments pursued their own interests by facilitating immigration and discouraging or even forbidding emigration. Whether to be taxed, to contribute to the growth of manufactures and commerce, to offer specialized knowledge, or to join the military, talented or affluent foreigners were frequently deemed useful to society and welcomed with open arms by European monarchs or municipalities.[1]

This freedom of international movement accorded to persons broadly defined as refugees was adversely impacted by the adoption of instrumentalist immigration policies in Western states during the early twentieth century.[2] Immigration came to be seen less as a means of allowing individuals to exercise their right to self-determination, and more as a vehicle to facilitate the selection by states of new inhabitants who could contribute in some tangible way, such as skill or wealth, to the national well-being. International migration was no longer to be a function of the particularized needs or ambitions of the would-be immigrants, but was instead to be closely controlled to maximize advantage for sovereign nation states.[3]

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[1] M. Marrus, *The Unwanted: European Refugees in the Twentieth Century*, pp. 6-7 (1985).

[2] "The twentieth century has been witness to substantial developments in immigration law and control. States have pressed on, assuming the right of exclusion to be 'inherent in their sovereign powers' . . . ": G. Goodwin-Gill, *International Law and the Movement of Persons Between States*, p. 96 (1978).

[3] "It was only with the rise of nationalism, and the resulting growth of State power, that international law became explained in terms of the sovereignty of States. This was only a natural development, grown out of the necessity of regulating the relationships between the all-powerful States": F. Krenz, "The Refugee as a Subject of International Law" (1966), 15 I.C.L.Q. 90, at 95.

The desire of European states to establish normative standards and control mechanisms to stem the arrival of immigrants perceived as non-contributing clashed head-on with the enormity of a series of major population displacements within Europe during the early part of the twentieth century.[4] The most prominent migrations were the flight of more than one million Russians between 1917 and 1922, and the exodus during the early 1920s of hundreds of thousands of Armenians from Turkey in order to avoid persecution and massacre by the government of that country.[5] The social crisis brought on by the *de facto* immigration of so many refugees convinced governments that their laws would have to recognize the reality of forced international movements of people. Because political and other disruptions would inevitably induce involuntary migration, policies of selecting immigrants on the basis of national advantage alone were obliged to yield in such circumstances: indeed, in some instances, the nation concerned had no practical power to control the flow of humanity.[6]

Refugee law was designed to effect a compromise between the reality of this largely unstoppable flow of involuntary migrants across European borders and the broader policy commitment to restrictionism in immigration.[7] At least in its initial form, refugee law constituted a humanitarian exception to the protectionist norm,[8] in that immigration screening was dispensed with for large groups of unprotected migrants.

1.1 International Refugee Definitions Before 1951

Analysis of the international refugee accords entered into between 1920 and 1950 reveals three distinct approaches to refugee definition. Each of these perspectives — juridical, social, and individualist — was dominant during a part of the initial decades of refugee law.

1.1.1 The Juridical Perspective

From 1920 until 1935, refugees were defined in largely *juridical* terms, which meant that they were treated as refugees because of their membership

[4] "[O]ne of the really pressing problems which arose in the wake of the First World War and the ensuing great revolutions, was the exodus of the great masses of human beings seeking refuge in foreign countries": A. Grahl-Madsen, "The League of Nations and the Refugees" (1982), 20 A.W.R. Bull. 86, at 86.

[5] Conférence des organisations russes, *Memorandum sur la question des réfugiés russes*, p. 4 (1921); J. Simpson, *Refugees: Preliminary Report of a Survey*, pp. 21-22 (1938).

[6] "In situations of mass migration, the fact is that those states wishing to control their own borders are often those most completely unable to do so . . . . Even though asylum is recognized in customary law as at the discretion of nation states, discretion can seldom be used when one is faced with thousands of people encamped on one's borders": M. Chamberlain, "The Mass Migration of Refugees and International Law" (1983), 7 Fletcher Forum 93, at 102.

[7] *See* M. Marrus, *supra*, note 1, pp. 51-81.

[8] The exclusive jurisdiction of states to control the entry of persons into their territory is now constrained by an increased recognition of protection as a humanitarian duty: G. Goodwin-Gill, *supra*, note 2, p. 138.

in a group of persons effectively deprived of the formal protection of the government[9] of its state of origin.[10] The purpose of refugee status conceived in juridical terms is to facilitate the international movement of persons who find themselves abroad and unable to resettle because no nation is prepared to assume responsibility for them.[11]

These first refugee definitions were formulated in response to the international legal dilemma caused by the denial of state protection. The withdrawal of *de jure* protection by a state, whether by way of denaturalisation or the withholding of diplomatic facilities such as travel documents and consular representation, results in a malfunction in the international legal system. Because the then existing international law did not recognise individuals as subjects of international rights and obligations, the determination of responsibilities on the international plane fell to the sovereign state whose protection one enjoyed.[12] When the bond of protection between citizen and state was severed, no international entity could be held accountable for the individual's actions. The result was that states were reluctant to admit to their territory individuals who were not the legal responsibility of another country.[13] The refugee definitions adopted between 1920 and 1935 were designed to correct this breakdown in the international order, and accordingly embraced persons who wished to have freedom of international movement but found themselves in the anomalous situation of not enjoying the legal protection of any state.

The most fundamental form of *de jure* withdrawal of state protection is, of course, denaturalisation.[14] It was the general policy of the League of Nations to extend protection to groups of persons whose nationality had been involuntarily withdrawn.[15] As well, the League recognised that persons who could not obtain valid passports were entitled to international protection.[16] Both of these groups received League of Nations identity certificates which

[9] L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations*, p. 311 (1956); R. Nathan-Chapotot, *La qualification internationale des réfugiés et personnes déplacées dans le cadre des Nations Unies*, p. 47 (1949); J. Simpson, *The Refugee Problem*, p. 227 (1939); R. Jennings, "Some International Law Aspects of the Refugee Question" (1939), 20 British Y.B. Intl. L. 98, at 99; P. Weis, "Legal Aspects of the Convention of 25 July 1951 relating to the Status of Refugees" (1953), 30 British Y.B. Intl. L. 478, at 480.

[10] *Report by the High Commissioner*, League of Nations Doc. 1927. XII. 3 (1927) at 13.

[11] R. Nathan-Chapotot, *supra*, note 9, p. 20.

[12] 1 A. Grahl-Madsen, *The Status of Refugees in International Law*, p. 57 (1966).

[13] J. Vernant, *The Refugee in the Post-War World*, p. 14 (1953).

[14] (1930) 11(11) League of Nations O.J. 1463.

[15] "In 1929, the Advisory Commission for Refugees clearly indicated that the characteristic and essential feature of the problem was that persons classed as 'refugees' have no regular nationality and are therefore deprived of the normal protection accorded to the regular citizens of a State": *Report by the Secretary-General on the Future Organisation of Refugee Work*, League of Nations Doc. 1930.XIII.2 (1930) at 3.

[16] *Minutes of the Inter-Governmental Conference on Refugee Questions*, League of Nations Doc. R/I.G.C.-10-1926 (1926) at 4; *Report by the High Commissioner*, League of Nations Doc. 1926.XIII.2 (1926) at 5.

contracting states agreed to recognise as the functional equivalent of passports.

The definitions of this era contained a criterion of ethnic or territorial origin, coupled with a stipulation that the applicant not enjoy *de jure* national protection. Only persons applying from outside their country of origin were eligible for refugee recognition.[17] This is consistent with the notion of the refugee as an international anomaly: while the unprotected individual remained within the boundaries of her home state, there was no question of another country being confronted with a person outside the bounds of international accountability and, accordingly, no need to include her within the scope of League of Nations protection.

1.1.2 The Social Perspective

In contrast to the initial juridical focus, the refugee agreements adopted between 1935 and 1939 embodied a *social* approach to refugee definition. Refugees defined from the social perspective are the helpless casualties[18] of broadly based social or political occurrences which separate them from their home society. Assistance in migration is afforded refugees not, as from the juridical perspective, with a view to correcting an anomaly in the international legal system, but rather in order to ensure the refugees' safety or well-being. The categories of persons eligible for international assistance encompassed groups adversely affected by a particular social or political event, not just those united by a common status *vis-à-vis* the international legal system.[19]

The essence of this second definitional approach was to continue to assist persons without formal national legal protection, but to assist as well the victims of social and political events which resulted in a *de facto*, if not a *de jure*, loss of state protection. For the most part, these agreements sought to protect persons caught up in the upheaval and dislocation caused by the National Socialist regime in Germany.[20] The substantive scope of this era's definitions was defined by an *en bloc* reference to general, situation-specific categories of persons affected by adverse social or political phenomena.

[17] *Report by the High Commissioner, supra*, note 10, at 13.

[18] J. Vernant, *supra*, note 13, p. 3.

[19] The response of the League of Nations to the Saar crisis in 1935 was the first recognition in international law that protection was required for persons on the basis of *de facto*, rather than merely formal, loss of state protection: (1935) 16(6) League of Nations O.J. 633.

[20] *Provisional Arrangement concerning the Status of Refugees coming from Germany*, July 4, 1936, 3952 L.N.T.S. 77; *Convention concerning the Status of Refugees coming from Germany*, February 10, 1938, 4461 L.N.T.S. 61; *Council Resolution on Refugees from Sudetenland*, January 17, 1939, (1939) 20(2) League of Nations O.J. 73; *Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees coming from Germany*, September 14, 1939, 4634 L.N.T.S. 142.

1.1.3 The Individualist Perspective

The third phase of international refugee protection, comprising the accords of the 1938-1950 era, was revolutionary in its rejection of group determination of refugee status. A refugee by individualist standards is a person in search of an escape from perceived injustice or fundamental incompatibility with her home state. She distrusts the authorities[21] who have rendered continued residence in her country of origin either impossible or intolerable,[22] and desires the opportunity to build a new life abroad. Refugee status viewed from this perspective is a means of facilitating international movement for those in search of personal freedom.

This individualist approach first affected the determination procedure: the decision as to whether or not a person was a refugee was no longer made strictly on the basis of political and social categories. Rather, the accords of the immediate post-war era prescribed an examination of the merits of each applicant's case.[23] Moreover, the move to a more personal conception of refugeehood altered substantive notions. The essence of refugee status came to be discord between the individual refugee applicant's personal characteristics and convictions and the tenets of the political system in her country of origin.

The subjective concept of a refugee was not universally embraced by the international community. During debate in the United Nations in 1946, for example, the socialist states asserted the impropriety of including political dissidents among the ranks of refugees protected by international law.[24] It was argued unsuccessfully that political émigrés who had suffered no personal prejudice ought not be protected as refugees under the auspices of the international community as a whole, but should instead seek the assistance of those states sympathetic to their political views.[25] The voting strength and influence of the Western alliance, however, led to a movement away from a focus on group *de jure* or *de facto* disfranchisement, and toward a personalized evaluation of incompatibility between state of origin and refugee

[21] A. Grahl-Madsen, "Further Development of International Refugee Law" (1964), 34 Nordisk Tidsskrift for International Ret 159, at 160.

[22] A. Grahl-Madsen, *supra*, note 12, p. 74.

[23] For example, the heart of the definition employed by the International Refugee Organisation (1946-1951) classified as refugees all persons who "in complete freedom and after receiving full knowledge of the facts . . . expressed valid objections to returning to [their country of origin]": 1(2) UNGAOR (67th plen. mtg.) at 1454.

[24] "[H]e had wanted to distinguish between refugees and displaced persons, on the one hand, and political émigrés on the other, as he did not think that countries of origin could be expected to support the latter. He had therefore suggested that the new organisation should be responsible for the people in the former categories and the receiving countries, and they only, should be responsible for those in the latter, under such international agreements as they could conclude": 1(2) UNESCOR Spec. Supp. 1 (1946) at 20, U.N. Doc. E/REF/75 (1946).

[25] *Id.*

claimant in search of personal freedom and liberty.[26] This initiative to define the refugee concept in a manner consistent with the ideology of the more powerful states set the stage for the development of contemporary international refugee law.

1.2 The 1951 Convention Definition of Refugee Status

The primary standard of refugee status today is that derived from the 1951 *Convention relating to the Status of Refugees*.[27] In addition to continuing protection for all persons deemed to be refugees under any of the earlier international accords,[28] the mandate of the Convention includes any person who

> . . . as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, 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.[29]

Provisions dealing with dual or multiple nationality[30] and the circumstances in which one may either cease to be a refugee[31] or be excluded from the benefits of refugee status[32] are also set out.

The Convention was drafted between 1948 and 1951 by a combination of United Nations organs, *ad hoc* committees, and a conference of plenipotentiaries. The two main characteristics of the Convention refugee definition are its strategic conceptualization and its Eurocentric focus.

The strategic dimension of the definition comes from successful efforts of Western states to give priority in protection matters to persons whose flight was motivated by pro-Western political values. As anxious as the Soviets had been to exclude political émigrés from the scope of the Convention for fear of exposing their weak flank,[33] so the more numerous and more powerful

[26] 1(1) UNGAOR (8th mtg.) at 23.

[27] 189 U.N.T.S. 2545, entered into force on April 22, 1954 ("*Convention*").

[28] "For the purposes of the present Convention, the term 'refugee' shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization. . .": *Convention, supra*, note 27, at Art. 1(A)(1).

[29] Convention, *supra*, note 27, at Art. 1(A)(2).

[30] "In the case of a person who has more than one nationality, the term 'country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national": *Convention, supra*, note 27, at Art. 1(A)(2), para. 2.

[31] *Convention, supra*, note 27, at Art. 1(C). *See* Chapter 6, *infra*.

[32] *Convention, supra*, note 27, at Art. 1(D), (E), (F). *See* Chapter 6, *infra*.

[33] "The U.S.S.R. delegation considers that persons who collaborated in any way with the

Western states were preoccupied to maximize the international visibility of that migration.[34] In the result, it was agreed to restrict the scope of protection in much the same way as had been done in the post-World War II refugee instruments:[35] only persons who feared "persecution" because of their civil or political status would fall within the international protection mandate. This apparently neutral formulation facilitated the condemnation of Soviet bloc politics through international law in two ways.

First, the persecution standard was a known quantity, having already been employed to embrace Soviet bloc dissidents in the immediate post-war years.[36] It was understood that the concept of "fear of persecution" was sufficiently open-ended to allow the West to continue to admit ideological dissidents to international protection.[37]

enemies of the democratic countries should not be regarded as refugees or enjoy the protection of the United Nations. It considers it essential to exclude from the category of persons who receive United Nations assistance not only those who, during the war, fought actively on the side of the enemy against the people and government of their country, but all those other traitors who are refusing to return home to serve their country together with their fellow citizens": Statement of Mr. Soldatov of the U.S.S.R., 5 UNGAOR (325th Mtg.) at 671, December 14, 1950.

[34] "[T]he definition of the term 'refugee'. . . was based on the assumption of a divided world. If, however, it was considered that a single text should cover both refugees from Western Europe seeking asylum beyond the 'Iron Curtain' and refugees from the latter countries seeking asylum in Western Europe, he wondered what the moral implications of such a text would be. The problem of refugees could not be considered in the abstract, but, on the contrary, must be considered in the light of historical facts. In laying down the definition of the term 'refugee', account had hitherto always been taken of the fact that the refugees principally involved had always been from a certain part of the world; thus, such a definition was based on historical facts. Any attempt to impart a universal character to the text would be tantamount to making it an 'Open Sesame' ": Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.22, at 15, July 16, 1951.

[35] The United Nations Relief and Rehabilitation Administration (UNRRA) insisted on "concrete evidence" of persecution, and the successor International Refugee Organization (IRO) required the demonstration of "valid objections" to return to the country of origin: UNRRA European Region Order 40(I), July 3, 1946; Constitution of the International Refugee Organization, Part I(C)(1), 18 U.N.T.S. 3.

[36] "The representative of France had observed that the definition of neo-refugees could be interpreted very broadly. The fact was that it already appeared in the IRO constitution where its meaning was quite clear: it would have to have the identical meaning in the convention. It did not apply to all types of refugees wherever they might be, but only to those who had become refugees as a result of events which had followed the outbreak of the Second World War": Statement of Mr. Henkin of the U.S.A., U.N. Doc. E/AC.32/SR.5, at 5, January 30, 1950.

[37] "As to refugees, both present and future, arriving in central and western Europe from eastern European lands, he considered that, having regard to the terms of the draft convention and the observations of the High Commissioner for Refugees, [there need be] no fear that such refugees would not be covered by the present text": Statement of Mr. Warren of the U.S.A., U.N. Doc. A/CONF.2/SR.21, at 15, July 14, 1951. *Accord* Mr. Robinson of Israel: ". . . [T]he word 'events' had originally been included. . . in an attempt to designate, in a somewhat camouflaged manner, the new categories of post-war refugees that had emerged as a result of the political changes which had supervened in parts of central and eastern Europe": U.N. Doc. A/CONF.2/SR.22, at 6, July 16, 1951.

Second, the precise formulation of the persecution standard meant that refugee law could not readily be turned to the political advantage of the Soviet bloc. The refugee definition was carefully phrased to include only persons who have been disfranchised by their state on the basis of race, religion, nationality, membership of a particular social group, or political opinion,[38] matters in regard to which East bloc practice has historically been problematic.[39] Western vulnerability in the area of respect for human rights, in contrast, centres more on the guarantee of socio-economic human rights[40] than on respect for civil and political rights. Unlike the victims of civil and political oppression, however, persons denied even such basic rights as food, health care, or education are excluded from the international refugee regime (unless that deprivation stems from civil or political status). By mandating protection for those whose (Western inspired) civil and political rights are jeopardized, without at the same time protecting persons whose (socialist inspired) socio-economic rights are at risk, the Convention adopted an incomplete and politically partisan human rights rationale.

In addition to their desire for the refugee definition to serve strategic political objectives, the majority of the states that drafted the Convention sought to create a rights regime conducive to the redistribution of the post-war refugee burden from European shoulders.[41] The Europeans complained that they had been forced to cope with the bulk of the human displacement caused by the Second World War,[42] and that the time had come for all members

[38] *Convention, supra*, note 27, at Art. 1(A)(2), para. 1.

[39] *See* generally Amnesty International, *Report 1987*, pp. 279-332 (1987). For example, in regard to the U.S.S.R., the Report (at p. 320) notes ". . . no improvement in the harsh and arbitrary treatment of prisoners of conscience in 1986. Although it has learned of fewer political arrests, Amnesty International was disturbed that the Soviet authorities continued to imprison many citizens whose conscience led them to dissent peacefully from official policies, and to apply compulsory psychiatric measures to others."

[40] "We vote for officials every two or four or six years. We never vote on those who occupy the land. We do not live in an economic democracy. Many of those who are now in wealth did not become so because of brilliance and hard work and character, but because of royal blood and inheritance and growth at the expense and exploitation of other people . . . . This generation cannot speak of political democracy apart from human rights, cannot speak of human rights apart from development. The great issues of our day transcend party, race, region, religion, and sex": J. Jackson, "Measuring Human Rights and Development by One Yardstick" (1985), 15 Ca. W. Intl. L.J. 453, at 456-60.

[41] "One region in the world was ripe for treatment of the refugee problem on an international scale. That region was Europe. One problem was ready to form the subject of an international convention, namely, the problem of European refugees": Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.19, at 12, November 26, 1951. Mr. Desai of India summarized the redistributive purpose succinctly: "In effect, an appeal was made to all governments to accord the same treatment to all refugees, in order to reduce the burden on contracting governments whose geographical situation meant that the greater part of the responsibility fell on them": U.N. Doc. E/AC.7/SR.166, at 18, August 22, 1950.

[42] "All previous international instruments concluded on behalf of refugees had been couched and conceived in respect of those European countries, of which Italy was one, that had first been affected by the problem and made sacrifices to relieve it. The proposed geographical restriction was essential . . . ": Statement of Mr. Del Drago of Italy, U.N. Doc. A/CONF.2/SR.21, at 4, July 14, 1951.

of the United Nations to contribute to the resettlement of both the remaining war refugees and the influx of refugees from the Soviet bloc.[43] Refugees would be more inclined to move beyond Europe if there were guarantees that their traditional expectations in terms of rights and benefits would be respected abroad. The Convention, then, was designed to create secure conditions such as would facilitate the sharing of the European refugee burden.[44]

Notwithstanding the vigorous objections of several delegates from developing countries faced with responsibility for their own refugee populations,[45] the Eurocentric goal of the Western states was achieved by limiting the scope of mandatory international protection under the Convention to refugees whose flight was prompted by a pre-1951 event within Europe.[46] While states might opt to extend protection to refugees from other parts of the world, the definition adopted was intended to distribute the European refugee burden without any binding obligation to reciprocate by way of the establishment of rights for, or the provision of assistance to, non-European refugees. It was not until more than fifteen years later that the *Protocol relating to*

[43] "[T]he Secretariat had sent out 80 invitations to the present conference. Yet the conference gave the appearance of being nothing more than a meeting of the Council of Europe slightly enlarged . . . . it meant that it was really European refugees who were still involved; it meant, too, that the non-European countries in whose territories European refugees were living did not wish to enter into commitments in respect of them": Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.3, at 12, November 19, 1951.

[44] "It was . . . one thing to frame a definition in the desire to assist all refugees irrespective of their country of origin, and quite another to adjust that definition to the remaining provisions of the Convention . . . . If, when considering the articles other than article 1, the Conference had been aware that the Convention was to apply to all refugees without distinction, it would undoubtedly have proceeded differently. As it was, the provisions so far agreed upon had been adapted specifically for application to refugees from European countries": Statement of Mr. Warren of the U.S.A., U.N. Doc. A/CONF.2/SR.22, at 16, July 16, 1951. *Accord* Mr. Del Drago of Italy: "If the Convention covered Europeans who wanted to settle in overseas countries with a western civilization, the rights and duties of the refugee and the receiving country could be defined": U.N. Doc. A/CONF.2/SR.19, at 15, November 26, 1951.

[45] "[T]he French text seemed to approach the question from a purely European point of view, and might not therefore be entirely suitable for an international convention. He believed that due consideration should be given to refugee problems existing outside the continent of Europe": Statement of Mr. Caledron Puig of Mexico, U.N. Doc. E/AC.7/SR.160, at 4, August 18, 1950. *Accord* Mr. Brohi of Pakistan: "The Pakistan delegation was of the opinion that the problem of refugees was not a European problem only and thought, therefore, that the definition of the term 'refugee' should cover all those who might reasonably fall within the scope of that term": 11 UNESCOR (399th mtg.) at 215, August 2, 1950.

[46] "For the purposes of this Convention, the words 'events occurring before 1 January 1951' in Article 1, Section A, shall be understood to mean either: (a) 'events occurring in Europe before 1 January 1951' or (b) 'events occurring in Europe or elsewhere before 1 January 1951' and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention . . . ": *Convention, supra*, note 27, at Art. 1(B)(1).

the Status of Refugees[47] expanded the scope of the Convention definition to include refugees from all regions of the world.[48]

1.3 The Impact of the 1967 Protocol on the Convention Definition

The 1967 Protocol achieved the formal, but not the substantive, universalization of the Convention definition of refugee status. The obvious restriction in the Convention definition — the requirement that the claim relate to a pre-1951 event in Europe — was prospectively eliminated by the Protocol.[49] However, there was no review conducted of the substantive content of the definition.

Even after the elimination of temporal and geographic limitations, only persons whose migration is prompted by a fear of persecution on the ground of civil or political status[50] come within the scope of the Convention-based protection system. This means that most Third World refugees remain *de facto* excluded, as their flight is more often prompted by natural disaster, war, or broadly based political and economic turmoil than by "persecution",[51] at least as that term is understood in the Western context.[52] While

[47] 606 U.N.T.S. 8791, entered into force on October 4, 1967 ("*Protocol*").

[48] Those states which had already made the declaration under Article 1(B)(1)(a) of the Convention to restrict its application in their jurisdiction to European refugees could, however, maintain that restriction: *Protocol, supra*, note 47, at Art. I(3).

[49] "For the purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and . . . ' and the words ' . . . as a result of such events', in article 1(A)(2) were omitted. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1(B)(1)(a) of the Convention, shall, unless extended under article 1(B)(2) thereof, apply also under the present Protocol": *Protocol, supra*, note 47, at Article I(2)-(3).

[50] "[S]i la persécution est toujours une réalité trop fréquente, elle est loin de constituer la seule raison que amène les individus à fuir leur pays ou à refuser sa protection": F. Julien-Laferrière, "Réflexions sur la notion de réfugié en 1978" (1978), A.W.R. Bull. 30, at 30.

[51] "[I]n addition to political persecution and the ravages of war, the modern refugee flees the whole range of problems which acompany underdevelopment in the post-colonial period, including civil strife, political instability, and harsh economic conditions. Though the post-World War II refugee and the modern refugee are . . . treated differently under international law, the actual position of both groups is the same. Hence, the argument continues, both groups should be accorded the same rights under international law": E. Lentini, "The Definition of Refugee in International Law: Proposals for the Future" (1985), 5 Boston Coll. Third World L.J. 183, at 184.

[52] "[F]or the great masses there will be a presumption, hard for them to disprove, that they have fled more in order to escape economic misery than because they fear political persecution . . . . It may seem as if there is a tendency to draw the line differently, depending on the differences of economic levels between the countries in question. If the flow is from one of the poorest countries in the world into one of the richest, as is the case of the Haitians trying to get into the United States, the scales may be heavily weighted against the newcomers . . . ":

these phenomena undoubtedly may give rise to genuine fear and hence to the need to seek safe haven away from one's home,[53] refugees whose flight is not motivated by persecution rooted in civil or political status are excluded from the rights regime established by the Convention.

1.4 International Expansion of the Refugee Concept

The Convention refugee concept has been expanded in practice through the evolution of the institutional competence of the United Nations High Commissioner for Refugees, the effort to prepare a United Nations convention on territorial asylum, the establishment of regional refugee protection arrangements, and the practice of states. While these developments do not constitute formal amendments to the Convention definition, they are nonetheless indicative of a widening of the circumstances in which persons may be said genuinely to be in need of international protection. In keeping with Recommendation E[54] of the Conference that adopted the Convention, states which are parties to the Convention may be expected to consider these developments in determining the extent to which persons outside the strict contractual scope of the Convention will be protected as refugees.

1.4.1 Enhanced Competence of the United Nations High Commissioner for Refugees

Developments in the refugee definition employed by the United Nations High Commissioner for Refugees[55] are salient particularly because this institu-

A. Grahl-Madsen, "International Refugee Law Today and Tomorrow" (1982), 20 Archiv des Völkerrechts 411, at 422.

[53] "[T]he Convention and Protocol, and thus several domestic laws, designate as refugees only those who have fled from persecution and exclude fugitives from natural disasters and from civil and international war. This limitation on the designation of refugee owes its origins to the fact that the refugee was designated as a person who stands in need of international protection because he or she is deprived of that in his or her own country. Such reasoning and definition may well be appropriate for the purpose of determining whether an individual should receive an international travel document and should be eligible for the diplomatic protection afforded by the High Commissioner's representatives; however, it appears inappropriate for the purpose of determining whether an applicant qualifies for admission to a country of asylum and to freedom from 'refoulement.' The compassionate claim of a fugitive from persecution may, after all, be no greater than that of a person displaced by an earthquake or a civil war": R. Plender, "Admission of Refugees: Draft Convention on Territorial Asylum" (1977), 15 San Diego L.Rev. 45, at 54-55.

[54] "The Conference, [e]xpresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides": *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 189 U.N.T.S. 37.

[55] "The competence of the High Commissioner shall extend to . . . [a]ny other person who is outside the country of his nationality, or if he has no nationality, the country of his former

tional definition and the Convention definition were drafted simultaneously by the same organs of the United Nations. Since the adoption of the 1967 Protocol, moreover, the two definitions are quite similar.[56]

The individualistic character of the refugee definition contained in the 1950 UNHCR Statute[57] made it difficult initially for the organization to respond in a meaningful way to the needs of refugees outside Europe.[58] Becauses refugees in Africa and Asia tend to move in large groups, the type of individuated, case by case application of a refugee definition contemplated by the Statute (like the Convention) was simply not a practical possibility.[59] The UNHCR was thus technically unable to exercise its universal mandate, and sought the authority to deal with refugee situations outside Europe in a more collective fashion that would not involve a process of individualized assessment.[60]

Since 1957, the General Assembly, the Economic and Social Council, and the Executive Committee of the UNHCR have moved by a variety of means

habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence": *Statute of the Office of the United Nations High Commissioner for Refugees*, U.N.G.A. Res. 428(V), December 14, 1950 ("*Statute*").

[56] The differences of importance include (a) the omission of any reference to claims grounded in membership of a particular social group in the UNHCR Statute; (b) the UNHCR Statute's inclusion of persons who have either a present or a past fear of persecution; (c) the explicit exclusion under the UNHCR Statute of persons whose refusal to return is for reasons of personal convenience or of an economic character; (d) the clarification in the UNHCR Statute that it is the actual receipt of assistance from another U.N. agency, rather than eligibility for the same, that results in exclusion from the refugee definition; and (e) the more narrow criminal exclusion in the UNHCR Statute. *See UNHCR Statute, supra*, note 55, and *Convention, supra*, note 27.

[57] *Supra*, note 55.

[58] "The UNHCR Statute . . . contains an apparent contradiction. On the one hand, it affirms that the work of the Office shall relate, as a rule, to groups and categories of refugees. On the other hand, it proposes a definition of the refugee which is essentially individualistic, requiring a case by case examination of subjective and objective elements. The escalation in refugee crises over the last 30 years has made it necessary to be flexible in the administration of UNHCR's mandate. In consequence, there has been a significant broadening of what may be termed the concept of 'refugees of concern to the international community' ": G. Goodwin-Gill, *The Refugee in International Law*, p. 6 (1983).

[59] "An eligibility procedure — however devised — is inevitably very time-consuming. When the Statute of the Office of the UNHCR and the Convention were adopted it was quite possible to recognize refugees on an individual basis. Since 1951, however, there have been occasions when new refugee problems have arisen and the number of refugees involved has been so large as to make it impossible to recognize persons on an individual basis": G. Melander, "The Protection of Refugees" (1974), 18 Scandinavian Studies in Law 153, at 161.

[60] "[T]he High Commissioner has been authorized to assist refugees without having to decide on an individual basis whether the persons in question were mandate refugees. The High Commissioner has — to use the official terminology — been authorized to lend his good offices to persons in need of assistance": G. Melander, *supra*, note 59, at 161.

to respond to non-European refugee-producing situations.[61] Styled variously as requests for the UNHCR to "extend its good offices", or to act on behalf of groups "of concern" to the international community, the *de facto* sphere of responsibility has expanded radically from its relatively constrained statutory base. UNHCR has been authorized to aid the full range of involuntary migrants, including the victims of all forms of both man-made[62] and natural[63] disasters. Moreover, the organization has been requested to assist refugees who remain within their country of origin,[64] and to contribute to the resettlement of refugees who are returning home.[65] The essential criterion of refugee status under UNHCR auspices has come to be simply the existence of human suffering consequent to forced migration. While this enhanced definition is linked primarily to eligibility for material assistance, UNHCR has also been authorized with increasing frequency to extend international legal protection to persons within its broader mandate.[66] In functional terms, few distinctions are now made between the role of UNHCR in regard to refugees within its statutory mandate and those within its extended competence.

1.4.2 The Attempt to Draft a Convention on Territorial Asylum

A second indication of the expanded scope of refugee status derives from the abortive effort to draft a convention to define the circumstances in which

[61] "The U.N. High Commissioner for Refugees (UNHCR) has enjoyed an expansion of his mandate and responsibility and authority under successive resolutions of the General Assembly, until now that responsibility extends far beyond the classic U.N. definition of 'refugee' to include a great many other 'displaced persons' ": D. Martin in C. Sumpter, "Mass Migration of Refugees — Law and Policy" (1982), 76 A.S.I.L.P. 13, at 17. *See generally* P. Maynard, "The Legal Competence of the United Nations High Commissioner for Refugees" (1982), 31 I.C.L.Q. 415.

[62] "It has been said that the High Commissioner's competence in relation to protection as well as to assistance has been extended gradually to all victims of man-made disasters": G. Coles, *Problems Arising From Large Numbers of Asylum-Seekers: A Study of Protection Aspects*, p. 15 (1981).

[63] Independent Commission on International Humanitarian Issues, *Refugees: The Dynamics of Displacement*, pp. 48-49 (1986).

[64] "Since the early 1970s, UNHCR has been requested on numerous occasions to assist refugees once they have returned to their home country. From time to time, it has been called on to help people who have been uprooted and displaced within their own country": Independent Commission on International Humanitarian Issues, *supra*, note 63, p. 48.

[65] "[I]nternational action, whether at the universal or regional level, to promote voluntary repatriation requires at the outset of a refugee movement consideration of the situation within the country of origin . . . . It was not to be excluded that conditions within the country of origin could be improved significantly and beneficially as a result of timely and helpful international intercessions whether of a political or economic nature . . . . Material assistance for the reintegration of returnees provided by the international community in the country of origin was recognized as an important factor in promoting voluntary repatriation": Executive Committee of the High Commissioner's Programme, "Refugee Aid and Development", U.N. Doc. A/AC.96/662 (1985) paras. 32 and 39.

[66] "The type of assistance which might be given [to non-mandate refugees] was initially limited, often to the transmission of financial contributions, but that restriction was soon dropped": G. Goodwin-Gill, *supra*, note 58, p. 7.

territorial asylum should be guaranteed to refugees. The need for such a convention stems from the failure to include in the Convention any obligation beyond "non-refoulement",[67] that is, the duty to avoid the return of a refugee to a country where she faces a genuine risk of serious harm. While willing to provide emergency protection against return to persecution the states that participated in the drafting of the Convention insisted that they be allowed to decide who should be admitted to their territory, who should be allowed to remain there, and ultimately who should be permanently resettled.[68]

In view of this deficiency in the Convention, and in an effort to effectuate the right to seek and enjoy asylum contained in the Universal Declaration of Human Rights[69] and the Declaration on Territorial Asylum,[70] a draft convention on territorial asylum was prepared and submitted to a conference of plenipotentiaries in 1977.[71] While the purpose of the proposed accord was essentially to enhance the scope of protection available to Convention refugees,[72] its most noteworthy achievement may in fact have been the degree of consensus attained on changes to the definition of refugee status for purposes of entitlement to international legal protection.

The expert draft of Article 2 of the proposed asylum convention recommended important changes to the definitional standard derived from the Convention, as amended by the Protocol. Clarifications of the notions of "political opinion" to include opposition to apartheid and colonialism, and of "persecution" to embrace prosecution grounded in persecutory intent were

[67] "The Convention does not address the granting of asylum. The reasons for this appear to be two-fold. First, because states are the proper subjects of international law, individuals have neither rights under nor access to it. More importantly, the right to grant asylum remains within the unfettered discretion of a state as an incident of sovereignty; in the absence of contrary treaty obligation, a state is not bound to grant or deny political asylum to any person": R. Sexton, "Political Refugees, Nonrefoulement and State Practice: A Comparative Study" (1985), 18 Vand. J. Transntl. L. 731, at 737-738.

[68] "States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there. They have refused to agree to international instruments which would impose on them duties to make grants of asylum": P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986), 60 Australian L.J. 148, at 153.

[69] "Everyone has the right to seek and enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations": *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), December 10, 1948, at Art. 14.

[70] U.N.G.A. Res. 2312 (XXII), December 14, 1967.

[71] *See generally* P. Weis, "The Draft United Nations Convention on Territorial Asylum" (1979), 50 British Y.B. Intl. L. 151.

[72] "The proposed new Convention, and the conference, were concerned more with increasing the degree of protection afforded to those falling within the existing definition of a *refugee* than with broadening the definition . . . ": R. Plender, *supra*, note 53, at 48.

proposed.[73] During the meeting of the 92 states, moreover, it was agreed *inter alia* that asylum should be accessible also to persons at serious risk of persecution due to kinship[74] or as a result of "foreign occupation, alien domination, and all forms of racism."[75] An important clarification of the definition agreed to by delegates was the replacement of the "owing to a well-founded fear of persecution" Convention-based standard with a requirement that a refugee be "faced with a definite possibility of persecution."[76] The expanded scope of protection as a whole, including both the expert group and conference amendments, which was approved by 47 votes to 14 with 21 abstentions, provided that:

> Each Contracting Stage may grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of:
> (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, foreign occupation, alien domination and all forms of racism; or
> (b) Prosecution or punishment for reasons directly related to the persecution set forth in (a);
> is unable or unwilling to return to the country of his nationality or, if he has no nationality, the country of his former domicile or habitual residence.[77]

While the drafting of the territorial asylum convention ended in a stalemate,[78] the affirmative vote in favour of an expanded definition of refugee

[73] The proposed Article 2, which set out the scope of the refugee concept read as follows:
"A person shall be eligible for the benefits of this Convention if he, owing to a well-founded fear of:
(a) Persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, or
(b) Prosecution or punishment for acts directly related to the persecution as set forth in (a)
is unable to unwilling to return to the country of his nationality, or, if he has no nationality, the country of his former habitual residence."
P. Weis, *supra*, note 71, at 155.

[74] This Australian amendment was adopted by a vote of 40-24, with 15 abstentions: P. Weis, *supra*, note 7, at 162.

[75] This amendment, co-sponsored by Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen was adopted by a vote of 45-21, with 15 abstentions: P. Weis, *supra*, note 71, at 162.

[76] Paul Weis argues that "[t]he amendment adopted is more restrictive, providing for an objective test only, and would depart from the present practice of many States": P. Weis, *supra*, note 71, at 162. The position advanced herein is to the contrary: *see* Section 4.1, *infra*.

[77] P. Weis, *supra*, note 71, at 163-64.

[78] "[T]he Committee met for [more than] four weeks, and only three of the ten articles of the experts' draft were discussed and voted on . . . . As foreseen, the preoccupation of the majority of the states was that of safeguarding, to exasperation point, the sovereign right of a state to grant asylum": E. Lapenna, "Territorial Asylum — Developments from 1961 to 1977 — Comments on the Conference of Plenipotentiaries" (1978), 16 A.W.R. Bull, 1, at 4.

status is nonetheless indicative of a willingness on the part of the international community to conceive the refugee concept more broadly than as elaborated in the Convention and Protocol. In contrast to the concern in 1967 to avoid the reassessment of the substantive content of the refugee definition,[79] a majority of the 92 states that attended the Conference on Territorial Asylum agreed to update the definition in ways that were responsive to refugee movements in the developing world, and which recognized the collective nature of many refugee-producing phenomena. While no binding, conventional commitment was established toward refugees within this revised concept, the work of the 1977 conference remains the most recent expression of international consensus on the appropriate scope of refugee status in international law.

Three regional groups have enacted standards of refugee protection that extend the Convention definition in ways similar to the evolution of the UNHCR mandate and the scope of the proposed asylum convention. The work of each of the Organization of African Unity, the Organization of American States, and the Council of Europe is considered in turn.

1.4.3 The Organization of African Unity Definition of Refugee Status

The first regional arrangement was established by the Organization of African Unity (OAU) in 1969. In addition to respecting the Convention definition of a refugee, state parties to the OAU *Convention governing the specific aspects of refugee problems in Africa*[80] broke new ground by extending protection to all persons compelled to flee across national borders by reason of any man-made disaster,[81] whether or not they can be said to fear persecution:

> 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.[82]

[79] *See* text *supra* at note 49. The Colloquium that drafted the Protocol "considered that a revision of the Convention would be too lengthy and cumbersome to meet the need for urgency and therefore recommended the adoption of a Protocol. Although this does not appear from the Colloquium's Report, the members of the Colloquium freely admitted that a revision of the Convention would also be undesirable as it might lead to a political discussion in the General Assembly": UNHCR, "Draft Protocol to the 1951 Convention: Analysis of the present position", Internal memorandum, May 26, 1966.

[80] U.N.T.S. 14,691, entered into force June 20, 1974 ("*OAU Convention*").

[81] "The second part of the definition would virtually cover all man-made disasters and would embrace that class of persons sometimes called 'displaced persons' ": G. Coles, "Background Paper for the Asian Working Group on the International Protection of Refugees and Displaced Persons", p. 83 (unpublished, 1980).

[82] *OAU Convention, supra*, note 80, at Art I(2).

This standard represents an important conceptual adaptation of the Convention refugee definition, in that it successfully translates the core meaning of refugee status to the reality of the developing world.[83] From its inception, refugee status has evolved in response to changing social and political conditions[84] — the initial concern with *de jure* statelessness shifted to embrace *de facto* unprotected groups, and further to protect individuals at ideological odds with their state. The common thread is a recognition that it is reasonable for groups and individuals to disengage from fundamentally abusive national communities, at which point refugee law exists to interpose protection by the international community. Whether the particular form of abuse consists of a denial of formal protection, a campaign of generalized disfranchisement, refusal to allow individuals political self-determination, or calculated acts of deliberate harm, the definitional framework of international refugee law has evolved to respond to the imperative to protect involuntary migrants in flight from states which fail in their basic duty of protection.

The OAU definition accepts this rationale for refugee status. It does not, for example, suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community, as a shift away from concern about the adequacy of state protection in favour of a more generalized humanitarian commitment might have dictated.[85] Rather, the OAU definition recognizes that four important modifications of the Convention definition are required in order to accommodate the specific context of abuse in states of the developing world.

First, the OAU definition acknowledges the reality that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of the refugee's state of origin, but also as a result of that government's loss of authority due to external aggression, occupation, or foreign domination. The anticipated harm is no less wrong because it is inflicted by a foreign power in control of a state rather than by the government of that state *per se*. This modification simply recognizes the need to examine a refugee claim from the perspective of the *de facto*, rather than the formal, authority structure within the country of origin.

[83] "The 1951 Convention was primarily drawn up to deal with the situation of displaced persons in Europe immediately after the Second World War, and to provide protection for those persons. The States acceding to the Convention were anxious to make their obligations specific and to ensure that those obligations could not be extended indefinitely. Today, circumstances have changed and many people who need international protection of the kind provided by the Convention do not fall within its ambit": P. Hyndman, *supra*, note 68, at 150.

[84] *See generally* J. Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950" (1984), 33 I.C.L.Q. 348, especially at 379-80.

[85] "Even this broader [OAU] definition would not cope with complex refugee situations with multiple causes, including ecological or economic disasters . . . . On humanitarian grounds, there is a strong case to be made for a broader approach . . . . Where a person's life, liberty or safety is threatened, it is immaterial whether that threat is the result of persecution or some other form of danger . . . ": Independent Commission on International Humanitarian Issues, *supra*, note 63, p. 46.

Second, the OAU definition reverts to the pattern of pre-World War II refugee accords in recognizing the concept of group disfranchisement.[86] By its reference to persons who leave their country in consequence of broadly based phenomena such as external aggression, occupation, foreign domination, or any other event that seriously disturbs public order, the OAU recognizes the legitimacy of flight in circumstances of generalized danger.

While the accommodation of abuse at the hands of a *de facto* government is little more than an extrapolation from the intent of the Convention definition, and while group-based refugee determination has its historical antecedents in European practice, there are two additional features of the OAU definition that are unprecedented in international refugee law.

The Convention definition and all of its predecessors link refugee status to the prospect of abuse *resulting from* some form of personal or group characteristic (in the case of the Convention, from one's civil or political status).[87] The OAU definition, on the other hand, leaves open the possibility that the basis or rationale for the harm may be indeterminate. So long as a person "is compelled" to seek refuge because of some anticipated serious disruption of public order, she need not be in a position to demonstrate any linkage between her personal status (or that of some collectivity of which she is a member) and the impending harm. Because the African standard emphasizes assessment of the gravity of the disruption of public order rather than motives for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight.

The OAU Convention also extends international protection to persons who seek to escape serious disruption of public order "in either part or the whole"[88] of their country of origin. This, too, represents a departure from past practice in which it was generally assumed that a person compelled to flight should make reasonable efforts to seek protection within a safe part of her own country (if one exists) before looking for refuge abroad.[89] There are at least three reasons why this shift is contextually sensible. First, issues of distance or the unavailability of escape routes may foreclose travel to a safe region of the refugee's own state. Underdeveloped infrastructure and inadequate personal financial resources may reinforce the choice of a more easily reachable foreign destination. Second, the political instability of many

[86] *See* text *supra* at notes 10-20.

[87] A Convention refugee is a person outside her country " . . . owing to a well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion . . . ": *Convention, supra*, note 27, at Art. 1(A)(2).

[88] *OAU Convention, supra*, note 80, at Art. I(2).

[89] "The fear of being persecuted need not always extend to the *whole* of the refugee's country of nationality . . . . a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, *if under all the circumstances it would not have been reasonable to expect him to do so*" [Emphasis added]: United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, pp. 21-22 (1979).

developing states may mean that what is a "safe" region today may be dangerous tomorrow. Rapid shifts of power and the consequent inability to predict accurately where safe haven is to be found may lead to a decision to leave the troubled state altogether. Finally, the artificiality of the colonially imposed boundaries in Africa has frequently meant that kinship and other natural ties stretch across national frontiers.[90] Hence, persons in danger may see the natural safe haven to be with family or members of their own ethnic group in an adjacent state.

The relevance of the OAU definition to conditions in the developing world has made it the most influential conceptual standard of refugee status apart from the Convention definition itself. It has provided the basis for enhanced UNHCR activity in Africa,[91] was at the root of the proposed conventional definition of persons entitled to territorial asylum,[92] and has inspired the liberalization of a variety of regional[93] and national[94] accords on refugee protection.

1.4.4 The Organization of American States Definition of Refugee Status

The most recent regional extension of the refugee definition is derived from the Cartagena Declaration, adopted by ten Latin American states in 1984.[95] In recognition of the inadequacy of the Convention definition to embrace the many involuntary migrants from generalized violence and oppression in Central America, the state representatives agreed to a refugee definition that

[90] "[Le] franchissement des limites territoriales, surtout en Afrique de l'Ouest, était fréquent avant que les pays accèdent à l'indépendance politique et que soient définies des frontières juridiques bien nettes . . . . Il importe, en outre, de souligner qu'à l'origine la définition des frontières à l'époque de l'administration coloniale n'avait qu'un effet minime puisque la plupart des migrants se déplaçaient très librement sans tenir compte de frontières artificielles": É.-R. Mbaya, *La communauté internationale et les mouvements des populations en Afrique*, p. 17 (1985).

[91] "UNHCR's competence in Africa has been recognized as extending also to refugees who have fled owing to external aggression, occupation, foreign domination or events seriously disturbing public order": G. Goodwin-Gill, "Refugees: The Functions and Limits of the Existing Protection System", in A. Nash, ed., *Human Rights and the Protection of Refugees under International Law*, p. 150 (1988).

[92] The successful amendment of the expert draft definition for purposes of the proposed asylum convention to embrace claims grounded in foreign occupation and alien domination (*supra*, note 75) parallels the major innovation of the OAU definition (*see* text *supra* at note 81).

[93] The Organization of American States refugee definition (discussed in text *infra* at note 95 ff.) embraces persons whose claims are grounded in generalized violence and foreign aggression, whether or not a well-founded fear of persecution can be demonstrated. The Council of Europe has also recommended a more expansive concept of *de facto* refugee status which extends to persons in flight from broad-based oppression (*see* text *infra* at note 104 ff.)

[94] *See* text *infra* at note 108 ff.

[95] *See Annual Report of Inter-American Commission on Human Rights 1984-85*, OEA/Ser.L/II.66, doc. 10, rev. 1, at 190-193.

is similar to that enacted by the Organization of African Unity. In addition to Convention refugees, protection as refugees was extended to

> . . . persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.[96]

This definition was approved by the 1985 General Assembly of the Organization of American States, which resolved "to urge Member States to extend support and, insofar as possible, to implement the conclusions and recommendations of the Cartagena Declaration on Refugees."[97]

The OAS definition shares some of the innovative characteristics of the OAU Convention. First, it acknowledges the legitimacy of claims grounded in the actions of external powers by virtue of its reference to flight stemming from foreign aggression. Second, it offers a qualified acceptance of the notions of group determination and claims in which the basis or rationale for harm is indeterminate. The qualification stems from the fact that while generalized phenomena are valid bases for flight, and while acceptance of a claim is not premised on any status or characteristic of the claimant or a group to which she belongs, all applicants for refugee status must nonetheless show that "their lives, safety or freedom have been threatened."[98] This requirement that the putative refugee be demonstrably at risk due to the generalized disturbance in her country contrasts with the OAU Convention's deference to individuated perceptions of peril.[99] Finally, the OAS definition, unlike its African counterpart,[100] does not explicitly extend protection to persons who flee serious disturbance of public order that affects only part of their country.

The references to claims grounded in "internal conflicts"[101] and "massive violations of human rights"[102] provide helpful clarification of established principles, but in substantive terms do not break new ground. Any situation of internal conflict would surely "disturb public order"[103] and hence be included within the general language of both the OAU and OAS definitions. Moreover, while the granting of refugee status based simply on the existence of massive violations of human rights would have been a major innovation, this ground of claim as codified adds little to the Convention definition in

[96] Conclusion 3, *Declaracion de Cartagena*, *supra*, note 95.
[97] UNHCR, "OAS General Assembly: an inter-American initiative on refugees" (1986), 27 Refugees 5.
[98] *Supra*, note 96.
[99] *See* text *supra* at note ff.
[100] *See* text *supra* at note 88 ff.
[101] *Supra*, note 96.
[102] *Supra*, note 96.
[103] This criterion is contained in the OAU refugee definition. *See* text *supra* at note 80.

view of the obligation of refugee claimants to show that *their* lives, safety, or freedom have been threatened by such human rights abuses.

Overall, the OAS definition of refugee status marks something of a compromise between the Convention standard and the very broad OAU conceptualization. It expands the "persecution" standard of the Convention to take account of abuse that can result from socio-political turmoil in developing countries, yet constrains the protection obligation to cases where it is possible to show that there is some real risk of harm to persons similarly situated to the refugee claimant.

1.4.5 The Council of Europe Definition of Refugee Status

The Council of Europe has also introduced standards of refugee protection that go beyond the Convention definition, although the changes are significantly more modest than those of the OAU or OAS. In the Parliamentary Assembly's Recommendation 773 in 1976, the Council of Europe expressed its concern in regard to the situation of "*de facto* refugees", that is, persons who either have not been formally recognized as Convention refugees (although they meet the Convention's criteria), or who are "unable or unwilling for . . . other valid reasons to return to their countries of origin."[104] Member governments were invited to "apply liberally the definition of 'refugee' in the Convention"[105] and "not to expel *de facto* refugees unless they will be admitted by another country where they do not run the risk of persecution."[106]

To date, this Recommendation has been only partially implemented. While the Committee of Ministers has stipulated that Convention refugees not formally recognized as such should be protected from return,[107] no text has been adopted dealing with the rights of the broader class of refugees outside the scope of the Convention definition. Overall, it can be said that the Council of Europe has acknowledged the legitimacy of the claim to protection of an expanded class of refugees, but has not moved to formalize their status or rights.

1.4.6 The Refugee Definition in the Practice of States

There is also evidence of an expanding conceptualization of refugee status in the practice of those states which do not participate in a formalized regional refugee protection arrangement. Refugees in flight from situations of generalized danger or serious disturbances of public order are often protected through special programs or regulatory schemes, or by burden-sharing arrangements concluded between states of reception and resettlement coun-

[104] Council of Europe, Parliamentary Assembly Recommendation 773 (1976).
[105] *Id.*
[106] *Id.*
[107] Council of Europe, Committee of Ministers Recommendation R(84)1 (1984).

tries.[108] Because these voluntary initiatives are not subject to the formal constraints of the Convention-based protection scheme, states have a substantial margin of discretion in determining the scope of their efforts. It is nonetheless striking to note the virtual unanimity of state practice in affording some type of protection to refugees outside the formal scope of the Convention.

In Europe, the general moral commitment toward non-Convention refugees evinced in Council of Europe resolutions[109] is buttressed by an array of national protection arrangements. Perhaps the best known is the concept of "B" status in Swedish law, whereby persons outside the scope of the Convention who remain abroad for valid humanitarian reasons may be temporarily admitted and granted residence permits.[110] Similarly, Portugal grants asylum to persons in flight from armed conflict or broadly based human rights violations,[111] West German law tolerates the residence of persons who face civil war, foreign occupation, or adverse political conditions in their country of origin,[112] and Dutch law provides for the granting of asylum to persons at risk due to difficult political circumstances in their home state that fall short of "persecution".[113] Under Great Britain's discretionary refugee policy, persons perceived by authorities to have a valid reason for not returning to their country may be granted asylum, whether or not they meet the Convention refugee definition.[114] French policy, while more closely wedded to the Convention definition, has nonetheless authorized the admission of Cambodian, Laotian, and Vietnamese citizens, regardless of whether they meet the strict refugee definition.[115] In general, while European states have constructed policies that safeguard national sovereignty over the admission of refugees in flight from broadly based disturbances, there is a general practice of not returning persons to states in which there is a significant risk of danger due to internal upheaval or armed conflict.[116]

A similar range of special programs exists in the traditional countries of immigration. In Australia, no distinction exists in law between Convention

[108] "There is a widespread practice of states to respond by special programs or internal regulations to large refugee movements arising out of civil war, internal disturbances, foreign occupation, natural catastrophes, or a general situation of gross violations of human rights": K. Hailbronner, "Non-refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" (1986), 26(4) Virginia J. Intl. L. 857, at 887.

[109] *See* text *supra* at note 104 ff.

[110] K. Hailbronner, *supra*, note 108, at 881-82. *Accord* A. Grahl-Madsen, *supra*, note 52, at 424.

[111] Act 38/80, August 1, 1980, Art. 5, para. 2, amended by Act 415/83, November 24, 1983. Cited in K. Hailbronner, *supra*, note 108, at 881.

[112] Deutscher Bundestag, 10 Wahlperiode, Drucksache 10/3346 (1985). Cited in K. Hailbronner, *supra*, note 108, at 882.

[113] K. Hailbronner, *supra*, note 108, at 881.

[114] R. Sexton, "Political Refugees, Nonrefoulement and State Practice" (1985), 18 Vand. J. Transntl. L. at 791.

[115] K. Hailbronner, *supra*, note 108, at 882-83.

[116] Note on the Consultations on the Arrivals of Asylum-seekers and Refugees in Europe, U.N. Doc. A/AC.96/INF.174 (1985).

and other refugees, as a result of which persons displaced by serious disturbances of public order may benefit from asylum.[117] Moreover, Australia operates special humanitarian programs to facilitate the admission of persons in refugee-like situations, including Soviet Jews, East Timorese, Sri Lankans, Lebanese, Latin Americans, and the victims of apartheid in South Africa.[118] Canadian law authorizes the admission of persons "for reasons of public policy or due to the existence of compassionate or humanitarian considerations."[119] In reliance on this authority, special measures programs have in the past been established to permit persons in Canada who are nationals of certain countries that are experiencing adverse domestic events to benefit from temporary asylum. Like Australia, Canada also operates overseas refugee selection programs that result in the resettlement of members of non-Convention "designated class" refugees in accordance with regional target allocations.[120] The United States of America temporarily admits classes of persons outside the Convention refugee definition under the Attorney General's parole power, based on a combination of humanitarian and foreign policy considerations.[121] Too, the extended voluntary departure procedure, which delays departure or removal on a discretionary basis, has been invoked in the cases of such refugee-like groups as Afghans, Poles, Ugandans, and Lebanese.[122]

The practice of many developing countries is based on either the OAU[123] or OAS[124] expanded refugee concept. Even in those countries not subject to one of these regimes, however, there is evidence of a willingness to protect refugees who may not meet the Convention definition. Pakistan and Iran, for example, sheltered the largest concentration of humanitarian refugees in the world, made up of persons forced to flee from the Afghanistan conflict.[125] Similarly, Hong Kong[126], Thailand[127] and other Southeast Asian

[117] K. Hailbronner, *supra*, note 108, at 886.

[118] A. Nash, *International Refugees Pressures and the Canadian Public Policy Response*, p. 99 (1989).

[119] *Immigration Act*, R.S.C. 1985, c. I-2, s. 114(2).

[120] [A]ny person who is a member of a class designated by the Governor in Council as a class, the admission of members of which would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted, may be granted admission": *supra, Immigration Act,* note 119, at 6.s(2).

[121] 8 U.S.C. 1182(d)(5)(A) (1982). Cited in K. Hailbronner, *supra*, note 108, at 883-84.

[122] G. Goodwin-Gill, "Non-Refoulement and the New Asylum Seekers" (1986), 26(4) Virginia J. Intl. L. 897, at 901.

[123] *See* text *supra* at note 80 ff.

[124] *See* text *supra* at note 95 ff.

[125] "By the end of 1987, estimates of the total number of Afghan refugees stood at between five and six million, approximately one-third of Afghanistan's population . . . . The overwhelming majority of Afghans who left their country took refuge in Pakinstan and in Iran — 3.1 million and 2.4 million respectively, according to the official statistics of these two governments": A. Billar, "An historic moment" (1988), 53 Refugees 8, at 9.

[126] R. Mushkat, "Hong Kong as a Country of Temporary Refuge: An Interim Analysis" (1982), 12 Hong Kong L.J. 157.

[127] A. Nash, *supra*, note 118, at 107.

states[128] have in most cases provided temporary refuge to Indochinese migrants in refugee-like situations pending their resettlement abroad. While refugee relief in developing countries has often been conditioned on the provision by the international community of either material assistance or resettlement opportunities,[129] there is nevertheless a clear pattern of granting non-Convention refugees basic protection from return once the security of the receiving state has been assured.

In sum, even in those states which have not formally committed themselves to the application of an expanded concept of refugee status through one of the regional accords, there is a consistent practice of recognizing as legitimate the protection needs of a class of refugees outside the scope of the Convention. A more difficult issue, given the predominance of discretionary and conditional programs for these humanitarian refugees, is the extent to which it can be said that they benefit from a *right* to international protection.

1.5 An Expanded Refugee Concept in Customary International Law?

Taking into account the consensus on the extension of the mandate of the UNHCR,[130] the agreement reached on broadening the refugee concept at the Conference on Territorial Asylum,[131] the conceptual advances of the three regional refugee accords,[132] and the consequent shifts in the practice of states,[133] can it be said that modern international law recognizes any duty toward a class of refugees more broad than as defined in the Convention and Protocol?

Guy Goodwin-Gill has argued[134] that a new class of refugees is recognized in customary international law. He believes that the obligation of states to observe the principle of "non-refoulement", implying at least temporary refuge in the face of imminent danger, now extends to persons outside the Convention refugee definition insofar as they may be said to lack governmental

[128] D. Greig, "The Protection of Refugees and Customary International Law" (1983), 8 Australian Y.B. Intl. L. 108, at 127.

[129] "In the developing world, recent state practice demonstrates that government are prepared to give at least temporary refuge to large numbers of distressed people, provided that the burden of caring for them and of seeking permanent solutions to their plight is shared by the international community. It was this principle of 'burden-sharing' that persuaded several South East Asian states which had initially been reluctant to admit Indo-Chinese boat refugees to change their policy": Independent Commission on International Humanitarian Issues. *Refugees: The Dynamics of Displacement*, pp. 44-45 (1986).

[130] *See* text *supra* at note 55 ff.

[131] *See* text *supra* at note 67 ff.

[132] *See* text *supra* at note 80 ff.

[133] *See* text *supra* at note 108 ff.

[134] G. Goodwin-Gill, *supra*, note 122.

protection against harmful events beyond their choosing or control.[135] Persons who flee situations of civil disorder, domestic conflict, or human rights violations should benefit from a presumption of humanitarian need, and may not be returned unless the state of refuge can rebut the presumed risk of danger.[136]

On the other hand, Kay Hailbronner[137] characterizes such views as "wishful legal thinking" on the basis that there is neither extensive and uniform state practice nor *opinio juris* sufficient to warrant an assertion of international rights for refugees outside the scope of the Convention. Hailbronner notes that most of the international practice in favour of the expanded class of refugees is in fact UNHCR institutional practice, which cannot be said to bind states in their own actions.[138] Moreover, regional standards have not been codified in binding terms, and national efforts on behalf of humanitarian refugees have been carefully defined as discretionary exercises of prerogative over immigration.[139]

Insofar as there is an international legal consensus on an expanded conceptualization of refugee status based upon custom, it surely is, as Goodwin-Gill concedes, "at a relatively low level of commitment."[140] In my view, Goodwin-Gill's assertion of a *right* to protection against "refoulement" overstates the extant scope of customary law in regard to non-Convention refugees. As noted by Hailbronner, developed states have felt free to reject members of the broader class of asylum seekers by the imposition of visa requirements, penalties on transportation companies, naval blockades, and

[135] "The central thesis of this paper is that the essentially moral obligation to assist refugees and to provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation (albeit at a relatively low level of commitment). The principle of non-refoulement must now be understood as applying beyond the narrow confines of articles 1 and 33 of the 1951 Refugee Convention": G. Goodwin-Gill, *supra*, note 122, at 898.

[136] "Whenever temporary refuge is sought, the existence of danger caused by civil disorder, domestic conflicts, or human rights violations generates a valid presumption of humanitarian need. This has important consequences for the process of determining the entitlement to protection of individuals or specific groups. In particular, the presumption should shift the burden of proof from the claimant to the state": G. Goodwin-Gill, *supra*, note 122, at 905.

[137] K. Hailbronner, *supra*, note 108.

[138] "Although the UNHCR fulfills its functions with the agreement of states, it remains a special body entrusted with humanitarian tasks . . . . the fact that the UNHCR continues to care for the interests of *de facto* refugees cannot be considered evidence of an *opinio juris* by states": K. Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees" (1986), 26(4) Virginia J. Intl. L. 857 at 869.

[139] "There is no evidence at all for a generalized recognition of an individual right of humanitarian refugees not be returned or repatriated. On the contrary, states have generally taken care not to narrow the range of possible responses to mass influxes of aliens . . . . It is common knowledge that states no longer enjoy absolute sovereignty. The real question is to what extent states have subjected their sovereign power to admit aliens to public international law. Municipal law, in fact, shows that states are not prepared to surrender in advance the ultimate option of returning to their home countries large categories of persons not meeting the definition of the 1951 Refugee Convention": K. Hailbronner, *supra*, note 138, at 887.

[140] G. Goodwin-Gill, *supra*, note 122, at 898.

the establishment of strictly discretionary mechanisms to cope with those asylum seekers who do reach their territory.[141] Developing states have conditioned their willingness to protect humanitarian refugees on the agreement of the international community to underwrite the costs of temporary asylum and to relocate the refugees to states of permanent resettlement.[142] Even the UNHCR has been tentative in its assertion of an expanded scope for the refugee definition applicable in the context of legal protection decisions.[143]

On the other hand, Hailbronner overlooks the consensus at the global, regional, and national levels in favour of *addressing in some way* the claims of those persons in one's territory or at one's borders who fear harm in their country of origin as a result of serious disturbances of public order. No aspect of international practice has questioned the duty to examine their need for protection. The nature of the special consideration has varied, and the avoidance of "refoulement" has not been universal. Nonetheless, UNHCR practice, the international consensus at the Conference on Territorial Asylum, all three regional refugee accords, and relatively consistent state practice agree in their extension of *some opportunity for special consideration* to persons within a state's territory who have been victimized by serious disturbances of public order in their country of origin.

The level of commitment is lower than that suggested by Goodwin-Gill,[144] but an intermediate category of refugee protection does now exist. The customary norm rooted in international usage is a right to be considered for temporary admission, whether by formal procedure or administrative discretion, *on the basis of a need for protection*. That is, customary international law precludes the making of decisions to reject or expel persons who come from nations in which there are serious disturbances of public order without explicit attention being paid to their humanitarian needs. This duty may be met through the granting of formal status as is contemplated by the three regional refugee accords, through the discretionary programs of "B" status, special measures, or extended voluntary departure that exist in Western developed states, or by seeking the assistance of other states or the international community to share the burden of actual or impending refugee flows. The obligation is simply to do *something* which provides a meaningful response to the humanitarian needs of the victims of serious disruptions of public order. We have not yet reached the point, though, of assimilating such

[141] K. Hailbronner, *supra*, note 138, at 875.

[142] *Supra*, note 129.

[143] "The UNHCR Notes on International Protection of 1984 and 1985 do not assert that persons who have been forced to seek refuge outside their country of origin because of armed conflict or other political or social upheavals have an individual right of temporary refuge even if one interprets this term in the sense of non-repatriation. Instead, the High Commissioner referred to difficulties of a definition of the legal status of *de facto* refugees which *should* include at least protection against refoulement and permission to remain in the territory": K. Hailbronner, *supra*, note 138, at 870.

[144] *See* text *supra* at notes 135-136.

persons to Convention refugees for the purpose of stipulating a duty to avert return in all cases.

In sum, international law may be said to recognize four categories of refugees. First are refugees defined by the Convention and Protocol. Convention refugees are entitled to claim protection against return to a country in which they fear persecution from any of the more than one hundred state parties to these accords. They may also invoke the full range of rights set out in the Convention, and call upon the institutional support of the UNHCR. Second, there are refugees who are protected by a regional agreement.[145] Such persons may be at risk of return to a situation of serious disturbance of public order, rather than persecution. Nonetheless, at least within Africa and Latin America, they are generally protected against return, and may be entitled to other preferential rights akin to those afforded Convention refugees. Third, there are refugees who fear harm as a result of serious disturbances of public order, but who are not able to invoke the protection of a special regional arrangement. These refugees from man-made harm are entitled to special consideration prior to return to their state of origin, but they may not claim protection from return as of right except as stipulated in the national legislation of the asylum state. Finally, all persons who are involuntary migrants as a result of natural or man-made causes may claim the institutional support of UNHCR by way of material assistance, aid in voluntary repatriation or resettlement, and in some cases legal protection. This residual class of refugees, however, has no special claim to protection under international law.

This book is devoted to a study of refugee status as defined by the Convention and Protocol. While other legal and extralegal vehicles add important momentum to the protection system for refugees, it remains clear that state practice today is fundamentally anchored in the basic conceptual framework established by these accords. The chapters which follow strive to elaborate a clear, contextually sensitive understanding of the Convention refugee definition as it has evolved through confrontation with the needs of contemporary involuntary migrants.

[145] While OAS and Council of Europe resolutions endorse expanded definitions similar to that of the OAU, only the African standard is incorporated in a legally binding convention. *See* text *supra* at notes 97 (OAS recommendation) and 104 (Council of Europe recommendation).