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Guy S. Goodwin-Gill

Office of the United Nations High Commissioner for Refugees

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Entry and Exclusion of Refugees

The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees

Guy S. Goodwin-Gill*

INTRODUCTION

Refugee problems today tend to have one factor in common—the huge numbers of people involved. But whether it is a case of one or of a mass of individuals, each arriving asylum seeker represents a challenge to established principles of state sovereignty. International jurists once wrote of the free movement of persons between nations, unhampered by passport and visa control. Since the late nineteenth century, however, the principle most widely accepted has been that each state retains exclusive control—an absolute discretion—over the admission to its territory of foreign nationals, refugees or not.¹ Although in practice many countries concede that certain individuals may have some claim to enter (*e.g.*, the close family members of local citizens or lawful residents), such claims must rely for their enforcement and implementation upon municipal law, and only rarely does international law have any relevance.²

The legal framework within which the refugee is located remains characterized by, on the one hand, the principle of state sovereignty and related principles of territorial supremacy, self-defense, and self-preservation; and on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty. This article examines the extent to which the latter may confine and structure an otherwise apparently absolute

* M.A., D.Phil. (Oxon.), of the Inner Temple, Barrister; Legal Adviser and Protection Officer in the Office of the United Nations High Commissioner for Refugees. The views expressed are the author's personal views and do not necessarily reflect those of the Office.

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discretion over the entry of foreign nationals. In this context, attention is paid to the status of international organizations and their role in developing and applying principles of international law, as well as to their impact on the standing of the individual. The major focus is on the entry of refugees and asylum seekers, although what is said in that regard is also relevant to the related questions of expulsion of lawfully resident refugees and extradition of refugees.

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Functions of UNHCR

The Office of the United Nations High Commissioner for Refugees (UNHCR) is the most recent in a line of international agencies concerned with refugees, whose history stretches back to the first years of the League of Nations.³ Early in 1946, the United Nations General Assembly had acknowledged that no refugee with "valid objections" should be compelled to return to his or her country of origin.⁴ This fundamental principle was expressly included in the Constitution of the International Refugee Organization (IRO, 1947-52), adopted by the General Assembly on December 15, 1946. This body⁵ assisted some 1,620,000 refugees during its short life, but its overall purpose was specific and limited. Some more "international" body was called for, which would be competent to deal with emerging refugee problems and to extend the necessary "protection" to refugees. In 1949, therefore, the UN General Assembly decided to establish the Office of the United Nations High Commissioner for Refugees⁶ and at the following session, the Statute was formally accepted, annexed to Resolution 428 of December 14, 1950.⁷

Resolution 428(V) calls upon governments to cooperate with the Office of UNHCR in the performance of its functions which, in turn, are set out in the Statute. The role of UNHCR is there declared to encompass "providing international protection" and "seeking permanent solutions" to the problems of refugees by way of voluntary repatriation or assimilation in new national communities.⁸ At the same time, the Statute expressly provides that "the work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees."⁹

Of the two functions, the provision of international protection is usually considered of primary importance. Without protection (for example, intervention by the Office to secure temporary refuge for refugees), there can be no possibility of finding durable solutions in the form of voluntary repatriation, integration in the country of first asylum, or resettlement in a third country.

In addition to defining refugees within the competence of the Office, the UNHCR Statute prescribes the relationship of the High Commissioner with the General Assembly and the Economic and Social Council (ECOSOC), makes provision for organization and finance, and identifies ways in which the High Commissioner is to provide for the protection of refugees.¹⁰ These include (1) promoting the conclusion of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; (2) promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection; and (3) promoting the admission of refugees.

Notwithstanding the statutory injunction that the work of the Office shall relate, as a rule, to groups and categories of refugees, it is common knowledge that a major part of UNHCR's protection work is concerned with individual cases, as was that of its predecessor organizations. To this author's knowledge, no state has objected to the High Commissioner taking up individual cases as such,¹¹ although states may and do question whether an individual is indeed a refugee.¹² There can be little practical point in requiring the High Commissioner to abstain from involvement in individual cases;¹³ such a dimension is a natural corollary to the stated function of supervising the application of international conventions. As discussed below, such instruments provide a definition of refugees which is essentially individualistic, and provide rights on behalf of refugees which can only be understood in the sense of the particular. The acquiescence of states in the individual protection function of UNHCR, nevertheless, significantly delineates both the competence of the Office and the status of the individual refugee in international law.

Generally, authority for the universal protection of refugees by UNHCR is traceable to the originating General Assembly Resolution 428(V) expressly calling on governments to cooperate with the Office in the exercise of its functions. Such authority has been strengthened by a succession of General Assembly resolutions, the most recent of which, for example, "*urges* governments to intensify their support for the humanitarian activities of the High Commissioner by, *inter alia*, (a) facilitating the accomplishment of his tasks in the field of international protection, in particular, by granting asylum to those seeking refuge and by scrupulously observing the principle of *nonrefoulement*."¹⁴

Specific authority for the involvement of UNHCR in the protection of refugees has been accorded the Office by states parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees.¹⁵ Article 35 of the Convention, for example, provides: "The contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in

particular facilitate its duty of supervising the application of the provisions of this Convention.”¹⁶ The day-to-day protection activities are necessarily dictated by the needs of refugees, but a summary reading of both the Statute of the Office and the 1951 Convention generally indicates the protection functions involved.

There are both direct and indirect aspects to the protection function, with the latter comprising the promotional activities of the Office already mentioned. Direct protection activities, involving intervention on behalf of specific individuals or groups, cover the following matters. The Office is concerned with protection generally of the refugee’s basic human rights, including, for example, nondiscrimination, liberty, and security of the person. It is concerned specifically with the following: (1) the prevention of *refoulement* (i.e., the return of refugees to a country or territory in which their life or liberty may be endangered); (2) the determination of refugee status; (3) the grant of asylum; (4) the prevention of expulsion; (5) the issue of identity and travel documents; (6) the facilitation of voluntary repatriation; (7) the facilitation of family reunion; (8) the assurance of access to educational institutions; (9) the assurance of the right to work and the benefit of other economic and social rights; and (10) the facilitation of naturalization.

Of these, the first four, together with the general function, are clearly of prime importance, and the principle of *nonrefoulement* is the *sine qua non* of the search for permanent solutions. The Executive Committee of the High Commissioner’s Programme has recently stressed the importance of procedures for the formal *determination of refugee status*, and in 1977 it expressed the hope that states would establish such procedures and give favourable consideration to UNHCR’s participation. The same year the committee also expressed its concern regarding the difficulties which asylum seekers face in finding even temporary refuge, and it appealed to governments to follow or to continue to follow liberal practices in regard to refugees who have come directly to their territory.¹⁷

Beneficiaries of UNHCR Activities

The High Commissioner’s functions are, at first glance, limited to refugees “within the scope of the . . . Statute,” and as defined in paragraph 6 thereof.¹⁸ The Statute first brings within the competence of the Office refugees so considered under various earlier treaties.¹⁹ It next includes refugees resulting from events occurring before January 1, 1951, who are outside their country of origin and unable or unwilling to avail themselves of its protection “owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion.” Finally, the

Statute provides that the High Commissioner's competence shall extend to:

Any other person who is outside the country of his nationality, or, if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or if he has no nationality, to return to the country of his former habitual residence.²⁰

This description is of universal application, containing neither temporal nor geographical limitations, and it remains of critical importance in determining the basic class of persons entitled to the protection and assistance of the Office. Nevertheless, the Statute suggests an inherent contradiction. While it affirms that the work of the Office shall relate, as a rule, to groups and categories of refugees, at the same time, it proposes a definition of the refugee which is essentially individualistic, requiring a case-by-case examination of subjective and objective elements. This factor, together with postwar developments leading to an escalation of the world's refugee population, has necessitated the introduction of a degree of flexibility into the High Commissioner's mandate. The result has been a noticeable broadening of what may be termed refugees of concern to the international community.

The UN General Assembly and the Economic and Social Council have played a major role in these developments, while more recently the Executive Committee of the High Commissioner's Programme has exercised a similarly formative influence.²¹ It was in 1957 that the General Assembly first authorized the High Commissioner to assist persons who might not qualify under the statutory definitions.²² The case in question involved the large number of mainland Chinese in Hong Kong whose status as "refugees" was complicated by the existence of two Chinas, each of which might have been entitled to exercise protection. In the circumstances, express authorization of assistance activities was an essentially pragmatic solution.²³

The General Assembly authorized assistance to other specific groups in the years that followed.²⁴ Concurrently, the General Assembly developed, little by little, the notion of the High Commissioner's "good offices" as an umbrella idea under which to bring refugees who did not come within the competence, or "immediate competence,"²⁵ of the United Nations. The type of assistance which the High Commissioner might render was initially limited, often to the transmission of financial contributions, but that restriction was soon dropped.²⁶ These developments enabled the High Com-

missioner's Office to be flexible and pragmatic in regard to refugee problems emerging in Africa during the 1960's. There the very size of the crises militated against individual assessment of refugee status, as did the absence of appropriate machinery.²⁷

Other factors have also been identified as influencing the pragmatic, rather than the doctrinal approach to the new problems. These have included the desire to avoid the imputation on the internal situation of newly independent states which is carried by every determination that a well-founded fear of persecution exists; and the feeling, not always manifested, that while "political conditions" had compelled the flight of the entire group in question, it might not be possible to establish a well-founded fear of persecution on an individual case-by-case basis. The "group approach" to defining refugees, which concentrates on persons who are effectively without the protection of their own government, can thus avoid the limitations of a strictly legal definition.²⁸

Most recently, the General Assembly has spoken of and unanimously commended the High Commissioner's activities on behalf of "refugees and displaced persons of concern to his Office." The reference to "displaced persons" dates from 1975, when it was contemporaneous with UNHCR's first involvement in the Indochinese peninsula.²⁹ If the term was intended to cover groups, besides refugees, who have crossed international frontiers, then at that time it may have been a misnomer. Until then, the term "displaced persons" had traditionally been used to describe those displaced *within* their own country, for example, by the effects of civil strife or natural disasters.³⁰ However, there is little doubt that the effect of General Assembly resolutions over the past years has been to endow the phrase with new meaning, and to broaden the class of those whom the High Commissioner is expected to protect and assist.³¹

In summary, refugees and displaced persons within the mandate of, or of concern to, the High Commissioner include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds, but also those often large groups or categories of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their state of origin.³²

Whether this description can be said to represent, for all purposes, the meaning of the term "refugees" in international law is less clear. The class of persons "without, or unable to avail themselves of, the protection of the government of their state or origin" begs many questions.³³ However, the principle of *nonrefoulement*, the foundation stone of international protection, does apply to a broad class of asylum seekers. It would hardly be permissible for a state to seek to avoid its obligations, either by declining to make

a formal determination of refugee status, or by ignoring the development of the refugee concept in state and international organization practice.

THE OBLIGATIONS OF STATES

Obligations Deriving from Treaty

Whereas the Statute of UNHCR prescribes the functions and competence of the Office within the United Nations organization, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees provide, between states parties, for the meaning of the term "refugee" and for appropriate standards of treatment. The link between the Statute and the treaties is in the supervisory role of UNHCR, conferred in general terms by the former,³⁴ and expressly acknowledged by states parties to the latter.³⁵

Definition of Refugees under the 1951 Convention and the 1967 Protocol

The states which acceded to or ratified the 1951 Convention initially agreed that the term "refugee" should apply, first, to any person considered a refugee under earlier international arrangements and second, to any person who, broadly speaking, qualifies as a refugee within the mandate of UNHCR.³⁶ Originally, the definition, like the first part of that in the Statute, limited application of the Convention to the refugee who acquired such status "as a result of events occurring before 1 January 1951." Moreover, there was an optional geographical limitation under which states might, on ratification, choose to limit their obligations to refugees resulting from "events occurring in Europe" prior to the critical date.³⁷ Finally, the substantive or ideological basis for the essential "well-founded fear of persecution" differs slightly from that in UNHCR's Statute, in that it includes the criterion "membership of a particular social group"³⁸ in addition to race, religion, nationality or political opinion.³⁹

The statutory definition was a model for that in the Convention, but various amendments were accepted by the Conference of Plenipotentiaries which adopted the final draft.⁴⁰ The reference to "membership of a particular social group," however, may not make any great practical difference in the respective areas of competence of UNHCR and states parties to the Convention and Protocol. This notion can be seen as clarifying certain elements in the more traditional grounds for persecution—race, religion or political opinion. Examples of persecution on social group grounds⁴¹ will often prove, on closer examination, to have a political basis; for example, the group is persecuted because the government considers it inherently disloyal and, rightly or wrongly, attributes dissident opinions to members of the group as a class.⁴²

It was recognized in 1951 that, in view of its various limitations, the definition would not cover every refugee. The Conference of Plenipotentiaries therefore recommended in the Final Act that states should apply the Convention beyond its strictly contractual scope, to other refugees within their territory.⁴³ Many states relied upon this recommendation in response to refugee situations precipitated by events after January 1, 1951, until the 1967 Protocol relating to the Status of Refugees expressly removed that limitation.⁴⁴ The recommendation may still be invoked by those who seek an extension of the Convention to groups or individuals who do not fully satisfy the definitional requirements.

In essence, therefore, Convention refugees are identifiable by their possession of four elemental characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.

*Rights of Refugees under the 1951
Convention and the 1967 Protocol*

Article 3 of the Convention obliges states to apply its provisions to refugees "without discrimination as to race, religion or country of origin;" most of those provisions in turn call for certain standards of treatment to be accorded to refugees. In principle, therefore, states ought to establish procedures for applying the definition and for identifying and recognizing refugees, without which *bona fide* and effective implementation of the Convention would not be possible.⁴⁵ Indeed, the establishment of such procedures remains one of the principal objectives of the Office of the UN High Commissioner for Refugees which, under Article 35 of the Convention, is recognized by contracting states as having the duty of supervising application of its provisions.⁴⁶

A detailed analysis of the definition is beyond the scope of the present article. It may be noted in passing that "persecution," though a prominent feature, is not defined. While it would encompass threats to life and liberty, so that execution, detention, and torture are readily included, persecution is also very much a question of degree and proportion, requiring relation of the general notion to commonly accepted principles of human rights.

Refugees are created by conditions—political in the broadest sense—which render continued residence impossible or intolerable. Depending on the circumstances, persecution may thus comprise less overt measures, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions or to education, failure (voluntary of

involuntary) on the part of state authorities to prevent or suppress mob violence against, for example, ethnic or religious minorities, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly and worship. Persecution need not actually occur. It may have happened already, or it may simply be anticipated. The mark of the Convention refugee is a "well-founded fear of being persecuted"—that factor looks more to the future than to the past. "Well-founded" in turn means that there must be sufficient facts to justify the conclusion that the applicant for refugee status, if returned to his or her country of origin, would face a serious possibility⁴⁷ of being subjected to persecution.

States parties have agreed not only on the definition of refugees summarized above, but also on standards of treatment for refugees either "lawfully staying" in their territories, or present there illegally. The provisions of the Convention cover a wide range of subjects: the rights of association, access to the courts, employment, self-employment, rationing, housing, education, public relief, social security, and freedom of movement. In practice, questions of the application of these provisions arise only rarely in many countries, as the rights in question tend to be guaranteed anyway by lawful residence. Overall though, the aim in each case is to secure the best possible treatment for refugees. The required standard varies between national treatment and the minimum accorded to aliens generally.

Certain provisions, however, are quite exceptional and possess a very special meaning for refugees. Thus, Article 28 obliges states to issue travel documents to refugees lawfully staying in their territory (known as Convention travel documents or CTDs). A Schedule to the Convention sets the form for the document, prescribes various conditions for issue, provides for "returnability" and for the recognition of CTDs issued by other states. Article 31 of the Convention obliges states parties not to impose penalties for illegal entry on refugees "coming directly from a territory where their life or freedom was threatened in the sense of Article 1," provided that they report to the authorities without delay and show good cause for their actions. Article 32 declares that a refugee lawfully within a state shall be expelled only on grounds of national security or public order. A hearing and appeal is to be permitted against such order of expulsion, except where compelling reasons of national security otherwise require. Moreover, the contracting states also agree to allow such refugees a reasonable period in which to seek legal admission to another state, subject to the states' right to apply such internal measures as they deem necessary.⁴⁸

Finally, Article 33, which is of general application and not limited to refugees "lawfully staying" in the territory of a contracting state, declares the fundamental principle of *nonrefoulement*—that no refugees shall be returned in any manner whatsoever to the frontiers of territories where their

life or freedom may be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.⁴⁹

Refugee Status and Asylum

There is a glaring omission in the above, necessarily brief, statement of the conventional rights of refugees: a refugee's or asylum seeker's right to be admitted, temporarily or permanently, to a country, and his or her "right to asylum." Neither the Convention nor the Protocol guarantees a right of entry or imposes any duty to admit; indeed, these instruments are remarkable for the extent to which asylum—in the sense of admission and protection—is ignored. The only references to asylum in the Convention are in the Final Act and the Preamble. The former includes a recommendation that governments "continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that . . . refugees may find asylum and the possibility of resettlement."⁵⁰ The Preamble to the Convention simply notes the unduly heavy burdens which the grant of asylum may impose on certain countries and that a solution to the problem demands international cooperation.

Article 31 provides only for certain instances of illegal entry, and anticipates either regularization of status, or admission into another country. What the article does not do is to make any express provision for such refugees' future: the contracting states are not bound to admit them to residence (*i.e.*, grant them durable asylum), and no obligation binds other contracting states to offer resettlement.

Refugees may, therefore, fall into limbo—their status unregularized by the country of immediate refuge, resettlement denied by other countries, and return to their country of origin barred by the rule of *nonrefoulement*. Unlike the case of the refugee lawfully staying in the territory of a contracting state, the limitations on the power of expulsion under Article 32 do not apply to refugees who have entered illegally. A distinction, however, must be drawn between the administrative act of ordering expulsion and actual, physical removal of the refugee. It is at the point of actual expulsion that the provisions of Article 33 significantly limit states' discretion. This was acknowledged in the *Refugee (Germany) Case*.⁵¹ The German court held that a refugee who had obtained an extension of his residence permit by false statements was not "lawfully" within the Federal Republic of Germany. The restriction on permissible grounds of expulsion did not, therefore, apply to him in the manner foreseen by Article 32. Nevertheless, the court also held that the right inherent in Article 33 was not similarly tied to lawful presence, and must be interpreted to mean that no refugee, whether lawfully or unlawfully within the territory, may be expelled to a place of persecution. An almost identical conclusion was reached in the 1974 United States case, *Chim Ming v. Marks*.⁵²

The exceptional privilege of derogation from the principle of *nonrefoulement* is closely circumscribed. Thus, Article 33(2) expressly provides that the benefit of *nonrefoulement* may not be claimed by a refugee, "whom there are *reasonable grounds* for regarding as a danger to the security of the country . . . or who, *having been convicted by a final judgment of a particularly serious crime*, constitutes a danger to the community of that country."⁵³ By thus indicating and limiting the circumstances in which the power to derogate may be exercised, Article 33 emphasizes the preeminence and the normative quality of the fundamental rule of *nonrefoulement*.⁵⁴

Regional Instruments

In addition to the instruments of potentially universal application, regional instruments may directly or indirectly support the refugee's search for admission or protect him or her against expulsion. For present purposes the following brief survey suffices.

The definition of refugee offered by the 1951 Convention and the 1967 Protocol has been incorporated in Article I of the 1969 OAU Convention on Refugee Problems in Africa. This definition also extends to those compelled to leave their country of origin on account of external aggression, occupation, foreign domination, or events seriously disturbing public order.⁵⁵ Moreover, the grant of asylum is affirmed to be a peaceful and humanitarian act, and OAU member states are required to use their "best endeavors" to receive refugees.

Significantly, the principle of *nonrefoulement* is strongly stated: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened. . . ." ⁵⁶ No express concession is made to overriding considerations of national security, although if a member state finds difficulty "in continuing to grant asylum," it may appeal directly to other member states and through the OAU.⁵⁷

The impact of regional human rights instruments, particularly those which offer the individual recourse against state action, is also relevant. Article 3 of the European Convention on Human Rights,⁵⁸ for example, prohibits inhuman or degrading treatment, and the European Commission has noted that in certain circumstances, expulsion may infringe that provision.⁵⁹ The American Convention on Human Rights may also be invoked by the refugee threatened with return to prosecution for political offences or to a country where his or her right to life or personal freedom is in danger of violation.⁶⁰

General International Law

As just described, one of UNHCR's roles is to supervise the application of international conventions benefiting refugees. In monitoring the issues of entry and removal of refugees, the Office will necessarily rely first upon the obligations which states have expressly and formally undertaken by becoming parties to such treaties. But not all states have ratified the 1951 Convention, the 1967 Protocol, or related instruments, and accordingly the standing in general international law of the basic rules and principles affecting refugees is next considered.

As argued above, strong evidence supports the concept of a class of refugees known to general international law, and applicable to all states regardless of their express consent. In this context, it is of interest to note that no state claims the right to return a refugee, as such, to persecution. A state faced with a refugee influx, however, may try to disembarass itself of the problem or to assert for itself greater freedom of action by avoiding any use of refugee terminology. Asylum seekers may thus find themselves classified as "displaced persons," "illegal immigrants," "quasi-refugees," "aliens," "departees," "boat people," or "stowaways." While the intention is to attempt to retain the broadest discretion to deal with those seeking entry, the clear implication for states at large is that refugees as a class are entitled to a somewhat better and higher standard of treatment, as a matter of general international law.⁶¹

The existence of such a class implies, in turn, certain minimum standards of treatment, including at least observance of the principles of *non-refoulement* and temporary refuge. The principle of *non-refoulement* is now examined in both its general international law and conventional rule aspects, with a view to determining more precisely: (1) the meaning and scope of the principle, (2) its standing in general international law, and (3) its relationship to the institutions of temporary refuge and asylum.

Meaning and Scope of the Principle of Nonrefoulement

The basic meaning of the principle has been stated above in the context of Article 33 of the 1951 Convention,⁶² and that core of meaning remains good for general international law. It is uncertain, however, whether the notion of *refoulement* encompasses (1) rejection at the frontier, prior to any penetration of state territory,⁶³ or (2) extradition of refugees. Antecedents of the principle of *non-refoulement* may certainly be found in the practice of nonextradition of political offenders which developed in the nineteenth century, but the precise relation of extradition and refugee status in the case of nonpolitical crimes has never been clear.⁶⁴

At the conference which accepted the 1951 Convention, little, if any objection was raised to the Swiss interpretation of *non-refoulement*, limiting

its application to those who had already entered state territory. This restrictive view was premised on the notion that a state was not obliged to allow large groups of persons claiming refugee status to cross its frontiers.⁶⁵ This interpretation, even then, did not square with the concept of *refoulement* in European immigration law and practice,⁶⁶ and it was, in any event, contrary to the letter of Article 3 of the Convention on the International Status of Refugees of 1933.⁶⁷ However, state practice during this period was also somewhat equivocal; large numbers of refugees were certainly admitted, integrated locally or resettled,⁶⁸ but major cases of return to persecution were not unknown.⁶⁹

Over the last thirty years the broader interpretation of *nonrefoulement* has become increasingly accepted.⁷⁰ Large numbers of asylum seekers have been allowed to cross frontiers, for example, in Africa from the early 1960s and, more recently, in Southeast Asia. At the same time, the practice of states and of international organizations has contributed to a progressive development of the law. Thus, the General Assembly's 1967 Declaration on Territorial Asylum, which recommends to states that they base their practices on the principles declared, provides in Article 3(1): "No person referred to in Article 1, Paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution."

Though fundamental to the protection of refugees, *nonrefoulement* has never been stated as an absolute principle. "National security" and "public order" have long been recognized as potential justifications for derogation.⁷¹ Article 3 of the 1967 Declaration, however, while recognizing "overriding reasons of national security," also appears to authorize an exception to *nonrefoulement* "in order to safeguard the population, as in the case of a mass influx of persons."⁷² Though strongly criticized for its vagueness,⁷³ this provision remains of concern in view of latest developments and the size of recent refugee crises. Nevertheless, given the strong likelihood of an international response to new crises, coupled with provision of assistance for local integration, voluntary repatriation, or resettlement projects in other states, a mass influx in itself should not be considered sufficient to justify *refoulement*.

It is trite knowledge that resolutions of the General Assembly, such as that adopting the 1967 Declaration on Territorial Asylum, have no direct, legally binding force. However, most commentators concur in the conclusion that they create an expectation of observance in good faith, particularly if adopted unanimously.⁷⁴ While in recent years there have been exceptions to the principles of *nonrefoulement* and nonrejection at the frontier, these have generally been vigorously protested by other states and by UNHCR. In October 1979, for example, Thailand announced the reversal

of a policy which had led earlier in the year to the forcible return of some 40,000 Kampuchean; henceforth, all asylum seekers were to be allowed to enter.⁷⁵ More recently, staggering numbers have been allowed to cross international frontiers without let or hindrance: as of December 1, 1980, 1,309,505 Afghans had been admitted to Pakistan; and some 1,077,351 Ethiopians to Somalia.⁷⁶

In 1977, the Executive Committee reaffirmed the importance of observing *nonrefoulement*, irrespective of whether the persons affected had been formally recognized as refugees.⁷⁷ Since that year, too, the General Assembly has repeatedly urged governments scrupulously to observe humanitarian principles, including the grant of asylum to those seeking refuge and *nonrefoulement*.⁷⁸ By and large, the international community, in its practice and its statements, appears to have recognized that the principle applies not only to the broad class of asylum seekers described above, but also to the moment at which those asylum seekers present themselves for entry. In both cases, certain factual elements may be necessary (for example, evidence of relevant or valid reasons for flight, such as human rights violations in the country of origin) before the principle of *nonrefoulement* is triggered, but developments in that concept and in the definition of refugee cannot be ignored.⁷⁹

*The Principle of Nonrefoulement
in General International Law*

Much of the evidence concerning the scope and meaning of the principle likewise supports the argument that today *nonrefoulement* is a principle of general or customary international law. There is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent. Pre-1951 state practice is perhaps equivocal as to whether, in that year, it could be said that Article 33 of the Convention reflected or crystallized a rule of customary international law.⁸⁰ The practice of states since then and, in particular, that of international organizations such as UNHCR, however, are persuasive evidence of *opinio juris*, even in the absence of any formal judicial pronouncement. Article 33 is of a "fundamentally norm-creating character."⁸¹ That *refoulement* may be permitted in exceptional circumstances does not deny this premise. Instead, it indicates the boundaries of discretion. Moreover, according to Article 42 of the Convention, no reservations may be made to Article 33.⁸²

The practice examined above nevertheless has been fairly selective. The position of certain states is far from clear, even though United Nations resolutions on asylum and UNHCR have been adopted unanimously or by consensus in the appropriate international fora.⁸³ The practice of East European and Communist states, for example, remains difficult to assess. The constitutions of such countries frequently acknowledge the principle

of asylum;⁸⁴ thus there is an awareness of the institution and recognition of a class of persons worthy of protection. On the other hand, the political offense exception which is closely related to the principle of protection of refugees,⁸⁵ finds no place in the extradition arrangements existing between such states.⁸⁶ One commentator has also noted that, constitutional provisions notwithstanding, asylum in Communist countries may be refused to one who, though anticapitalist, refuses to espouse communism.⁸⁷

At the 1977 United Nations Conference on Territorial Asylum, some states pressed for the inclusion of a specific article which would protect refugees against extradition to a country in which they might face persecution.⁸⁸ The German Democratic Republic and the USSR, however, both proposed amendments to the draft article on *nonrefoulement* which would have reiterated the paramouncy of states' extradition obligations.⁸⁹ In any event, the conference was unable to complete its work and these conflicting approaches were not resolved.

Another potential challenge to the argument that the fundamental principles of refugee law are part of customary international law is the so-called "right of unilateral qualification." Article 1(3) of the 1967 Declaration on Territorial Asylum declares that, "It shall rest with the state granting asylum to evaluate the grounds for the grant of asylum."⁹⁰ This provision, which Poland introduced during discussions in the Third Committee, is of uncertain scope. Insofar as the grant of asylum remains discretionary and a manifestation of sovereignty by the territorial state, it is redundant.⁹¹ Some commentators fear, however, that, rather than facilitate a liberal policy on asylum, such a provision might be invoked to justify decisions to refuse asylum.⁹² The varying and disparate interpretations of "political offense" in the related field of extradition, and the tendency for that concept to become dominated by political considerations, emphasize how, in the absence of directly applicable international standards, states' discretion may remain paramount.

If it is accepted that each state remains absolutely free to determine the status of asylum seekers and either to abide by or ignore the principle of *nonrefoulement*, then the refugee's status in international law is denied and the standing, authority, and effectiveness of UNHCR are seriously undermined. The weight of the evidence, though, is in favor of the limits to discretion which flow from an international definition of the refugee and from the generally accepted practice of *nonrefoulement*. That certain gray areas exist in the formulation of *nonrefoulement* is not conclusive evidence of its lack of status in general international law. As Brierly noted some fifty-six years ago, "the principles of international law are not susceptible of precise formulation. . . . [The] rules are . . . constantly changing and modelling themselves on the everchanging needs of international life."⁹³

Nonrefoulement, Temporary Refuge, and Asylum

UNHCR seeks permanent solutions to the problems of refugees. No rule as yet obliges a state to grant asylum, in the sense of secure residence and protection, but the principle of *nonrefoulement* does proscribe the return of asylum seekers to persecution. "Temporary refuge" is the logical and necessary corollary in this otherwise incomplete regime, although hitherto it has been the subject of little inquiry.⁹⁴ A recent Australian initiative⁹⁵ highlights the need for further elaboration of the concept, which is clearly already present in the practice of states. The Australians propose that, while the fundamental principle of *nonrefoulement* should be maintained, the obligations of states to assist countries of first asylum should be clarified on the basis of principles of international solidarity and equitable burden sharing.⁹⁶

Understandably, perhaps, some fear that developments such as the Australian initiative may undermine the principle of *nonrefoulement* and lead states to consider their humanitarian obligations fulfilled by temporary refuge rather than by the grant of durable asylum. However, it should be possible to avoid these tendencies by carefully developing the concept and its implications. A distinction does remain between, on the one hand, refugee status and its implied protection against *refoulement*, and, on the other hand, permanent asylum in the sense of secure lawful residence, and all the rights which derive from refugee status in accordance with the relevant international instruments.

ASYLUM AND THE DETERMINATION OF REFUGEE STATUS

The individualism of the refugee definition, supposing a dispassionate case-by-case examination of subjective and objective elements, has been noted above. Obviously, individual assessment may be impractical in the case of a large-scale influx, but even here there is a need for certain minimum standards of procedure.⁹⁷ A principal objective of UNHCR is the establishment within states of formal procedures for the determination of refugee status. Clearly, where such procedures exist, they help ensure that refugees are both protected against *refoulement* and guaranteed the rights and benefits provided by international instruments.

At its major session on protection in 1977, the Executive Committee of the High Commissioner's Programme expressed the hope that all states parties to the Convention and Protocol that had not done so would establish such procedures in the near future and also give favorable consideration to UNHCR participation. The committee further recommended that

procedures meet certain basic requirements, which are set out in the Annex to this article.

The procedures described in this part are those with which the author is most familiar and they illustrate the variety of methods which may be chosen by states to deal with applications for refugee status.⁹⁸ The following survey does not deal with the general issue of implementation of the 1951 Convention and the 1967 Protocol in national law, a question which may cause acute concern in states where ratification of treaties has no direct effect in municipal law.

Australia

Legal Background

Neither the 1951 Convention nor the 1967 Protocol has been expressly incorporated into Australian municipal law. Therefore, the entry of refugees falls within the broad discretionary provisions of the Migration Act of 1958, as amended.⁹⁹ The responsible authority is the minister for immigration and ethnic affairs; a more or less parallel competence to grant "political asylum" resides in the minister for foreign affairs, but it is rarely used and applicants for asylum/refugee status are now processed under a single procedure.

In May 1977, the minister for immigration and ethnic affairs announced the creation of a standing interdepartmental committee to evaluate claims to refugee status under the Convention, and to make appropriate recommendations. Later the same year, interdepartmental discussions, in which UNHCR also participated, resulted in the establishment of the Determination of Refugee Status (DORS) Committee and in agreement on procedural rules.¹⁰⁰ The committee began assessing applications for refugee status in 1978, and now meets regularly in Canberra.¹⁰¹ The determinations and advice of the DORS Committee do not have the force of law, but in practice those recognized as refugees by the minister, on the recommendation of the committee, have been accorded residence status in Australia.

Procedure

Application for refugee status may be made (1) on arrival at a port of entry, (2) after entry, either during the currency of any temporary permission to remain or after its expiry, and (3) after the initiation of deportation machinery.¹⁰² According to guidelines established in 1977, every applicant is interviewed on the basis of his or her claim; that interview is then transcribed, acknowledged as accurate by signature of the applicant, and referred to the DORS Committee. Interviews are generally conducted by officers at the state level of the Department of Immigration and Ethnic Affairs, while the committee hitherto has always sat in Canberra. Appli-

cants are interviewed where necessary with the aid of interpreters, and they are entitled to be accompanied by a legal adviser of their choice.

The DORS Committee itself is chaired by an official from the Department of Immigration and Ethnic Affairs, while other members represent the Department of Foreign Affairs, the Attorney-General's Department, and the Department of Prime Minister and Cabinet. The representative in Australia of the United Nations High Commissioner for Refugees is also entitled to attend meetings of the DORS Committee in an observer capacity, and to make known the views of the Office.

The DORS Committee is required to apply the definition of "refugee" set out in Article 1 of the 1951 Convention, as amended by the 1967 Protocol. It considers applications on the basis of the interview report and such other information as may be put before it, but the applicant does not usually appear before the committee. Decision on each application is by majority vote (with the chair holding a casting vote in the event of a tied decision), and the committee may decide either to accept, reject, or to defer an application for further inquiries. In addition, the committee is expressly empowered to recommend that an applicant whose claim to refugee status is rejected nevertheless, should be allowed to remain temporarily or permanently in Australia on humanitarian or compassionate grounds. The minister for immigration and ethnic affairs retains overall responsibility and may therefore accept or reject the committee's recommendation. Nor is the question of residence for those accepted or rejected decided by the committee, although it is evident in practice that a favorable recommendation on refugee status creates a strong presumption that asylum will be granted.

Appeal

There is at present no right of appeal against an adverse decision of the DORS Committee, and the only formal provision in this regard empowers the minister to refer back for reconsideration any case for which new information is received. However, certain classes of claimants to refugee status may raise the issue in court, on appeal against deportation. The Administrative Appeals Tribunal Act of 1975¹⁰³ introduced a limited right of appeal against deportation on behalf of aliens convicted of crimes and of immigrants in certain other specified cases.¹⁰⁴ But the right of appeal does not extend to one who wished to challenge removal from the country following illegal entry or on becoming a prohibited immigrant.¹⁰⁵

In a recent judgment, the Administrative Appeals Tribunal expressly considered relevant provisions of the 1951 Convention on expulsion and *refoulement*, although these are not formally a part of Australian law.¹⁰⁶ As the appellant lost on the merits of the case, whether an applicant for

refugee status is able to rely successfully on the Convention and Protocol remains undecided.¹⁰⁷

Belgium

Legal Background

The legal basis for determining refugee status is established by a series of enactments which adopted the 1951 Convention and 1967 Protocol, and established the conditions of entry, residence, and establishment of foreign nationals in Belgium.¹⁰⁸ Article 3 of the 1953 law appoints the minister of foreign affairs as the sole authority to determine refugee status, but also provides that the minister may delegate that competence to the international authority entrusted by the United Nations with protecting refugees.¹⁰⁹ This power has been duly exercised in favor of the UNHCR representative in Belgium.¹¹⁰

Procedure

All applications for refugee status are first examined by the Ministry of Justice with a view to determining their admissibility: applications must be made without delay (within forty-eight hours of entry, or within two weeks of the change of circumstances in the country of origin which are alleged to give rise to a fear of persecution on return), and Belgium must be the country of first asylum.¹¹¹

Admissible cases are referred to the UNHCR Office in Brussels, where asylum seekers are interviewed and complete a detailed application form. If the application is considered manifestly ill-founded, the Ministry of Justice may initially decide to proceed no further with the case. If this initial decision is contested, and in all other cases, the UNHCR representative will then determine the issue of refugee status. If recognition is accorded, the UNHCR Branch Office will issue a certificate attesting thereto. The decision on recognition is directly effective in Belgian law, and as a consequence, the recognized refugee is granted residence.

Appeal

While no formal right of appeal is accorded by Belgian law, in practice any asylum seeker whose application has been rejected may request the UNHCR representative to review the decision. Cases are reopened (1) if new facts or evidence are adduced which, had they been known during the first examination of the case, would have led to a favorable decision, or (2) if it appears that an error or misunderstanding has occurred. The appellant is permitted to remain in the country pending review of the case.

France

Legal Background

The legal bases for the determination of refugee status and for the grant of asylum in France are the 1958 Constitution, the Preamble of which includes a statement of the principle of asylum, and a series of operating laws and administrative decrees.¹¹²

The competent authority for determining refugee status is the *Office Français de Protection des Réfugiés et Apatrides* (OFPRA), a public authority attached to the Minister of Foreign Affairs, but with its own legal personality and financial and administrative autonomy.¹¹³ The director of OFPRA is assisted by a council which approves the budget and the accounts of the office, advises generally on the running of the office and on determination of refugee status, and proposes to the government any measures aimed at improving the situation of refugees. It is chaired by a representative of the minister of foreign affairs and comprises representatives of the ministers of justice, interior, finance, labor, and health and a representative of voluntary organizations dealing with refugees. The UNHCR representative attends the council meetings and is entitled to present observations and proposals.¹¹⁴

OFPRA provides legal and administrative protection to refugees and stateless persons and ensures the execution of international agreements on the protection of refugees. It determines and certifies the refugee status of any applicant who meets the definition of refugee in Article 1 of the 1951 Convention, as amended by the 1967 Protocol, cooperates with UNHCR and is subject to its supervision (*est soumis à sa surveillance*) in accordance with international agreements.¹¹⁵

An applicant who is refused recognition has a right of appeal to the Appeals Commission (*Commission des Recours*), composed of a member of the French Council of State (*Conseil d'Etat*), who acts as president, a representative of UNHCR and a representative appointed by the OFPRA Council.¹¹⁶ The *Commission des Recours* is also empowered to give advisory opinions on cases of refugees affected by measures coming within the purview of Articles 31, 32, and 33 of the 1951 Convention (*e.g.*, restrictions on freedom of movement and expulsion orders). The execution of such measures is suspended pending the commission's advice.¹¹⁷

Procedure

Applications for refugee status and asylum may be made initially at the local police authority (*préfecture de police*) at the time of request for residence. Circular no. 74-378 from the minister of the interior to the prefects of *départements* recalls the "rules concerning the role of frontier officials when faced with an alien requesting asylum," and emphasizes that "there is of

course no question of sending a refugee back to the country from which he has had to flee.”¹¹⁸ Some latitude on refusal of entry exists where the refugee does not come directly from a country of persecution and can be returned to another country without risk of being sent on to danger. Otherwise, however, frontier officials must refer those seeking asylum to the *préfecture* of the locality where they wish to reside, and issue them a safe-conduct if they are without proper documentation.¹¹⁹

The role of the *préfecture* is largely formal. On receipt of the application for residence and recognition as a refugee, the asylum seeker is issued a provisional permit or a written acknowledgement (*récepissé de demande de carte de séjour*) by the *préfecture*, both of which may be valid for one to three months and are renewable. The asylum seeker is then referred to OFPRA where formal application for recognition as a refugee is made. It is the responsibility of the asylum seeker to ensure the completion of his or her case by providing photographs, photocopy of temporary residence permit if held, passport or other travel document, any papers relating to the circumstances of departure from the country of origin, and any supplementary information requested by OFPRA. An interview with OFPRA usually takes place only if the asylum seeker so requests.

From the date on which the case file is completed, the law allows a maximum period of four months for decision. If nothing has been heard by then, the asylum seeker may take this as an implicit rejection and enter an appeal. Where the decision is positive, the asylum seeker is issued a *Certificat de réfugié*, valid generally for three years and renewable.¹²⁰ In the event of a negative decision or where no decision is given within four months, the asylum seeker has one month within which to exercise the right of appeal.¹²¹

Appeal

The *Commission des Recours* has two functions:¹²² to decide on appeals against refusal to recognize the status of refugee, and to advise on the application to refugees of measures such as expulsion and *assignation à résidence* in the light of Articles 31, 32, and 33 of the 1951 Convention.¹²³ In the first case the right must be exercised within one month and in the second within one week.¹²⁴

The basic procedure for appeals is set out in Decree no. 53-377. Hearings are in public, although closed sessions can be required. Three parties may be present before the *Commission des Recours*: a *rapporteur*,¹²⁵ the appellant and his or her representative, and a representative of the director of OFPRA. The *rapporteur* is provided with copies of the appellant's grounds of appeal and annexes (the *recours*) and the observations of OFPRA. After the *rapporteur* states the case and makes or does not make a recommendation, the appellant, either alone or through counsel, presents his or her claim. The

commission commonly questions appellants and also has the power to ask for supplementary inquiries. The OFPRA representative may also present the views of that office to the commission, which will generally reserve its decision. The decision itself must be given in public and must be reasoned.¹²⁶

The decision (or, in the case of a request, the advisory opinion) and its reasons are then communicated to the appellant and to OFPRA (or the Ministry of the Interior). If the decision recognizes the appellant's refugee status, OFPRA is required to issue immediately a *Certificat de réfugié*.

Recognition as a refugee does not automatically entail the right to permanent residence. Application for a regular residence permit must again be made to the local *préfecture de police*, and in certain circumstances, it may be refused. Previously, the issue of the ordinary resident's permit was conditional upon the applicant having either a work permit or a place as a student (and funds for support during the course of study). Until the refugee was established in employment or as a student, the provisional residence permit or *récipissé* was usually extended for periods of three months at a time. However, it has recently been announced that the issue of a *Certificat de réfugié* will result in the issue of a work permit without further formalities.¹²⁷

The discretion of the authorities generally to refuse asylum or to impose other administrative sanctions on refugees is closely circumscribed. Circular no. 74-378 emphasizes that such cases will be exceptional, and that any decision to refuse residence should be submitted to the minister of the interior.¹²⁸ Likewise, any proposal to expel must be referred and, as has been noted above, the refugee concerned has the right to appeal by an expedited procedure to the *Commission des Recours*, which in turn may give an advisory opinion as to whether the measures in question should be maintained.¹²⁹

Federal Republic of Germany

Legal Background

The legal bases for the determination of refugee status and the grant of asylum are the Federal Constitution (*Bonner Grundgesetz*)¹³⁰ and the Aliens Law of 1965 (*Ausländergesetz*)¹³¹ which has since been considerably amended.¹³² The Aliens Law provides that refugees in the sense of Article 1 of the 1951 Convention and other foreign nationals who come within Article 16 of the Federal Constitution are entitled to asylum.¹³³

The competent authority for the determination of refugee status is the Federal Agency for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung Ausländischer Flüchtlinge*), established at Zirndorf, Bavaria. The *Bundesamt* is provided for by article 29 of the Aliens Law and its director

appointed by the federal minister of the interior. The federal minister also issues regulations governing procedure before the *Bundesamt*, but in all other respects the agency enjoys complete independence in determining the status of persons seeking asylum.

Decisions on refugee status are now taken by a single, independent *Bundesamt* official. The proceedings are not public, but the right to attend is granted to federal and state (*Land*) representatives and to UNHCR. The federal interest is represented by the federal commissioner for asylum affairs (*Bundesbeauftragter für Asylangelegenheiten*) who is appointed by the minister of the interior and who must possess the qualifications for judicial or other high administrative office.¹³⁴ This officer is entitled to participate in proceedings before the *Bundesamt* and before the administrative courts, and has the right to initiate proceedings before the courts.

Procedure

An asylum seeker's initial contact is normally with the border police or local aliens authority, and the law requires that applicants should present themselves promptly. Since 1977, aliens authorities have enjoyed greater freedom to "pre-screen" applicants for refugee status/asylum; this allows the authorities to expel those whose applications are manifestly an abuse of legal process (*offensichtlich rechtsmissbräuchlich*).¹³⁵ The provision remains controversial; previously, aliens authorities tended not to rule on the issue of abuse (which has been interpreted narrowly by the courts), but to remit the issue for decision by the *Bundesamt*. Where the "prescreening" is passed the application for asylum/refugee status is referred to the *Bundesamt*. The agency now has discretion to interview the asylum seeker personally, but otherwise the initial decision is based on written statements as to background, reasons for departure, and unwillingness to return. A time limit applies, and statements or other evidence submitted thereafter will not be considered.¹³⁶

When the file is completed, it is considered by the decision-making authority—the single official referred to above. The asylum seeker has a right to be heard if he or she so wishes and may be represented by counsel. The decision to recognize as a "person entitled to asylum" (*Asylberechtigter*) or to refuse recognition must be in writing, must state the facts clearly, and must set out the relevant evidence; reasons must be given and the decision must be justified in law.¹³⁷ Deportation proceedings may be initiated upon the announcement of a negative decision.

Appeals

In the event of an adverse decision, the individual applicant may exercise a right of appeal to the administrative court competent for the area of his or her residence; likewise, the federal commissioner may appeal, either

against recognition or against the refusal to recognize. From the administrative court appeal lies to the higher administrative court (*Verwaltungsgerichtshof*) of the *Land*, unless the court of first instance rules unanimously that the application is manifestly ill-founded.¹³⁸ If that court gives leave, a further appeal lies to the Federal Administrative Court (*Bundesverwaltungsgericht*) in Berlin. Yet one more appeal to the Federal Constitutional Court (*Bundesverfassungsgericht*) is less likely now that that Court has ruled that the constitutional provision on asylum covers the same ground as the law implementing the 1951 Convention and 1967 Protocol.

Recognition as a refugee, as *Asylberechtigte*, imports certain legal consequences and is binding in all save extradition proceedings.¹³⁹ Those so recognized are entitled to be issued a residence permit valid for five years and enjoy the legal status provided by the 1951 Convention.¹⁴⁰ Such status may be terminated only through revocation proceedings initiated by the director of the *Bundesamt* and these will succeed only where there has been a change in the circumstances on which recognition was founded, or where it was based on incorrect statements or concealment of material facts.¹⁴¹

The concept of *Asylberechtigte* does not embrace every refugee within the meaning of the Convention and excludes those who have been recognized in another state or who have found protection elsewhere.¹⁴² While this exception is sufficient and acceptable for the purpose of justifying a refusal to grant asylum (residence), clearly it may not be relevant in deportation proceedings. Accordingly, the application of the principle of *nonrefoulement* even to the refugee who does not qualify as *Asylberechtigte* is recognized in the law, and limitations on the power of expulsion are prescribed in regard to all aliens whose life or freedom would be threatened within the meaning of Article 33(1) of the 1951 Convention.¹⁴³

The United Kingdom

Background

Neither the 1951 Convention nor the 1967 Protocol are incorporated in United Kingdom law, and the entry, residence, and removal of foreign nationals is subject to control under the Immigration Act of 1971.¹⁴⁴ The immigration rules implementing the Act, however, do acknowledge that there may be a class of persons who should be admitted, allowed to remain, or not deported on account of a well-founded fear of persecution.

Procedure

At a port of entry, two types of asylum claims may be made, by those with visas and those without visas. A visa national may claim asylum immediately upon arrival, or the intention not to return to the country of origin

may emerge in the course of questioning by the immigration officer. Generally, from an immigration law perspective, that the applicant resorted to misrepresentation in order to secure a visa is sufficient ground for refusal of admission. However, recent changes in the immigration rules stress that the immigration officer should refer any case which may appear to fall within the asylum provisions to the central authority, the Home Office, for decision regardless of the grounds which may justify exclusion.¹⁴⁵

Moreover, every visa national in possession of a valid visa has a right of appeal against refusal of entry exercisable in the United Kingdom,¹⁴⁶ and notice of such appeals as involve claims to asylum is given to the UNHCR Branch Office in London. The critical factor separating the non-visa national from the visa national who seeks asylum lies in the character of their rights of appeal. In the case of nonvisa nationals, such right may be exercised *only after they have left the country*.¹⁴⁷ Immigration law and practice indicate the port of embarkation as the "normal" destination of those refused entry.¹⁴⁸ For the asylum seeker this may be the country of origin or some transit state, and again only the visa national may appeal against destination while still in the United Kingdom.¹⁴⁹

An asylum seeker who has secured admission may raise the fear of persecution either in the course of an application for an extension of his permission to stay in the United Kingdom or as a ground of objection to deportation. Asylum seekers are interviewed by Home Office officials or immigration officers, but the interview report is not submitted to the asylum seeker for comment or correction. Decisions on refugee status are taken at a senior level within the Home Office. If positive, the refugee will usually be given a (renewable) stay for twelve months, with permission to work, and a formal letter attesting to the recognition of refugee status may also be issued.¹⁵⁰

The issue of refugee status/asylum may also arise in deportation proceedings. Foreign nationals are liable to deportation (1) for breach of conditions of admission or overstaying; (2) on "public good" grounds including national security and political reasons; (3) as the family member of another person who is or has been ordered to be deported; (4) following the recommendation of a court made on conviction for any offense punishable with imprisonment.¹⁵¹

There is no right of appeal if the secretary of state certifies that deportation is conducive to the public good¹⁵² or where a deportation order is made following the recommendation of a court upon conviction of the alien. The recommendation itself may be appealed against as a part of the sentence imposed by the court, but a superior court has ruled that the decision to order deportation is solely at the discretion of the secretary of state, not for the court which either recommends deportation or hears an appeal against such recommendation.¹⁵³ There is also no right of appeal

exercisable within the United Kingdom by illegal entrants (which includes those who may have entered on a false passport). They are liable to detention and summary removal.¹⁵⁴

Appeals

Within the above-mentioned limitations, an asylum seeker who is refused an extension of stay may appeal provided that both the application and the Home Office decision were made while the applicant still had permission to be in the country and that notice of intention to appeal is given within fourteen days of the negative decision. A refugee or asylum seeker may appeal against the making of a deportation order provided notice is given in time.

All appeals, whether involving refugees, aliens or Commonwealth citizens, are generally heard first by immigration appeals adjudicators. From their decisions, an appeal lies to the Immigration Appeal Tribunal.¹⁵⁵ Decisions of the tribunal may be subject to judicial review in the superior courts by way of application for orders of certiorari and mandamus.¹⁵⁶

According to the rules of procedure, the United Kingdom representative of the UNHCR may elect to be treated as a party to any appeal in which the appellant is or claims to be a refugee.¹⁵⁷ As noted above, the UNHCR Branch Office is advised of all asylum appeals. United Kingdom immigration law is of general application and, in common with that of many other states, makes no special provision for refugees. That law must therefore be supplemented by the use of administrative discretion, both to avoid the application of the general law (*i.e.*, to prevent prosecution, removal, or detention) and to secure those benefits called for by the Convention and Protocol; in such circumstances, the role of UNHCR may be that much more acute.

United States

Legal background

Radical changes in the legal regime governing the admission of refugees and the processing of asylum seekers were effected in the United States with the enactment of the 1980 Refugee Act,¹⁵⁸ and with the ensuing establishment of an asylum procedure.¹⁵⁹ For the first time, United States legislation expressly incorporates the substance of the refugee definition found in the 1951 Convention and the 1967 Protocol; it also makes specific provision for annual intakes of refugees from among groups of special humanitarian concern to the United States.¹⁶⁰ A detailed analysis of the legislation appears elsewhere in this volume.¹⁶¹

Jurisdiction in the determination of asylum requests resides either with the appropriate district director of the Immigration and Naturalization

Service (INS) having responsibility for the particular port of entry or area of residence of the applicant; or, if exclusion or deportation proceedings have been commenced, with the immigration judge.¹⁶² The criterion for the grant of asylum is qualification as a refugee within the meaning of the Act, subject to exceptions in respect of those who, broadly speaking, come within the "exclusion clauses" of the 1951 Convention¹⁶³ or the permissible grounds of derogation from the principle of *nonrefoulement*.¹⁶⁴

Procedural Aspects

Neither the Act nor the regulations make any express provision for the involvement of UNHCR in the decision-making process, whether in an advisory, observer, or other capacity. However, a limited practice has developed over the years whereby the Department of State refers certain classes of cases to the UNHCR Representative for an advisory opinion. UNHCR also submitted its views in the prelegislative phase on the drafting of the Refugee Act and on the asylum procedure introduced by the interim regulations.

The cases hitherto referred to UNHCR have principally involved Haitians and Cubans. Following the arrival of large numbers of Cubans in the United States in early 1980, UNHCR was requested by the authorities, *inter alia*, to advise on asylum applications which were likely to be refused on account of the applicants' criminal background.¹⁶⁵ There were a number of unusual features to this exercise, in which the writer was closely involved during June and July of 1980. First, the large numbers of applicants militated against individual case-by-case assessment and a decision was subsequently taken to accord the majority of asylum seekers an interim status in anticipation of their situation being regularized by special legislation.¹⁶⁶ Secondly, the approach to the question of exclusion or denial of asylum was somewhat unusual, in that it involved examination of applicants' criminal backgrounds prior to, rather than after, assessment of the well-foundedness of their claims to be refugees. The following account summarizes some of the work accomplished in this joint UNHCR/State Department exercise.

United States and UNHCR Cooperation

Article 1(F) of the 1951 Convention provides that the Convention "shall not apply to any person with respect whom there are serious reasons for considering that . . . (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."¹⁶⁷ The Refugee Act of 1980 employs this exclusion clause in the context of an exception to the prohibition on the deportation or return of an alien to a country in which his or her life or freedom may be threatened.¹⁶⁸ Section 208.8 of the Interim Regulations governing Refugee and

Asylum Procedures also adopts the exclusion clause as the basis for the denial of asylum.¹⁶⁹

In general, before examining the applicability of the exclusion clause of the 1951 Convention, it is usual to consider whether the applicant for asylum or refugee status comes within the scope of the "inclusion clauses," that is, whether the person concerned fulfills the criterion of "well-founded fear of persecution." In applying the exclusion clause, it is also necessary to strike a balance between the nature of the offenses presumed to have been committed by the applicant and the degree of persecution feared. A crime must be very grave indeed for a person to be excluded who has a well-founded fear of very severe persecution, for example, such as would endanger his or her life or freedom. On the other hand, if the persecution feared is less serious, then the nature of the crime or crimes in question should be assessed in order to establish whether criminal character in fact outweighs the applicant's character as a *bona fide* refugee. It is debatable whether in practice the applicability of Article 1(F)(c) can be effectively assessed in isolation, without at the same time taking into account the substance of the claim to refugee status, including the degree of persecution feared.

The phrase "serious non-political crime" is not easy to define, given the different connotations of the term "crime" in different legal systems.¹⁷⁰ However, finally, the standard to be applied is an international standard, in the sense that a provision of a multilateral treaty is involved, although clearly account may also be taken of standards relating to criminal prosecution and treatment of offenders current in the potential country of asylum. In dealing with cases, the basic principle should be to consider each on its merits, taking due account of both mitigating and aggravating factors.¹⁷¹

With a view to promoting consistent decisions, UNHCR proposed that a presumption of serious nonpolitical crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery. However, that presumption might be rebutted by evidence of mitigating factors, some of which are set out below. It was also proposed that the following offenses might be considered to constitute serious nonpolitical crimes, provided other factors were present: breaking and entering (burglary), stealing (theft and simple robbery), receiving stolen property, embezzlement, drugs possession and use, and assault. Factors which would support a finding of seriousness include use of weapons, injury to persons, value of property involved, type of drugs involved,¹⁷² and evidence of habitual criminal conduct. With respect to all cases, the following elements were suggested as tending to rebut a presumption or finding of serious crime: age of the offender (minority), parole, elapse of five years since

conviction or completion of sentence, general good character (*e.g.*, one offense only), that the offender was merely an accomplice, and other circumstances surrounding commission of the offense, for example, provocation and self-defense.

During a period of some seven weeks, 1,021 cases were examined jointly by UNHCR and officials of the State Department on the basis of evidence provided by the applicants at interview. The greater part of the caseload provided few problems, in that the commission of serious crimes was clearly indicated. A number of other cases, however, were discussed at length, resulting in final agreement on the serious or nonserious nature of the crime, or in deferral for further inquiries and reinterview regarding either the circumstances of the offense or political and refugee elements. Any applicant refused asylum on the ground that he or she had committed a serious nonpolitical crime prior to entry could have that issue redetermined in exclusion or deportation proceedings.

Summary Conclusions Regarding Participation by UNHCR in Procedures for the Determination of Refugee Status

Participation in procedures for the determination of refugee status derives sensibly from UNHCR's supervisory role and from states' obligation to cooperate with the Office. It allows UNHCR to play a close monitoring role in matters of status and of the entry and removal of asylum-seekers. The procedures themselves will differ, necessarily, in the light of states' own administrative and judicial framework; so too will the nature and degree of involvement of UNHCR. However, the fundamental issue remains the same—identifying those who should benefit from recognition of their refugee status, and ensuring, so far as is practical, consistent and generous interpretations of essentially international criteria.

As was noted above, Belgium has a unique arrangement for it is the local UNHCR representative who determines refugee status. In France, the determining authority is expressly subjected to the supervision of UNHCR, while the local representative is also a full voting member of the *Commission des Recours*. In the Federal Republic of Germany, the law provides expressly for asylum seekers to be given the opportunity to contact UNHCR and, while prescribing closed sessions generally for the recognition process, declares that the UNHCR representative shall be entitled to attend. In the United Kingdom, UNHCR may elect to be a party to proceedings before the immigration appeal authorities, while in the United States, UNHCR's involvement in an advisory capacity is gradually developing. In many other states, UNHCR's role may be less formal. Even where no procedure as such exists, or where UNHCR maintains no presence, the Office never-

theless holds a watching brief in all matters affecting refugees; should there arise cause for concern, then appropriate interventions will be made, either locally or through the permanent diplomatic missions in Geneva.

In a document submitted to the 1980 session of the Executive Committee,¹⁷³ the procedures of thirty-two states are described and, roughly speaking, UNHCR involvement falls into the following categories: (1) no formal role—eight states; (2) observer on advisory committee or similar body—eleven states; (3) full member of appeal body—three states; (4) UNHCR determines status—three states (including one state in which decisions are jointly taken); (5) UNHCR is informed of cases or its views may be sought or given or it may be invited to attend decision-making bodies—seven states.

Considered broadly, the role of UNHCR in such procedures is to contribute to the effective identification of *bona fide* refugees. This may entail (1) offering an assessment of the applicant's credibility in the light of the claim and of conditions known to exist in his or her country of origin; (2) providing information on the treatment of similar cases or similar legal points in other jurisdictions; (3) representing the international community's interest by providing UNHCR's interpretation of fundamental concepts, such as "well-founded fear"; and (4) promoting a liberal interpretation of humanitarian instruments (which includes giving the benefit of the doubt in appropriate cases), as well as a generous policy on asylum.

Evidently, the burden is on the applicant to establish his or her case, but given the practical problems as well as the trauma which a person in flight may face, a corresponding duty also rests upon those charged with ascertaining and evaluating the relevant facts.¹⁷⁴ Providing international protection may thus include helping those unable, for one reason or another, to help themselves, in order to ensure that no *bona fide* refugee is returned to a place in which he or she may have reason to fear persecution.

THE REFUGEE IN INTERNATIONAL LAW: SOME FINAL OBSERVATIONS

Three principal points of general international law have been canvassed above: (1) that there is an international legal definition of refugees applicable to all states; (2) that there is a general principle of international law obliging states to grant temporary refuge to asylum seekers and not to return them to where their lives or freedom may be endangered; and (3) that UNHCR enjoys universal jurisdiction to provide international protection to refugees.

In respect to each of these premises one factor is missing: to whom are the obligations in question owed? The individual is still not considered to

be a subject of international law, capable of enforcing his or her rights on the international plane.¹⁷⁵ Nevertheless, the problems which refugees are likely to face are not such as would prompt the exercise of the right of diplomatic protection on the part of the state of nationality. Whether another state or subject of international law exists with the competence to assert its own or the individual refugee's rights against a delinquent state is the central issue.

With regard to the states parties to the 1951 Convention and the 1967 Protocol, the existence of obligations *inter se* may be assumed. Moreover, both instruments expressly provide for the settlement of disputes relating to their interpretation or application, and for reference to the International Court of Justice at the request of any one of the parties to the dispute, should other means of settlement fail.¹⁷⁶ No litigation has resulted, and, in the absence of injury to an individual related to a claimant state by the link of nationality, the results of any such litigation are likely to be without practical consequence.¹⁷⁷ However, there are precedents for the view that states may yet have legal interests in matters other than those which affect directly their material interests.¹⁷⁸

Under Article 24 of the European Convention on Human Rights, any contracting state may refer to the European Commission an alleged breach of the Convention by another party. The instrument itself thus provides for the emergence of a "European public order," a regime in which all states parties have a sufficient interest in the observance of the European Convention's provisions to allow for the assertion of claims. While there are similarities in the objectives of the European Convention and the refugee conventions—both call for certain standards of treatment to be accorded to certain groups of persons—the refugee conventions lack effective investigation, adjudication, and enforcement procedures; they can hardly be considered to offer the same opportunity for judicial or quasi-judicial solutions. At the same time, although UNHCR is accorded a supervisory role in the application of the Convention and Protocol, it is not a party to those instruments. For the advancement of UNHCR claims to be acceptable it needs a sure foundation in the general law.

UNHCR does enjoy, by derivation and intention, international personality. As a subsidiary organ of the General Assembly, its "personality" (its capacity to possess international rights and duties) can be traced to the United Nations organization at large.¹⁷⁹ Moreover, its statute shows that the Office was intended by the General Assembly to act on the international plane.¹⁸⁰ The standing of the Office in matters of international protection has been amply reinforced by successive General Assembly resolutions calling on all states to cooperate with the High Commissioner in the performance of his other functions.¹⁸¹ The "effective discharge"¹⁸²

of these functions may in turn require capacity to assert international claims on behalf of individuals falling within the competence of the Office.

At this point, it is tempting to invoke a dictum of the International Court of Justice in the *Barcelona Traction Case*,¹⁸³ and to argue that, in view of the importance of the rights involved, all states have an interest in their protection;¹⁸⁴ and that UNHCR, by express agreement of some states and by the acquiescence of others, is the qualified representative of the "international public order" in such matters. As yet, no cogent theory of responsibility has been developed to cover this situation. The legal consequences that may flow from a breach of the international obligations in question remain unclear.

International claims may take the form of protest, a call for an inquiry, negotiation, or a request for submission to arbitration or to the International Court of Justice. Both the nature of breaches of obligation affecting refugees and the nature of the protecting organization rule out certain types of claims, such as arbitration, while strictly legal considerations may exclude, for example, recourse to the International Court of Justice. Currently, the simple existence of obligations owed at large may provide sufficient justification, not just for "expressions of international concern,"¹⁸⁵ but also for formal protest on the part of UNHCR.¹⁸⁶ The significance of this development for the individual's standing in general international law should not be underestimated.

ANNEX

Conclusions on International Protection Adopted by the Executive Committee at its 28th Session*

The Committee

(1) *General*

- (a) Was gravely preoccupied that in a number of cases the basic human rights of refugees had still not been respected, that refugees had been subjected to physical violence, to unjustified and unduly prolonged measures of detention and to measures of forcible return in disregard of the principle of *non-refoulement*;
- (b) Welcomed the efforts undertaken by the High Commissioner in the field of international protection and recognized the urgent need for these efforts to be continued and intensified,

* Extract from the Report of the 28th Session of the Executive Committee of the High Commissioner's Programme (1977): U.N. Doc. A/32/12/Add. 1, at 12-16.

particularly in those areas where the basic rights of refugees are endangered;

- (c) Reiterated its satisfaction at the establishment of the Sub-Committee of the Whole on International Protection as a forum for examining current problems and recommending appropriate solutions in this field;
- (d) Decided that the Sub-Committee of the Whole on International Protection should meet for one full day immediately preceding the opening of the twenty-ninth session of the Executive Committee.

(2) *International instruments*

- (a) Noted with disappointment that since the Committee's twenty-seventh session only one further State had acceded to the 1951 Convention and to the 1967 Protocol relating to the Status of Refugees;
- (b) Noted further that a large number of States had still not become parties to these instruments and recommended that the High Commissioner undertake a concerted and determined initiative at the highest level to promote further accessions;
- (c) Considered that such an initiative should also extend to promoting the withdrawal of the geographical limitation still maintained by certain States in respect of their obligations under the 1951 Convention and the 1967 Protocol;
- (d) Reaffirmed the fundamental importance of the Statute of the Office of the United Nations High Commissioner for Refugees as a basis for the international protection function of the High Commissioner, particularly in respect of States which had not yet acceded to the 1951 Convention or the 1967 Protocol or whose obligations under these instruments were restricted by the geographical limitation.

(3) *Asylum*

- (a) Noted with satisfaction the report of the High Commissioner that States have generally continued to follow liberal asylum practices;
- (b) Concerned, however, that according to the report of the High Commissioner cases continue to occur in which asylum-seekers have encountered serious difficulties in finding a country willing to grant them even temporary refuge and that refusal of permanent or temporary asylum has led in a number of cases to serious consequences for the persons concerned;
- (c) Requested the High Commissioner to draw the attention of Governments to the various international instruments existing

in the field of asylum and reiterated the fundamental importance of these instruments from a humanitarian standpoint;

- (d) Appealed to Governments to follow, or continue to follow, liberal practices in granting permanent or at least temporary asylum to refugees who have come directly to their territory;
 - (e) Called upon Governments to co-operate, in a spirit of international solidarity, with the High Commissioner in the performance of his functions—especially with respect to asylum—in accordance with General Assembly resolution 428 (V) of 14 December 1950.
- (4) *Non-refoulement*
- (a) Recalling that the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States;
 - (b) Expressed deep concern at the information given by the High Commissioner that, while the principle of *non-refoulement* is in practice widely observed, this principle has in certain cases been disregarded;
 - (c) Reaffirms the fundamental importance of the observance of the principle of *non-refoulement*—both at the border and within the territory of a State—of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.
- (5) *Expulsion*
- (a) Recognized that, according to the 1951 Convention, refugees lawfully in the territory of a Contracting State are generally protected against expulsion and that in accordance with article 32 of the Convention expulsion of a refugee is only permitted in exceptional circumstances;
 - (b) Recognized that a measure of expulsion may have very serious consequences for a refugee and his immediate family members residing with him;
 - (c) Recommended that, in line with article 32 of the 1951 Convention, expulsion measures against a refugee should only be taken in very exceptional cases and after due consideration of all the circumstances, including the possibility for the refugee to be admitted to a country other than his country of origin;
 - (d) Recommended that, in cases where the implementation of an expulsion measure is impracticable, States should consider giving refugee delinquents the same treatment as national delinquents and that States examine possibility of elaborating an international instrument giving effect to this principle;

- (e) Recommended that an expulsion order should only be combined with custody or detention if absolutely necessary for reasons of national security or public order and that such custody or detention should not be unduly prolonged.
- (6) *Determination of refugee status*
- (a) Noted the report of the High Commissioner concerning the importance of procedures for determining refugee status;
 - (b) Noted that only a limited number of States parties to the 1951 Convention and the 1967 Protocol had established procedures for the formal determination of refugee status under these instruments;
 - (c) Noted, however, with satisfaction that the establishment of such procedures was under active consideration by a number of Governments;
 - (d) Expressed the hope that all States parties to the 1951 Convention and the 1967 Protocol which had not yet done so would take steps to establish such procedures in the near future and give favourable consideration to UNHCR participation in such procedures in appropriate form;
 - (e) Recommended that procedures for the determination of refugee status should satisfy the following basic requirements:
 - (i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
 - (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
 - (iii) There should be a clearly identified authority—wherever possible a single central authority—with responsibility for examining requests for refugee status and taking a decision in the first instance.
 - (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
 - (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
 - (vi) If the applicant is not recognized, he should be given a

reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system. (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending;

- (f) Requested UNHCR to prepare, after due consideration of the opinions of States parties to the 1951 Convention and the 1967 Protocol, a detailed study on the question of the extra-territorial effect of determination of refugee status in order to enable the Committee to take a considered view on the matter at a subsequent session taking into account the opinion expressed by representatives that the acceptance by a Contracting State of refugee status as determined by other States parties to these instruments would be generally desirable;
- (g) Requested the Office to consider the possibility of issuing—for the guidance of Governments—a handbook relating to procedures and criteria for determining refugee status and circulating—with due regard to the confidential nature of individual requests and the particular situations involved—significant decisions on the determination of refugee status.

NOTES

¹ See, e.g., *Mosgrove v. Chun Teeong Toy*, [1891] A.C. 272 (P.C.); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1891); *Nottebohm Case* (Lichtenstein v. Guatemala), [1955] I.C.J. 4, 46 (Read, J., dissenting).

² An exception would be where a treaty regime operates; see, e.g., *Mohamed Khan v. United Kingdom*, [1967] Y.B. EUR. CONV. ON HUMAN RIGHTS 478 (Eur. Comm. on Human Rights) (claim to enter the United Kingdom as concomitant to the right to respect for family life recognized by Article 8 of the European Convention on Human Rights).

³ See generally, I A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1966); J.H. SIMPSON, *THE REFUGEE QUESTION* (Oxford Pamphlets on World Affairs No. 13, 1939); Reale, *Le problème des passeports*, 50 HAGUE ACAD. INT'L L. RECUEIL DES COURS 89 (1934-IV); Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193 (1954).

⁴ G.A. Res., U.N. Doc. A/64, at 12 (1946); "war criminals, quislings and traitors" were expressly excluded.

⁵ And its nominal predecessor, the Preparatory Commission for the IRO, established in view of the dilatoriness of governments in ratifying the IRO Constitution.

⁶ G.A. Res. 319, U.N. Doc. A/1251, at 36 (1949). The Office, established as a subsidiary

organ of the General Assembly under Article 22 of the UN Charter, is not a permanent institution. Originally limited to a period of three years, the mandate of the Office is now regularly reviewed every five years; it was most recently renewed through to December 31, 1983. G.A. Res. 32/68, 32 U.N. GAOR, Supp. (No. 45) 140, U.N. Doc. A/32/45 (1977). The High Commissioner is elected by the General Assembly on the nomination of the Secretary General. The present incumbent, Poul Hartling (Denmark), was elected by the General Assembly for a period of five years from January 1, 1978. G.A. Res. 32/314, 32 U.N. GAOR, Supp. (No. 45) 224, U.N. Doc. A/32/45 (1977).

⁷ G.A. Res. 428, U.N. GAOR, Supp. (No. 20) 46, U.N. Doc. A/1775 (1950), declares:

The General Assembly

In view of its resolution 319A(IV) of 3 December 1949,

1. *Adopts* the annex to the present resolution, being the Statute of the Office of the United Nations High Commissioner for Refugees;
2. *Calls upon* Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office, especially by:
 - (a) Becoming parties to international conventions providing for the protection of refugees, and taking the necessary steps of implementation under such conventions;
 - (b) Entering into special agreements with the High Commissioner for the execution of measures calculated to improve the situation of refugees and to reduce the number requiring protection;
 - (c) Admitting refugees to their territories, not excluding those in the most destitute categories;
 - (d) Assisting the High Commissioner in his efforts to promote the voluntary repatriation of refugees;
 - (e) Promoting the assimilation of refugees, especially by facilitating their naturalization;
 - (f) Providing refugees with travel and other documents such as would normally be provided to other aliens by their national authorities, especially documents which would facilitate their resettlement;
 - (g) Permitting refugees to transfer their assets and especially those necessary for their resettlement;
 - (h) Providing the High Commissioner with information concerning the number and condition of refugees, and laws and regulations concerning them;
3. *Requests* the Secretary-General to transmit the present resolution, together with the annex attached thereto, also to States non-members of the United Nations, with a view to obtaining their co-operation in its implementation.

⁸ Statute of the Office of the United Nations High Commissioner for Refugees, para. 1, Annex to G.A. Res. 428, 5 U.N. GAOR, Supp. (No. 20) 46, U.N. Doc. A/1775 (1950) [hereinafter cited as UNHCR Statute].

⁹ *Id.*, para. 2. Paragraph 3, however, obliges the High Commissioner to follow policy directives given him by the General Assembly or the Economic and Social Council.

¹⁰ UNHCR Statute, *supra* note 8, para. 8.

¹¹ Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 1 H^AGUE ACAD. INT'L L. RECUEIL DES COURS 331-32 (1976); Schnyder, *Les aspects juridiques actuels du problème des réfugiés*, 1 H^AGUE ACAD. INT'L L. RECUEIL DES COURS 339, 416 (1965); Weis, *supra* note 3, at 214.

¹² Similarly, objection on such grounds may be raised to the High Commissioner's activities with regard to groups and categories; *see, e.g.*, discussion in the Third Committee in 1979 on assistance by UNHCR to Afghan refugees in Pakistan, 34 U.N. GAOR, Third Committee (46th Mtg.) (Agenda Item 83) paras. 58-59, U.N. Doc. A/C.3/34/SR.46 (1979);

34 U.N. GAOR, Third Committee (48th Mtg.) (Agenda Item 83) paras. 13, 19, 20, 25, U.N. Doc. A/C.3/34/SR.48 (1979).

¹³ With the qualifying phrase "as a rule" in paragraph 2 of the UNHCR Statute, *supra* note 8, para. 2, the "groups and categories" directives can hardly be considered mandatory.

¹⁴ G.A. Res. 34/60, 34 U.N. GAOR, Supp. (No. 46) 173, U.N. Doc. A/34/46 (1979).

¹⁵ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, and Protocol relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 767. As of November 30, 1980, 83 states were party to the 1951 Convention and/or the 1967 Protocol.

¹⁶ Article II of the 1967 Protocol, *supra* note 15, is to similar effect. *See also* Article VII of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *done* Sept. 10, 1969, U.N.T.S. No. 14691, *reprinted in* 8 INTERNATIONAL LEGAL MATERIALS 1288 (1969) [hereinafter cited as the OAU Convention].

¹⁷ *See* Annex to this article for the full text of the Executive Committee's Conclusions on International Protection.

¹⁸ Insofar as they are not excluded by the terms of paragraph 7 of the UNHCR Statute, *supra* note 8, para. 7.

¹⁹ In particular, those the subject of arrangements concluded under the League of Nations or who were considered refugees under the Constitution of the IRO are included within the competence of UNHCR.

²⁰ UNHCR Statute, *supra* note 8, para. 6(B).

²¹ The Executive Committee's terms of reference include (1) advising the High Commissioner, at his request, in the exercise of his statutory functions; and (2) advising the High Commissioner of the appropriateness of providing international assistance through his Office in order to solve such specific refugee problems as may arise, G.A. Res. 1166, 12 U.N. GAOR, Supp. (No. 18) 19, U.N. Doc. A/3805 (1957). There are now forty states members of the Executive Committee; *see* G.A. Res. 33/25, 33 U.N. GAOR, Supp. (No. 45) 139, U.N. Doc. A/33/45 (1978); E.S.C. Res. 1979/52, 34 U.N. ESCOR, Supp. (No. 1A) 25, U.N. Doc. E/1979/79/Add.1 (1979).

²² G.A. Res. 1167, 12 U.N. GAOR, Supp. (No. 18) 20, U.N. Doc. A/3805 (1957) (relating to Chinese refugees in Hong Kong). *See also* G.A. Res. 1784, 17 U.N. GAOR Supp. (No. 17) 34, U.N. Doc. A/5217 (1962) (relating to problems of Chinese refugees in Hong Kong).

²³ *See generally* E. HAMBRO, THE PROBLEMS OF CHINESE REFUGEES IN HONG KONG (1955).

²⁴ *See, e.g.*, G.A. Res. 1286, 13 U.N. GAOR, Supp. (No. 18) 26, U.N. Doc. A/4090 (1958); G.A. Res. 1389, 14 U.N. GAOR, Supp. (No. 16) 21, U.N. Doc. A/4354 (1959); G.A. Res. 1500, 15 U.N. GAOR, Supp. (No. 16) 20, U.N. Doc. A/4684 (1960); G.A. Res. 1672, 16 U.N. GAOR, Supp. (No. 17) 28, U.N. Doc. A/5100 (1962) (all relating to special help for Algerians fleeing to Tunisia and Morocco to escape the effects of the struggle for liberation); *see also* G.A. Res. 1671, 16 U.N. GAOR, Supp. (No. 17) 27, U.N. Doc. A/5100 (1962) (relating to Angolan refugees in the Congo).

²⁵ The term is employed but not defined in G.A. Res. 1499, 15 U.N. GAOR, Supp. (No. 16) 19, U.N. Doc. A/4684 (1960).

²⁶ *Compare* G.A. Res. 1167, 12 U.N. GAOR, Supp. (No. 18) 20, U.N. Doc. A/3805 (1957) with G.A. Res. 1784, 17 U.N. GAOR, Supp. (No. 17) 34, U.N. Doc. A/5217 (1962).

²⁷ Schnyder, *supra* note 11, at 426-33; Khan, *supra* note 11, at 306, 339-43.

²⁸ *Id.*

²⁹ G.A. Res. 3455, 30 U.N. GAOR, Supp. (No. 34) 93, U.N. Doc. A/10034 (1975).

³⁰ In 1977, the High Commissioner sought advice from the Executive Committee on the refugee/displaced person distinction, but no formal response was forthcoming. For views expressed, *see* Executive Committee of the High Commissioner's Programme (28th session), U.N. Doc. A/AC.96/549, paras. 21-26 (1977) (discussion of the applicability of the term

"displaced persons" to certain Indochinese refugees); Executive Committee of the High Commissioner's Programme (28th session), U.N. Doc. A/AC.96/SR.288, paras. 26, 37 (1977) (discussion of distinction between terms "refugee" and "displaced person"). *See also* the High Commissioner's statement to the 31st Session of the Executive Committee, Executive Committee of the High Commissioner's Programme (31st session), U.N. Doc. A/AC.96/588, Annex I (1980) (discussing the High Commissioner's role with regard to "displaced persons"), and the remarks by the representative for Turkey (Mr. Inan) on the extension of the High Commissioner's mandate. In Mr. Inan's view, "the time had come to ensure that UNHCR did not, by virtue of precedents, become a body which cared for anyone compelled for whatever reason to leave his country or even to move to a different area inside his country." Executive Committee of the High Commissioner's Programme (31st session), U.N. Doc. A/AC.96/SR.319, paras. 12-15.

³¹ *See, e.g.*, G.A. Res. 3143, 28 U.N. GAOR, Supp. (No. 30) 84, U.N. Doc. A/90/30 (1973) (requesting the High Commissioner "to continue his assistance and protection activities in favour of refugees within his mandate as well as for those to whom he extends his good offices or is called upon to assist in accordance with relevant resolutions of the General Assembly"); G.A. Res. 32/68, 32 U.N. GAOR, Supp. (No. 45) 140, U.N. Doc. A/32/45 (1977) (continuing the Office of UNHCR and noting "the outstanding work . . . performed . . . in providing international protection . . . to refugees and displaced persons. . .").

³² In considering, at large, the mandate of the Office of UNHCR, attention should also be given to its increasing involvement in programs for the reception and rehabilitation of *returning* refugees. The facilitation of voluntary repatriation is a prescribed function of the Office (paragraphs 1 and 8(c) of the Statute). That this function should extend to a period after initial return, when technically the persons in question will have ceased to be refugees, was recognized by the General Assembly as early as 1961. G.A. Res. 1672, 16 U.N. GAOR, Supp. (No. 17) 28, U.N. Doc. A/5100 (1962) (assistance to those repatriating to Algeria). Such involvement has been maintained and expanded. *See, e.g.*, G.A. Res. 2789, 26 U.N. GAOR, Supp. (No. 29) 84, U.N. Doc. A/8429 (1971) (recognizing the role the Office plays in facilitating the rehabilitation of groups of refugees who have voluntarily returned to their country of origin); G.A. Res. 2958, 27 U.N. GAOR, Supp. (No. 30) 65, U.N. Doc. A/8730 (1973) (assistance to Sudanese refugees returning from abroad); G.A. Res. 33/26, 33 U.N. GAOR, Supp. (No. 45) 139, U.N. Doc. A/33/45 (1978) (commending the Office's efforts for assisting in rehabilitation of returnees).

³³ For example, would such lack of protection include the failure (or inability?) of a state to safeguard or implement the rights set forth in the 1966 Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966)? If not, why not? Is there a collection of basic rights, infringement of which would indicate sufficient lack of protection? If so, what are they?

³⁴ UNHCR Statute, *supra* note 8, para. 8(a).

³⁵ 1951 Convention, *supra* note 15, art. 35.

³⁶ 1951 Convention, *supra* note 15, art. 1(A)(2). The statutory definition is discussed in the text at notes 18-19 *supra*.

³⁷ 1951 Convention, *supra* note 15, art. 1(B).

³⁸ "Social factors" also occur in other international instruments, for example, as a potential basis of (prohibited) discrimination. *See, e.g.*, Universal Declaration of Human Rights, art. 2, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, art. 2, Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

³⁹ In the treaties and agreements of the interwar years, a group approach was adopted. Refugees were defined by reference to their country of origin and to their lack of protection from their government; *see, e.g.*, Arrangement relating to the Issue of Identity Certificates to

Russian and Armenian Refugees, supplementing and amending the previous Arrangements dated July 22, 1922, and May 31st, 1924, May 12, 1926, 89 L.N.T.S. 47; Arrangement concerning the Extension to Other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 63; Provisional Arrangement concerning the Status of Refugees coming From Germany, July 4th 1936, 171 L.N.T.S. 76; Additional Protocol to the Provisional Arrangement and to the Convention, signed at Geneva on July 4, 1936, and Feb. 10, 1938, respectively, concerning the Status of Refugees Coming From Germany, *opened for signature*, Sept. 14, 1939, 198 L.N.T.S. 141.

⁴⁰ GRAHL-MADSEN, *supra* note 3, at 217.

⁴¹ *Id.* at 219-20.

⁴² Grahl-Madsen, however, considers that the notion was introduced to stop a potential gap and concludes: "whenever a person is likely to suffer persecution merely because of his background, he should get the benefit of the present provision." *Id.* at 220.

⁴³ Recommendation E of the Final Act of the 1951 United Nations Conference on the Status of Refugees and Stateless Persons, Appendix of the 1951 Convention, *supra* note 15.

⁴⁴ *See, e.g.,* Molefi v. Principal Legal Adviser, [1971] A.C. 182, 186 (P.C.).

⁴⁵ Such indeed has been held to be the case by one court in the Federal Republic of Germany. *See* Judgment No. 74 of Nov. 25, 1958, Bundesverwaltungsgericht [BVerwGE], 7 Entscheidungen des BVerwGE 333, 334.

⁴⁶ 1951 Convention, *supra* note 15, art. 35.

⁴⁷ The criterion for refugee status looks to the future; standards of proof which seek to relate past causes to past effects (such as the balance of probabilities rule or the concept of proof beyond a reasonable doubt) are manifestly inapplicable. *Fernandez v. Government of Singapore* [1971] 1 W.L.R. 987, 993-94.

⁴⁸ 1951 Convention, *supra* note 15, art. 32(3). *See also Expulsion of an Alien (Austria) Case*, 28 I.L.R. 310 (Supreme Court, Austria, 1958); 4 A. KISS, *REPertoire FRANÇAISE DE DROIT INTERNATIONAL PUBLIC* 462 (1962).

⁴⁹ *See also* G. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 139-40 (1978).

⁵⁰ Recommendation D of the Final Act of the 1951 United Nations Conference on the Status of Refugees and Stateless Persons, Appendix of the 1951 Convention, *supra* note 15.

⁵¹ 28 I.L.R. 297 (Federal Administrative Court, Federal Republic of Germany, 1959).

⁵² 505 F.2d 1170 (2d Cir. 1974).

⁵³ 1951 Convention, *supra* note 15, art. 33(2) (emphasis added).

⁵⁴ *See* GOODWIN-GILL, *supra* note 49.

⁵⁵ OAU Convention, *supra* note 16, art. I(2).

⁵⁶ *Id.*, art. II(3).

⁵⁷ *Id.*, art. II(4). Provision is made for "temporary residence" pending resettlement, but its grant is not mandatory.

⁵⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221 (commonly referred to as the European Convention on Human Rights).

⁵⁹ *See* GOODWIN-GILL, *supra* note 49, at 218-28; Nance, *The Individual Right of Asylum Under the European Convention on Human Rights*, this volume, and the cases discussed therein.

⁶⁰ American Convention on Human Rights, Nov. 22, 1969, art. 22(7), (8), OAS Official Records, OEA/Ser.K/XVI/1 I. *Cf.* Young-Anawaty, *Haitian Refugees v. United States: Bringing a Country of Refuge Before the International Bench*, this volume.

⁶¹ States' use of substitute terminology has not inhibited UNHCR from intervening to protect groups and individuals from expulsion or return to a place of persecution or where their life or freedom would otherwise be endangered.

⁶² See text at note 39 *supra*. Cf. A. GRAHL-MADSEN, TERRITORIAL ASYLUM 40-41, 43, 46, 53-54, 65 (1980).

⁶³ See 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 93-103 (1972); Weis, *Legal Aspects of the Convention of 28 July 1951 Relating to the Status of Refugees*, 30 BRIT. Y.B. INT'L L. 478, 481-83 (1953); Weis, *Territorial Asylum*, 6 INDIAN J. INT'L L. 173, 181-91 (1966); Weis, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT'L L. 92, 102-03 (1969).

⁶⁴ In principle there is no reason why the rule of *nonrefoulement* should not also apply in the context of extradition proceedings; the 1951 Convention already recognizes the interests of the state of refuge in not committing itself to the reception of serious criminals (Articles 1(F)(b), 32(1) and 33(2) of the 1951 Convention, *supra* note 15), and the only issue of principle is that of a potential conflict of treaty obligations. Extradition of refugees was considered at the 31st Session of the Executive Committee. See Report of the Sub-Committee of the Whole on International Protection, Executive Committee of the High Commissioner's Programme (31st session), U.N. Doc. A/AC.96/586, paras. 4-16, (1980); Report of the Executive Committee, Executive Committee of the High Commissioner's Programme (31st session), U.N. Doc. A/AC.96/588, para. 48(2) (1980).

⁶⁵ See Weis, *Legal Aspects of the Convention of 28 July 1951 Relating to the Status of Refugees*, *supra* note 63, at 482.

⁶⁶ See, e.g., the phenomenon of "conventions de prise en charge de personnes a la frontiere," 1 H. BATIFFOL & P. LAGARDE, DROIT INTERNATIONAL PRIVÉ 198 (5th ed. 1970); and the phenomenon of "Übernahme-" or "Schubabkommen," R. SCHIEDERMAIR, HANDBUCH DES AUSLÄNDERRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 178, 227-30 (1968).

⁶⁷ Convention on the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199. This convention was ratified by only eight states. The United Kingdom, which did not ratify, expressly objected to the principle of nonrejection at the frontier. Jennings, *Some International Law Aspects of the Refugee Question*, 20 BRIT. Y.B. INT'L L. 98, 105 (1939). In assessing this restrictive view, note the essentially negative debate which surrounded proposals for a right to asylum to be incorporated in the Universal Declaration of Human Rights. See the original draft of Article 14 in 3 U.N. GAOR, Third Committee (121st meeting) 5, U.N. Doc. A/C.3/S.R.121 (1948); the objections raised by the Australian and Russian delegates, 3 U.N. GAOR, Third Committee (122nd meeting) 6, U.N. Doc. A/C.3/S.R.122 (1948). See also H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 421-23 (1950); O. KIMMINICH, DER INTERNATIONALE RECHTSSTATUS DES FLÜCHTLINGS 76-88 (1962).

⁶⁸ For example, in 1939, France received 400,000 refugees from Spain in just ten days. See 4 A. KISS, *supra* note 48, at 433-35. In the six years of its operation, the IRO assisted in the resettlement of integration of some 1,620,000 refugees.

⁶⁹ See, e.g., N. BETHELL, THE LAST SECRET (1974); N. TOLSTOY, VICTIMS OF YALTA (1977).

⁷⁰ See, e.g., Schnyder, *supra* note 11, at 381. But cf. Khan, *supra* note 11, at 318-22 (taking the position that the lack of acceptance of a viable standard of *nonrefoulement* remains a "serious gap" in refugee law).

⁷¹ See Convention relating to the International Status of Refugees, Oct. 28, 1933, art. 3, 159 L.N.T.S. 199; Convention concerning the Status of Refugees coming from Germany, Feb. 10, 1938, art. 5(2), 192 L.N.T.S. 59; 1951 Convention, *supra* note 15, art. 33(2); Declaration on Territorial Asylum, art. 3(3), G.A. Res. 2312, 22 U.N. GAOR, Supp. (No. 16) 81, U.N. Doc. A/6716 (1978). Article 3(3) of the Declaration of Territorial Asylum declares that if a state decides to make an exception to the principle of *nonrefoulement*, "it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State."

⁷² The mass efflux/influx phenomenon raises its own very special problems, including the question of causes, and has recently (November/December 1980) been under examination in a number of international fora.

73 Weis, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT'L L. 92, 113, 142-43 (1969). Weis nevertheless applauds rejection of the "public order" exception as being too wide and susceptible of different connotations in civil and common law countries. For an examination of the *ordre public* concept, see GOODWIN-GILL, *supra* note 49.

74 Weis, 7 CAN. Y.B. INT'L L. 92, 147-49 (1969); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 66, 165-76 (1974).

75 See Report of the Secretary General: 1979 Geneva Meeting on Refugees and Displaced Persons in South-East Asia, U.N. Doc. A/34/627, para. 48; *id.*, Annex I, para. 8. The international community's response and, in particular, the significant increase in offers of resettlement places, were clearly important factors influencing this decision.

76 See OAU Convention, *supra* note 16, art. II (prohibiting measures which would compel a refugee to return to or remain in a territory in which he or she would be endangered).

77 See Annex to this article; see also Report of the Executive Committee, Executive Committee of the High Commissioner's Programme (30th session), U.N. Doc. A/AC.96/572, para. 72, (1979).

78 See, e.g., G.A. Res. 32/67, 32 U.N. GAOR, Supp. (No. 45) 139, U.N. Doc. A/32/45 (1977); G.A. Res. 33/26, 33 U.N. GAOR, Supp. (No. 45) 139, U.N. Doc. A/33/45 (1978); G.A. Res. 34/60, 34 U.N. GAOR, Supp. (No. 46), U.N. Doc. A/34/46 (1979).

79 See, e.g., the Recommendations of the 1979 Arusha Conference in the Report of the Conference on the Situation of Refugees in Africa, U.N. Doc. A/AC.96/INF.158, at 7-21 (1979); 1980 Manila Declaration on the International Protection of Refugees and Displaced Persons in Asia, reported in U.N. Doc. A/AC.96/INF.162 (1980).

80 This statement represents a modification of the author's previous position as set out in GOODWIN-GILL, *supra* note 49, at 141.

81 North Sea Continental Shelf Cases, [1969] I.C.J. 3, 42.

82 Cf. Report on the Thirtieth Session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/572, para. 72. On the "no derogation" issue, human rights standards and general international law, see GOODWIN-GILL, *supra* note 49, at 58-74.

83 E.g., G.A. Res. 34/60, 34 U.N. GAOR, Supp. (No. 46) 173, U.N. Doc. A/34/46 (1979). The 1977 United Nations Conference on Territorial Asylum was a failure.

84 See the provisions listed in *A Select Bibliography on Territorial Asylum*, U.N. Doc. ST/GENEVA/LIB.SER.B/Ref.9, at 68-74 (1977).

85 See GOODWIN-GILL, *supra* note 49, at 142-46.

86 I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 65-66 (1971).

87 Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 86 (1979).

88 See, e.g., proposal by the Federal Republic of Germany and Senegal, U.N. Doc. A/CONF.78/C.1/L.105 and U.N. Doc. A/CONF.78/12, Annex I, at 66 (1977).

89 U.N. Doc. A/CONF.78/12, Annex I, at 43-44, 45-46. The text finally referred to the drafting committee omitted any mention of extradition, *id.* at 50-51, but the Committee of the Whole agreed the issue should be considered later, *id.* at 47. However, the conference was unable to complete its work and whether it will be reconvened is uncertain.

90 Declaration on Territorial Asylum, *supra* note 71, art. I(3). An article on the right of qualification was also proposed for inclusion in the Convention on Territorial Asylum. 32 U.N. GAOR, U.N. Doc. A/CONF.78/12, Annex I, at 60 (1977).

91 GRAHL-MADSEN, *supra* note 62, at 46; INT'L L. ASSOC., *REPORT OF THE 53RD CONFERENCE* 260-61 (1958) (statement of Dr. H. Idoyaga at Working Session on Legal Aspects of the Problems of Asylum); INT'L L. ASSOC., *REPORT OF THE 54TH CONFERENCE* 30-31 (1970) (statement of P. Weis at Working Session on Legal Aspects of the Problem of Asylum).

92 GRAHL-MADSEN, *supra* note 62, at 46, 88. See, in particular, Epps, *supra* note 87, and also the various provisions on the right of qualification in Latin American treaties, e.g., Montev-

ideo Treaty on International Penal Law, Jan. 29, 1889, art. 23, OAS T.S. No. 34, at 1; Montevideo Convention on Political Asylum, Dec. 26, 1933, art. 3, OAS T.S. No. 34, at 27; Montevideo Treaty on International Penal Law, arts. 20, 23, Mar. 19, 1940, OAS T.S. No. 34, at 71; Caracas Convention on Diplomatic Asylum, art. 4, Mar. 28, 1954, OAS T.S. No. 34, at 82. Cf. European Convention on Extradition, art. 3, *done* Dec. 13, 1957, 359 U.N.T.S. 273.

⁹³ J. BRIERLY, *The Shortcomings of International Law*, in *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 68, 74 (H. Lauterpacht & C. Waldock eds. 1958).

⁹⁴ Coles, *The International Protection of Refugees: Legal Aspects of the Large-Scale Influx of Refugees* (paper presented to the Asian Round Table on Problems in the International Protection of Refugees and Displaced Persons, Manila, April 15-19, 1980); *The International Protection of Refugees and the Concept of Temporary Refuge* (paper presented to the Seminar on Indo-Chinese Refugees, International Institute of Humanitarian Law, San Remo, May 28-30, 1980).

⁹⁵ This was first raised in 1979. On that occasion, the Executive Committee stated its view that, in the case of a large-scale influx, persons seeking asylum should always receive at least temporary refuge; and that receiving states should receive immediate assistance from other states in accordance with the principle of equitable burden sharing. Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/572, para. 72 (1979). The temporary refuge issue was raised again by the Australian delegation the following year in the Executive Committee's Sub-Committee of the Whole on International Protection; further study was recommended, and this was accepted by the Executive Committee. Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/586, paras. 30-37 (1980).

⁹⁶ See OAU Convention, *supra* note 16, art. II(4), (5); Declaration on Territorial Asylum, *supra* note 71, art. 3(3).

⁹⁷ See Report of the 1979 Arusha Conference, Recommendations on the term "refugee" and determination of refugee status, Executive Committee of the High Commissioner's Programme (30th session), U.N. Doc. A/AC.96/INF.158, at 9 (1977).

⁹⁸ See Note on the Procedures for the Determination of Refugee Status Under International Instruments, U.N. Doc. A/AC.96/INF.152/Rev.2 (1980) (describing the procedures in 32 countries).

⁹⁹ Migration Act 1958-1973, 7 ACTS AUSTRAL. P. 773 (1973). In 1980, the Immigration (Unauthorized Arrivals) Act was enacted. One of its objectives is to prevent and punish the act of carrying to Australia large numbers of asylum seekers in freighters fitted out for that purpose, as has frequently happened in Southeast Asia. Provision is made for penalties up to \$100,000 and 10 years imprisonment. The Act is also capable of applying to those who, having rescued refugees at sea, arrive at an Australian first port of call; however, it is understood that prosecutorial discretion would be exercised favorably on behalf of shipmasters responsible for such purely humanitarian actions.

¹⁰⁰ This was confirmed by Cabinet decisions of May 24, 1977, and March 16, 1978.

¹⁰¹ A summary procedure to deal with manifestly ill-founded cases is at present being developed.

¹⁰² See note 100 *supra*.

¹⁰³ [1975] Austral. Acts 869.

¹⁰⁴ The right of appeal is made available, under part 22 of the schedule to the Administrative Appeals Tribunal Act, to persons subject to deportation orders under sections 12 and 13 of the Migration Act 1958-1973.

¹⁰⁵ The possibility of widening the scope of appeals in immigration matters is currently under consideration by the Administrative Review Council.

¹⁰⁶ *Ceskovic v. Minister for Immigration and Ethnic Affairs*, March 27, 1979, *aff'd* 27 Austral. L.R. 423 (Federal Court of Australia, 1979).

¹⁰⁷ Further, as yet unexplored, possibilities of judicial review are raised by the bringing

into force in October 1980 of the Administrative Decisions (Judicial Review) Act 1977, [1977] Austl. Acts 314.

¹⁰⁸ Law of June 26, 1953, adopting the 1951 Refugee Convention, *Moniteur*, Oct. 4, 1953, [1953] *Pasinomie* 723; ministerial decree of February 22, 1954, *Moniteur*, April 18, 1954; royal decree of June 18, 1964, *Moniteur*, June 30, 1964, [1964] *Pasinomie* 777, amending the royal decree of March 25, 1961, *Moniteur*, April 25, 1961, [1961] *Pasinomie* 386, relating to the conditions of entry, residence, and establishment of foreign nationals in Belgium; royal decree of December 21, 1965, *Moniteur*, Dec. 31, 1965, [1965] *Pasinomie* 1526, as amended by a decree of July 11, 1969, *Moniteur*, Aug. 14, 1969, [1969] *Pasinomie* 1244, also relating to the conditions of entry, residence, and establishment of foreign nationals in Belgium; law of February 27, 1969, *Moniteur*, May 3, 1969, [1969] *Pasinomie* 110, approving the 1967 Refugee Protocol. Reference should also be made to a new law on foreigners of December 15, 1980, *Moniteur*, Dec. 31, 1980, which enters into force in 1981.

¹⁰⁹ Law of June 26, 1953, [1953] *Pasinomie* 723, art. 5.

¹¹⁰ Ministerial decree of Feb. 22, 1954, *Moniteur*, April 18, 1954.

¹¹¹ Law of March 28, 1952, art. 3, *Moniteur*, March 30, 1952, [1952] *Pasinomie* 209, as amended by Law of April 30, 1964, *Moniteur*, June 30, 1964, [1964] *Pasinomie* 543.

¹¹² Law no. 52-893 concerning the creation of the French Office for the Protection of Refugees and Stateless Persons (OFPRA), July 25, 1952, [1952] *Journal Officiel de la République Française* [J.O.] 7642, [1952] *Dalloz, Législation* [D.L.] 284; Decree no. 53-377 relating to OFPRA, May 2, 1953 [1953] J.O. 4029, [1953] D.L. 158; Law no. 70-1076 authorizing accession to the 1967 Protocol, Nov. 25, 1970, [1970] J.O. 10851, [1970] *Dalloz-Sirey, Législation* 308.

¹¹³ Law no. 52-893, [1952] J.O. 7642, art. 2; Decree no. 53-377, [1953] J.O. 4029, arts. 1-2.

¹¹⁴ Law no. 52-893, [1952] J.O. 7642, art. 3; Decree no. 53-377, [1953] J.O. 4029, arts. 9-14.

¹¹⁵ Law no. 52-893, [1952] J.O. 7642, art. 2.

¹¹⁶ *Id.*, art. 5; Decree no. 53-377, [1953] J.O. 4029, art. 15.

¹¹⁷ Law no. 52-893, [1952] J.O. 7642, art. 5(b).

¹¹⁸ The circular is published in the Report on political rights and position of aliens, Eur. Consult. Ass., 28th Sess., Doc. no. 3834, at 20 (1976).

¹¹⁹ *Id.*

¹²⁰ Decree no. 53-377, [1953] J.O. 4029, art. 3. The certificate is formal proof of refugee status, establishes the applicant's claim to the protection of OFPRA and to a Convention travel document, and is an essential prerequisite in an application for residence.

¹²¹ Law no. 52-893, [1952] J.O. 7642, art. 5.

¹²² Decree no. 53-377, [1953] J.O. 4029, arts. 15-29.

¹²³ Such advisory jurisdiction is in keeping with French administrative law generally, which concedes to the executive authorities an area of discretion beyond the control of rule or statute. *See, e.g.*, Expulsion of Aliens, October 24, 1952, [1952] *Sirey, Recueil des Arrêts du Conseil d'Etat* 467 (commenting on what constitutes a threat to *ordre public* under article 23 of Ordinance no. 45-2658, November 2, 1945, [1945] J.O. 7225, [1946] D.L. 24).

¹²⁴ Decree no. 53-377, [1953] J.O. 4029, art. 20; Law no. 52-893, [1952] J.O. 7642, art. 5. Petitioners are entitled to have counsel present, and there is no charge for the petition. Decree no. 53-377, art. 17.

¹²⁵ Decree no. 53-377, art. 23. The *rapporteur* is an *auditeur* or *maître des requêtes* of the *Conseil d'Etat*, appointed by the president of the *Commission des Recours* to study the case and present it to the *Commission*, either with or without recommendation.

¹²⁶ *Id.*, art. 25

¹²⁷ See the statement of the French representative at the 31st session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/SR.316, at 8 (1980).

¹²⁸ Even if asylum is denied, the Circular concludes that the applicant should be allowed time to find a favorable host country since there can be no question of returning him or her

to a country of origin. If the refugee does not depart after having been denied residence, continued presence may be authorized by the issuance of residence permits valid for three months only, accompanied by *assignation à résidence*. See Ordinance no. 45-2658, art. 27, November 2, 1945, [1945] J.O. 7225, [1946] D.L. 24, regulating the entry and residence of aliens.

129 Law no. 52-893, [1952] J.O. 7642, art. 5; Decree no. 53-377, [1953] J.O. 4029, arts. 27-29.

130 Article 16(2) of the Federal Constitution provides that the politically persecuted enjoy the right of asylum in Germany (*Politisch Verfolgte geniessen Asylrecht*).

131 Ausländergesetz, April 28, 1965, [1965] Bundesgesetzblatt [BGBl] I 353.

132 See especially Allgemeiner Verwaltungsvorschrift zur Ausführung des Ausländergesetzes (Revised Implementing Ordinance), May 10, 1977, Gemeinsames Ministerialblatt, May 16, 1977; Gesetz zur Beschleunigung des Asylverfahrens (Law for the Acceleration of the Asylum Procedure), July 25, 1978, [1978] BGBl I 1108; Zweites Gesetz zur Änderung des Verwaltungsgerichtsordnung (Second Law Amending the Procedure of the Administrative Courts), July 25, 1978, [1978] BGBl I 1107; Sweites Gesetz zur Beschleunigung des Asylverfahrens (Second Law for the Acceleration of the Asylum Procedure), August 16, 1980, [1980] BGBl I 1437. For comment and criticism, see Schnapp, *Beschleunigung des Asylverfahrens*, [1978] NEUE JURISTISCHE WOCHENSCHRIFT 1726; Henkel, *Anatomie des deutschen Asylverfahrens*, [1980] NEUE JURISTISCHE WOCHENSCHRIFT 479; Henkel, *Wege zur Gesundung des Deutschen Asylverfahrens*, [1980] ZEITSCHRIFT FÜR RECHTSPOLITIK 67.

133 Ausländergesetz, [1965] BGBl I 353, art. 28.

134 *Id.*, art. 35.

135 Allgemeine Verwaltungsvorschrift, *supra* note 132, art. 1, para. 26.5.

136 Zweites Gesetz zur Beschleunigung des Asylverfahrens, [1980] BGBl I 1457, art. 3(2).

137 Ausländergesetz, [1965] BGBl I 353, art. 33.

138 Gesetz zur Beschleunigung des Asylverfahrens, [1975] BGBl I 1108, art. 3.

139 Ausländergesetz, [1965] BGBl I 353, art. 45.

140 *Id.*, arts. 43, 44; see also *id.*, art. 6 (extending to refugees rights derived from the Constitution).

141 *Id.*, art. 37.

142 *Id.*, art. 28.

143 *Id.*, art. 14.

144 The Immigration Act, 1971, c. 77.

145 See Statement of Changes in Immigration Rules, House of Commons Papers No. 394, paras. 16, 64 [1980]. See also the statement of the United Kingdom representative, Dr. Paul Weis, at the 31st Session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/SR.322, para. 43 (1980).

146 The term "visa national" is used here also to include certain classes of Commonwealth citizens who may require so-called "entry clearances." See generally GOODWIN-GILL, *supra* note 49, at 106-7.

147 Immigration Act, 1971, § 13(3).

148 See House of Commons Papers No. 384, para. 77 (1980); Immigration Act, 1971, sched. 2, para. 8.

149 See Immigration Act, 1971, §§ 13(3), 17.

150 See Executive Committee of the High Commissioner's Programme, 29th Session, U.N. Doc. A/AC.96/SR.302, para. 16 (1978)(statement by British representative indicating intent to begin issuing letters recognizing refugee status).

151 Immigration Act, 1971, § 3(5)-(6).

152 *Id.* § 13(5). See generally GOODWIN-GILL, *supra* note 49, at 247-48.

153 *Ali v. Immigration Appeal Tribunal; Ali v. Secretary of State* [1973] Imm. A.R. 19, 33.

154 Immigration Act, 1971, §§ 4(2), 16(1)-(2), ch. 2, para. 9.

155 Originally constituted by the Immigration Appeals Act, 1969, c. 21, and continued by the Immigration Act, 1971, § 12, ch. 5.

156 See generally GOODWIN-GILL, *supra* note 49, 272-3.

157 Immigration Appeals (Procedure) Rules 1972, arts. 7(3), 17(3).

158 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)(to be codified in scattered sections of 8, 22 U.S.C.).

159 Interim Regulations on Refugee and Asylum procedures have been established under section 201 of the Refugee Act. 45 Fed. Reg. 37,392 (1980)(to be codified in 8 C.F.R. §§ 207.1-7, 208.1-15, 209.1-21, 245.1, 245.4).

160 Refugee Act of 1980, § 201(a)-(b)(to be codified at 8 U.S.C. §§ 1101, 1157); 45 Fed. Reg. 37,392-93 (1980)(to be codified at 8 C.F.R. § 207.1). See also the Canadian Immigration Act of 1976, which likewise makes provision for the admission of refugees and for the determination of the refugee status of asylum-seekers arriving independently. Immigration Act, 1976, §§ 45-48, Vol. 2, No. 8 Can. Gaz. Part III. See generally Wydryzynski, *Refugees and the Immigration Act*, 25 MCGILL L.J. 154 (1979). In addition to adopting the Convention definition, the Canadian legislation provides for the designation of other classes whose admission to Canada would be in keeping with the humanitarian tradition. Three such classes have so far been designated: Indochinese (SOR/78-931), Latin Americans (SOR/78-932), and Self-Exiled Persons (SOR/78-932). By contrast, in Australia, the admission of refugees and other special groups is determined by the minister in the exercise of broad discretion conferred by the Migration Act 1958-1973.

161 See Martin, *The Refugee Act of 1980: Its Past and Its Future*, this volume.

162 45 Fed. Reg. 37,392, 37,394 (1980)(to be codified at 8 C.F.R. § 208.1). See generally on U.S. Immigration Law GOODWIN-GILL, *supra* note 49, at 123-25, 237-42, 266-69.

163 1951 Convention, *supra* note 15, art. 1(F).

164 *Id.*, art. 33(2). Regulations declare that the grant of asylum status in no way exempts an alien from, *inter alia*, liability to criminal proceedings. 45 Fed. Reg. 37,392, 37,395 (1980)(to be codified at 8 C.F.R. § 208.12). This is not entirely consistent with Article 31 of the 1951 Convention, which provides that no penalties be imposed on refugees for illegal entry or presence in a state.

165 The text of the U.S. request is printed in 19 INT. LEG. MAT. 1296.

166 See Bureau of Public Affairs, Dep't of State, *Cuban-Haitian Arrivals in U.S.*, Current Policy No. 193, (1980).

167 1951 Convention, *supra* note 15, art. 1(F).

168 Refugee Act of 1980, § 202(e)(amending 8 U.S.C. § 1253(h) (Supp. II 1978)).

169 45 Fed. Reg. 37,392, 37,394-95 (1980)(to be codified at 8 C.F.R. § 208.8). It should be noted that other grounds of inadmissibility to the United States (under section 212(a) of the Immigration and Nationality Act) are not applicable to the grant of asylum to those who meet the definition of refugee, although they may be relevant to an application for change of status to that of permanent resident. See 8 C.F.R. § 209.2(b).

170 See GRAHL-MADSEN, *supra* note 3, at 289-99.

171 The standards applicable in the implementation of immigration law and policy are not automatically appropriate to the interpretation of the phrase "serious non-political crime" in the Refugee Act. The terminology differs considerably, for example, from that employed in the Immigration and Nationality Act, § 212(a)(9)-(10), 8 U.S.C. § 1182(a)(9)-(10)(1976), while the objectives of the two statutes also diverge. The concept of moral turpitude or the notion of crimes *mala in se* are not suitable substitutes for "serious non-political crimes," where issues other than moral standards are involved. See generally 22 C.F.R. § 41.91(a) (1980). In the latter

case, the emphasis is evidently on the seriousness of the offense, considered objectively, rather than on any inherent or supposed moral value.

172 Mere possession of marijuana for personal use was not considered to amount to a serious nonpolitical crime.

173 Note on Procedures for the Determination of Refugee Status under International Instruments, U.N. Doc. A/AC.96/INF.152/Rev.2 (1980).

174 A "back-up" interview by UNHCR will often fill gaps left, often understandably, by official examinations.

175 The traditional view is stated by Schwarzenberger: "Whether [the individual] is entitled to benefit from customary or consensual rules of international law depends on his own link—primarily through nationality—with a subject of international law which, on the international level, is alone competent to assert his rights against another subject of international law." G. SCHWARZENBERGER & E. BROWN, *A MANUAL OF INTERNATIONAL LAW* 64 (6th ed. 1976).

176 1951 Convention, *supra* note 15, art. 38; 1967 Protocol, *supra* note 15, art. IV.

177 *See* Case concerning the Northern Cameroons (Cameroons v. United Kingdom), Preliminary Objections, [1963] I.C.J. 15, 34-35.

178 *See* South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, [1962] I.C.J. 319, 424-33 (separate opinion of Judge Jessup.) *But cf.* South West Africa case (Second Phase), [1966] I.C.J. 6, 32-33, 47 (holding that individual states do not have a legal right to require the performance of South Africa's Mandate for South West Africa.)

179 *See generally* Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, [1949] I.C.J. 174, 178-79.

180 For example, the Statute refers to the High Commissioner supervising the application of international conventions, promoting certain measures through special agreements with governments, and consulting with governments on the need to appoint local representatives. UNHCR Statute, *supra* note 8, paras. 8(a)-(b), 16.

181 *See generally* South-West Africa—Voting Procedure, Advisory Opinion, [1955] I.C.J. 67, 120-22 (separate opinion of Judge Lauterpacht).

182 *Cf.* Reparations for injuries suffered in the service of the United Nations, Advisory Opinion, [1949] I.C.J. 174, 180 (holding that the UN has the capacity to bring certain international claims if necessary to discharge its functions).

183 Barcelona Traction, Light and Power Company, Limited, [1970] I.C.J. 3, 32.

184 *See also* Declaration on Territorial Asylum, art. 2(1), G.A. Res. 2312, 22 U.N. GAOR, Supp. (No. 16) 81, U.N. Doc. A/1775 (1950).

185 *See generally* GOODWIN-GILL, *supra* note 49, at 23.

186 Where *refoulement* has taken place or is believed to be imminent, UNHCR will intervene either with the authorities locally, through its representative on the spot, or through the country's Permanent Mission to the United Nations in Geneva; it may even use both channels.