ASYLUM AND NON-REFOULEMENT—ARE THESE OBLIGATIONS OWED TO REFUGEES UNDER INTERNATIONAL LAW?

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INTRODUCTION

The plight and tragedy of the world's ever-increasing numbers of refugees is a distressing reflection upon present day society which cannot be ignored. Press reports continually appear, giving new examples and portraying new dimensions of the often hopeless and invariably desperate situation currently facing the millions of people whom we loosely categorise as "refugees."

Only comparatively recent has it been recognised that if any effective solution is to be found to the world refugee problem the attempt must be made at the level of international co-operation. In earlier times people fleeing from their own lands, such as the various religious dissenters of past centuries, were dealt with on an *ad hoc* basis by the countries to which they fled. Today the problem has escalated to such an extent that the specific responses of individual states are no longer enough. In some cases an adequate response is simply not possible from a single nation, and, even if possible, it is neither reasonable nor realistic to expect the countries which happen to be in the immediate geographical proximity to vast numbers of refugees to accommodate all these persons and to cope unaided with the resultant problems.

The last UN High Commissioner for Refugees, Prince Sadruddin Aga Khan, recently observed,

> How can host countries in Africa, Asia or Latin America be expected to keep their doors open without adequate guarantees that material assistance and resettlement opportunities will be provided by other nations? Some governments have claimed that the world's indifference forced them to restrict the granting of asylum. They even used this excuse to send refugees to certain death as in south-east Asia last year.[1]

In desperation in

> mid-1979 ... Malaysia began towing away refugee boats from its shores and, according to a Malaysian Government figure, their 'tough measures' accounted for over 41,000 persons being towed away from Malaysian shores by a Task Force especially appointed for the purpose. In one 2-day

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[1] Foreword to paper by F. d'Souza, *The Refugee Dilemma: International Recognition and Acceptance*, Minority Rights Group, No. 43, 1980, London, p. 3.

> period about 1,700 persons were reported as having been towed away, and there were incidents in which boats overturned while being towed, not everyone on board being saved.[2]

During the twentieth century the need of refugees for protection of an international nature has gradually been recognised and a body of international refugee law has slowly evolved. What rights of admission to new countries does this law give to refugees? What is the position under this law of states at whose borders refugees arrive in search of asylum?

It is of vital importance to refugees who are fleeing in fear from their country that they be admitted by the state at whose frontiers they arrive seeking asylum. If they flee by land across the boundaries of an adjoining state, rejection there means return to the state from which they have fled. Those fleeing by sea often arrive at the frontiers of another country unable to go further. Rejection in these circumstances will not result in a return to the country fled; it could well result in death.

The present High Commissioner, Paul Hartling, has stated that

> the first requirement for the protection of refugees is to ensure that they receive permanent, or at least temporary, asylum and that the principle of *non-refoulement* is scrupulously observed. No refugee must be forced back to a country where he fears persecution. One hopes that this principle, which has repeatedly been breached during this decade, will no longer be subject to any derogations and will simply become an obvious necessity and a self-evident truth.[3]

The aim of this article is to examine whether "this requirement" has become in fact a binding obligation under current international law, and to what extent states are thereby under a duty to grant asylum to, and to refrain from *refoulement* of, the refugees arriving at their borders. Since the possibility of refusal of admission has been a particularly prevalent risk for the refugees and displaced persons from Indo-China, and specifically for the "boat people", particular attention is paid to the situation within the South-East Asian region.

"Asylum" and *"non-refoulement"* are two established legal concepts. However, difficulties are immediately encountered when an attempt is made to define the first term. It seems to have no clear or universally accepted meaning.[4] In 1950 the Institute of International Law did define it as "the protection which a State grants on its territory, or in some other place under the control of certain of its organs, to a person who comes to seek it".[5] But the term continues to be used in connection with several different legal

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[2] D. Willday, *Resettlement of Indo-Chinese Refugees and Displaced Persons*, U.N. Doc. HCR/155/49/80 p. 2.

[3] U.N. Doc. A/AC.96/572 Annex p. 6.

[4] GRAHL-MADSEN, TERRITORIAL ASYLUM, (1980), p. 86 says "The term 'Asylum' has no clear or agreed meaning".

[5] This was at the Institute's Bath Session in 1950, *see* Vol. 43-2 *Annuaire de L'Institut de Droit International*, p. 389.

situations. It may concern entry, and, correspondingly, exclusion, also extradition and expulsion.

Here asylum is used in the sense of admission to the territory of a state, and a distinction is made between admission which is granted as an emergency measure, guaranteeing refuge of a *temporary* nature only, and admission which encompasses the more durable aspect involved in the grant of a *permanent* right to settle.

The second term, *non-refoulement*, comes from the French word *refouler* meaning to return, reconduct or send back. By this term is indicated the principle which prohibits the return of refugees to territories where they are likely to become victims of persecution.

The first set of international legal obligations which will be considered are those obligations which are imposed upon contracting states by international instruments. One obvious means by which an international legal duty may be acquired is for the state concerned to accede to a treaty, expressly undertaking a binding commitment to act in accordance with the terms of that treaty. A number of international instruments exist under which the contracting states agree to accord to refugees certain minimum standards of treatment and to grant to them certain rights. These instruments are examined first, the provisions relating to the admission of refugees are assessed, and conclusions are drawn as to the resulting obligations of the contracting states.

Secondly, customary international law is considered. Though the main source of international refugee law has been provided by international conventions, this is not the only possible origin of binding international obligations.

The most often quoted statement of the sources of international law is that contained in Article 38(1) of the Statute of the International Court of Justice whereby the Court is specifically directed to take into consideration in the resolution of disputes before it:

> a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59 [which provides that 'The decision of the court has no binding force except between the parties and in respect of that particular case'], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"International custom, as evidence of a general practice accepted as law", or customary international law, is particularly relevant here. If obligations do exist under customary international law these obligations bind all nations regardless of whether or not there has been an explicit undertaking of any

commitment by accession to a treaty. Before the customary behaviour of states will be regarded as a binding rule of customary international law, there must be exhibited both a consistency of state practice and a belief on the part of those observing the practice that the observation is mandatory.

These requirements are examined in the light of the current practice and attitudes of states towards refugees arriving at foreign frontiers in search of asylum and the concepts of asylum and *non-refoulement* are considered in this context. Finally, some conclusions are drawn as to the present obligations of admission owed by states to these refugees under current customary international law.

INTERNATIONAL INSTRUMENTS RELATING TO REFUGEES

The *1951 Convention relating to the Status of Refugees*[6]—supplemented since 1967 by the *Protocol relating to the Status of Refugees*[7] which widened the Convention's scope and made it more appropriate to changed circumstances— is the most important of these international instruments and has been called the refugees' Magna Carta.[8]

The earliest instruments concerning refugees had dealt only with specific categories of refugees, for instance, those fleeing from Russia after the Bolshevik Revolution, and had defined "refugee" in terms of the particular category of persons in question. Also the first instruments did not provide for a wide code of rights, being concerned only with the issue of travel and identity documents.[9]

The approach of the 1951 Convention is much broader. Firstly its definition of "refugee" is not linked to specific categories of refugees, though it is still narrower than the concept of refugee as popularly understood. The term "refugee" is one which causes difficulties. It is defined in different ways in different instruments. When the protection afforded by any specific legal instrument is being considered, the definition contained in that instrument will be the one relevant for the purpose of the application of its provisions. In the 1951 Convention the term "refugee" is defined to apply

[6] 189 U.N.T.S. 137. Hereinafter referred to as the 1951 Convention. This Convention was concluded at Geneva on July 28, 1951. It entered into force on April 22, 1954.

[7] 606 U.N.T.S. 267. Hereinafter referred to as the 1967 Protocol. The draft of the Protocol was prepared at a Colloquium held at Bellagio, Italy, in April 1965. The draft, with some amendments, was adopted by the General Assembly on 16 December 1966 (Resolution 2198 (XXI)). It was opened for accession on 31 January 1967, and entered into force on October 4, 1967.

[8] READ, MAGNA CARTA FOR REFUGEES. (Rev. Ed. 1953).

[9] The first treaty that really provided an international status for refugees, and provided for a code of rights for them was the *Convention relating to the International Status of Refugees of 1933*, 159 L.N.T.S. 199. The general contents and organisation of this Convention became the pattern for the later instruments concerning the status of refugees.

firstly to those people already considered to be refugees under earlier conventions,[10] and, secondly, to cover persons who,

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
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> In the case of a person who has more than one nationality the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.[11]

The 1967 Protocol widened this definition by dispensing with the requirements that the events causing the flight must have occurred prior to January 1, 1951,[12] and also by dispensing (for future signatories) with another provision, that of Article 1B(2) of the Convention, under which states may choose to accept as refugees only those fleeing as a result of events occurring in Europe.[13]

Because of provisions such as these, and because of the context in which the 1951 Convention was drafted—the immediate post-World War II period with its problems of millions of refugees and displaced persons on the European continent—the Convention has sometimes been regarded as a purely European instrument. This may be one reason for the failure of the vast majority of states in the Asian region to become parties to it.

It is pertinent to note here that the obligations undertaken by states under the major refugee instruments are not duties undertaken to the refugees themselves and enforceable directly by them under international law. The obligations are undertaken to the other states which also are parties to those same instruments.

The specific concern of this paper is with the question of whether or not states have incurred obligations to grant admission to refugees arriving at their borders.

The position under the 1951 Convention is that, although it does comprise the most comprehensive code of the basic rights of refugees contained in any international instrument, and binds the contracting states to

[10] 1951 Convention, Art. 1A(1).
[11] 1951 Convention, Art. 1A(2).
[12] 1967 Protocol, Art. 1(2).
[13] 1967 Protocol, Art. 1(3). The 'Europe only' alternative has been chosen (and is still maintained) by the following states: Argentina, Brazil, Italy, Madagascar, Malta, Monaco, Paraguay, Peru and Turkey.

apply these to all persons within its compass without discrimination as to race, religion or country of origin,[14] it lays down no stated obligation to provide asylum for refugees. Asylum is not even referred to in the main body of the text, though it is mentioned in the Preamble and also in the Final Act, but not in terms imposing a duty upon contracting states to grant asylum to refugees arriving at their borders.

The provisions which do concern refugees' rights to stay in, and, somewhat indirectly, to enter a country of refuge, are set out in Articles 31, 32 and 33.

In most municipal legislation concerning immigration, failure to abide by any of the provisions whereby entry into the territory of the state is authorised—for example arrival at specified frontier control points, possession of a valid passport and visa for entry—renders the offender liable for removal or deportation and, pending the implementation of any such measures, detention. Clearly refugees may not have complied, and may be unable to comply, with such immigration requirements and Article 31 is of assistance here. It provides that, even if refugees have entered a country illegally, contracting states shall not imposed penalties upon them on account of their illegal entry or presence.

Article 32 deals with expulsion and provides that contracting states shall not expel a refugee who is lawfully within their territories save on grounds of national security or public order. Any expulsion must be carried out according to due process of law and the refugee shall be permitted a hearing, an appeal against any order of expulsion, and representation unless "compelling reasons of national security otherwise require". If expulsion does follow, a reasonable period should be allowed in which the refugee might seek legal admission into another country. Though Article 32 is not equivalent to providing a refugee with a right to enter, or even a right to stay in a country which he has managed to enter, nevertheless the conjunction of it with Article 33 does result in some real protection for refugees.

Article 33 (the *non-refoulement* provision) provides that:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Whereas Article 32 requires persons to be "lawfully" within the state before its provisions will apply, there is no such limitation in Article 33 which applies to protect a refugee even though he is in a country illegally.[14a] Hence though an administrative act of ordering the expulsion may not offend against

[14] 1951 Convention, Art. 3.

[14a] Refugee (Germany) Case, 28 I.L.R. 297; Chim Ming v. Marks, 505 Fed. 2d. 1170, 1172. (1974)

Article 32, the actual removal may be forbidden under Article 33 if it will result in the return of the refugee to a country where he fears persecution. Thus, Grahl-Madsen has observed:

> It would seem that the rule of "non-refoulement" gives an, albeit limited, right of asylum to those persons who are entitled to invoke it.[15]

Various problems have arisen as to the scope of the protection afforded by these Articles. One is a dispute as to who are the persons entitled to invoke them. Must a person first be formally recognised as a "refugee"? This is not spelled out in the Convention. The fact that the Articles are worded to apply to "refugees" has lent support to the argument that the intention was that protection would be afforded only to persons admitted into a state and categorised as "refugees".

There is no requirement under the Convention or Protocol that formal procedures for the determination of refugee status be set up, and far from all of the contracting states have established them. Furthermore where procedures have been established they vary widely.[16] Whether or not a person is a "refugee" is decided by the state concerned.[17] It should be noted that the definition is in terms of individuals, requiring a separate consideration of the status of each person, a difficult requirement in cases of sudden mass influx. Recognition of refugee status by one state does not bind other states, though it may often be observed, and a decision on eligibility made by one state can have some legal ramifications in other states.[18].

Vast numbers of refugees have never been officially categorised as such, and for the purpose of invoking the protection of these Articles Grahl-Madsen thinks formal recognition is not essential. He states:

> These provisions are meant to protect the persons entitled to invoke them, throughout their life as refugees, and in particular the prohibition of forcible return to a country of persecution could easily be rendered meaningless if it could only be invoked upon the formal recognition of the person concerned as a refugee.
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> From the moment an asylum-seeking *prima facie* refugee sets foot on the territory of a State Party to the Refugee Convention, he must be able to invoke, provisionally, the benefits of Articles 32 and 33 which means that he cannot be expelled or returned (*refoule*) except in accordance with the provisions of those articles, so long as it has not been definitively de-

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[15] 2 GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 11 (1972).

[16] JAEGER, STATUS AND INTERNATIONAL PROTECTION OF REFUGEES, International Institute of Human Rights, Ninth Study Session, July 1978, p. 13.

[17] 1951 Convention, Art. 9.

[18] For instance, travel documents issued in accordance with Art. 28 *must* be recognised by other contracting states, and in fact these documents are widely recognised by states not parties to the Convention and Protocol as well. So that refugee status determined in one state is widely recognised, at least for travel purposes, by other states. The Executive Committee of the High Commissioner's Programme in 1978 noted that the very purpose of the 1951 Convention implies that refugee status determined by one contracting state will be recognised by the other contracting states; U.N. Doc. A/AC.96/559 p. 17.

cided that he is not entitled to recognition as a Convention refugee (or as a refugee in the sense of the Protocol of 31 January 1967).[19]

The Executive Committee of the High Commissioner's Programme would seem to be in agreement with this. (This Committee meets to advise the Office of the UN High Commissioner for Refugees. More detail is given about this Office later.) In October 1977 the Executive Committee reaffirmed the fundamental importance of the observance of the principle of *non-refoulement* 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*" (emphasis added). This view makes good sense.

Grahl-Madsen does, however, stress the need for the refugee to "set foot" on the territory of a contracting state as a necessary pre-requisite to claiming the benefit of the Convention and Protocol. There are then further problems in ascertaining precisely when territory has been "entered". Whatever its exact meaning, this requirement will obviously be more difficult for refugees to satisfy if the obligation of *non-refoulement* contained within the Convention does *not* include a duty not to reject at the frontier. This raises another difficulty which is encountered when considering the ambit of Article 33. Does it forbid the rejection of refugees who have arrived at a frontier but have not yet crossed it?

There is no provision specifically forbidding rejection at the frontier in the Article though such a provision had been included in the *non-refoulement* article of the earlier *1933 Refugee Convention.*[20] This factor and some of the statements made by delegates during the drafting of the Convention have led to the suggestion that Article 33 does not refer to the admission of refugees, but merely to the treatment of refugees who have already entered, legally or illegally, the territory of the state concerned[21]

The matter was not so vital in the context of the time—the post-World War II situation with the millions of refugees and displaced persons at that stage on the continent of Europe. Rejection at the borders was not really the problem as most of these persons were already in new countries having been displaced from their own country by the war. Even where this was not the case, and the people in question were still crossing borders as a result of a desire to escape the consequences of the communist take-over of Eastern Europe, they were generally welcomed by the states of Western Europe if only for propaganda reasons.

Today rejection at the frontier has assumed a critical significance. Refugees are still leaving their country of origin or habitual residence to

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[19] GRAHL-MADSEN, *op. cit. supra* note 15 at 224.

[20] Article 3 states: "...Each of the Contracting Parties...undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin..."

[21] GRAHL-MADSEN. *op. cit supra* note 15 at 99.

escape the regimes there. They may even be forced out by those regimes in mass expulsions. They now often pour into countries with peoples whose backgrounds may be very different to their own—racially, culturally, economically or politically. In the South-East Asian region particularly, there are widely varying ethnic and cultural backgrounds. Some countries, for instance Malaysia, have a delicate balance of races. A mass influx of refugees of one of those races will endanger this balance, and so may be seen as a threat to the present social and political structure of the country. In addition to these problems, the host countries into which refugees are fleeing today often already have a very low standard of living and their limited resources cannot easily stretch to accommodate and provide for hundreds of thousands of extra, uprooted and homeless persons. Hence one possible solution from the viewpoint of the state of potential refuge may be to reject these persons at the frontier, and so avoid incurring the expenses and difficulties which their arrival must inevitably entail.

Thus the question of whether or not non-rejection at the border is included within the obligation of *non-refoulement* contained in Article 33 can be of real significance today. It should be noted that, as a matter of practically, whether or not rejection is likely will depend upon the terrain in question and whether the border is patrolled. It seems arbitrary to allow the character of the border facing refugees in different parts of the world to alter the standard of protection afforded to them Also it seems equally illogical that a person who crosses a border illegally should enjoy greater protection than one who presents himself to the authorities there.[22]

If *non-refoulement* does *not* include non-rejection at the frontier, rejection would be legally possible when the border is manned; but return of the incoming refugee by the state whose territory has been entered would not be possible if the border, not being manned, had already been crossed by that refugee. Thus, common sense at least would seem to be on the side of the inclusion of non-rejection within the concept of *non-refoulement.*

A further problem which arises with *non-refoulement* is the question as to whether or not the principle encompasses the extradition of refugees. This issue will not be examined here.[23] It pertains to individual refugees and is not of any great significance in the situations currently causing the most concern—the mass influx situations.

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[22] S. Prakash Sinha, when commenting that the words of Article 33 are inconclusive as to whether or not non-rejection at the frontier is included within the *non-refoulement* provision, states that exclusion of non-rejection from Article 33 seems absurd, see PRAKASH SINHA, ASYLUM AND INTERNATIONAL LAW 111 (1971).

[23] For further discussion on problems of extradition and *non-refoulement* see GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 218-228 (1978); SHEARER EXTRADITION IN INTERNATIONAL LAW 85, 166-193 (1971); I.A. Shearer, *Extradition and The Principle of Non-Refoulement,* paper presented to the Seminar on the International Protection of Refugees, University of New South Wales, Sydney, Australia, 2-3 Aug. 1980. Also see U.N. Docs. A/AC.96/586 pp. 1-5 and A/AC.96/588 pp. 12, 13.

In recent years the position of the "boat people" has been a matter of particular concern both within the Asian region and beyond it. The press in all parts of the world frequently carry horrifying stories of the dangers and disasters which face these people in their attempts to find sanctuary and a new homeland. Articles 31, 32 and 33 of the 1951 Convention, relating as they do to the imposition of penalties for unlawful entry within a territory, expulsion of refugees lawfully within a state's territory, and *non-refoulement,* usually would not provide any protection for the particular plight of the "boat people". Frequently persons fleeing across the ocean have not even reached the territory in question when sent back out to sea, by either hostile fishermen and residents or government patrol boats, and are unable to claim that penalties have been imposed on them on account of their illegal entry or presence, or that, being lawfully within the territory, they are being "expelled" or that they are being *"refouled".* Rejection of people at coastal frontiers generally can not constitute *refoulement* as it does not amount to returning them to a country from whose government they fear persecution. Obviously, however, the consequences may be even more severe. If rickety and unseaworthy craft, overloaded with passengers, are sent back to the high seas to face the hazards of pirates and storms as well as the usual vicissitudes of a long sea journey, not infrequently the consequence for the rejected "boat people" has been, and will continue to be, death.[24] (The question of whether or not all the "boat people" could properly be categorised as "refugees" and so qualify for any relevant protections contained within the major international instruments is beyond the scope of this paper and is not examined here.)

The above considerations relate to the problems of ascertaining the exact ambit of the protection afforded by Articles 31, 32 and 33 of the 1951 Convention. Whatever the scope is finally determined to be it is pertinent to note that although the Convention permits reservations to be made to well over half of its provisions, including those of Articles 31 and 32, reservations may not be made to Article 33.[25] This is an indication of the importance which those who drafted the Convention attached to the principle of *non-refoulement.* Exceptions to the obligation are, however, allowed. They are worded in the following terms:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[26]

This wording would seem to be directed at the individual refugee who might constitute a danger to the security of the receiving country and its com-

[24] One estimate has been that the "boat people" have a 20% expectation of success, see Y. Saito, *Some Aspects of the Refugee Problem in Asia—With Special Reference to Japan,* 16 A.W.R. 43, 46 (1978).

[25] Article 42(1).

[26] Article 33(2).

munity and not to provide an excuse for the *refoulement* of groups of refugees.

States which are parties to the 1951 Convention, or to the 1967 Protocol, or to both, have expressly undertaken these obligations to refugees, and, as of November 1981, ninety-one states had become parties.

However, within the Asian region there has been a marked reluctance to accede to either instrument. As already mentioned the European cast of the 1951 Convention and the European context in which it was drafted may be to some extent responsible for this, in that the instrument is seen by some nations as limited to the refugee problems of the European continent and not as being of a universal character.[27] If this is so the position should now have been ameliorated to some extent by the widened definition incorporated in the 1961 Protocol.

Another reason given for the reluctance of some states to accede to these instruments is the wide scope of the rights contained within them which contracting states are required to undertake to grant to refugees. The ground given here is that developing nations may feel unable to comply with all these obligations. This, however, would not seem to be a problem specific to countries within the region of Asia. Many states with similar or greater difficulties in this regard, such as many nations on the African continent have not only acceded to the 1951 Convention, but have also acceded to regional agreements of their own some of which, for example, the *OAU Convention*[28] (the Convention of the Organisation of African Unity), prescribe even more demanding duties.

Whatever the reason, from within the Asian region, very few accessions to the 1951 Convention or 1967 Protocol have been forthcoming, and the situation is that, including Western Asia and Oceania, so far only Australia, Fiji, Iran, Israel, New Zealand, the Yemen and, very recently, Japan and the Philippines have become parties to either the Convention or the Protocol. This means that very few nations in Asia or Oceania owe the obligations of Articles 31, 32 and 33 to refugees as a result of having incurred a binding treaty obligation.

There are other international treaties besides the ones just mentioned, but again Asian countries are not signatories to them. In any case none of these, not even the 1967 UN *Declaration on Territorial Asylum*[29] imposes an obligation upon states to grant asylum to refugees arriving at their bor-

[27] It has been suggested by some authors that Asian countries have not acceded to the 1951 Convention for this reason, see JAEGER, *op. cit. supra* note 16 at 10; Y. Saito, *op. cit supra* note 24 at 47.

[28] 8 INT'L. LEGAL MAT. (1969) p. 1288. Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 September 1969). Entry into force, 20 June 1974.

[29] Adopted by the U.N. General Assembly on 14 December 1967, in Resolution 2312 (xxii).

ders. (The provisions of these other international instruments which relate to *non-refoulement* are considered later.) When the provisions concerning asylum are examined it very quickly becomes apparent that states the world over consistently exhibit a great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory. It has so far proved impossible to secure agreement upon an international convention relating to asylum.[30] States are loathe to undertake obligations of asylum whose ramifications for the future could be unpredictable. As a matter of interest, many states have been willing to accept obligations under their own domestic law which are sometimes more onerous. They may, for instance, assume obligations to admit to their territory persons who are related to their citizens. But they are not willing to make such undertakings on the international level.

For instance, Article 14 of the *Universal Declaration on Human Rights*[31] provides "everyone has the right to seek and enjoy in other countries asylum from persecution". The original, and more compelling, text which did not gain acceptance and hence was not adopted, read, "everyone has the right to seek and be granted... asylum".

The terms of the UN Declaration on Territorial Asylum, 1967, which are in the form of a recommendation only and have no binding effect, are not very strong on asylum. Article 1.1 states that asylum, once granted, should be respected by all other states, which injunction seems directed rather at the state of origin than at the receiving state, and Article 1.3 provides that the state granting asylum shall evaluate the grounds for its grant, leaving the decision, whether or not to grant asylum at all, exclusively within state sovereignty. No obligation to grant asylum is laid down. Article 2 does call for international co-operation to aid states which are finding difficulty in continuing to grant asylum, but the terms here, to "consider... appropriate measures..." are not compelling. Article 3 (which relates to *non-refoulement* and is considered later) does recommend in more definite terms that states admit certain persons into their territories.

Provisions in the various regional conventions which afford protection to refugees also do not impose any duty to grant asylum. Of these, Article 22(7) of the *American Convention on Human Rights*,[32] begins forcefully, providing as it does that "Every person has the right to seek and be granted asylum in a foreign territory", however, the next phrase, "in accordance with the legislation of the state and international conventions" does limit

30 For a comprehensive description of the attempts to reach agreement on a Convention on Territorial Asylum see GRAHL-MADSEN, TERRITORIAL ASYLUM, *op. cit supra* note 4.

31 Adopted and proclaimed by U.N. General Assembly Resolution 217A(III) of 10 December 1948.

32 OAS Official Records, OEA/Ser.K/XVI/1.1. Signed on 22 November 1969 at the Inter-American Specialized Conference on Human Rights, held at San Jose, Costa Rica. Entry into force 18 July 1978.

the extent of the right just bestowed. This Convention is of binding effect upon states which are parties to it.

Another regional convention, the OAU Convention, simply provides that:

> Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.[33]

This Convention goes further in the protection which it affords to refugees than does the 1951 Convention as amended by the 1967 Protocol. It is complementary to these two treaties, recognising that they constitute "the basic and universal instrument relating to the status of refugees. . . and calling upon Member States of the OAU who had not already done so to accede to [them], and meanwhile, to apply their provisions to refugees in Africa".[34] It is the effective regional complement in Africa of the 1951 Convention, and has been described as "the only regional instrument dealing with the refugee problem in a comprehensive manner".[35] It is binding on the states which are parties to it.

The definition of "refugee' in the OAU Convention is wider than that in the 1951 Convention. It is a pragmatic one related to the problems of the African continent. From the late 1950's onwards there have been, largely as a result of the presence or after effects of colonial regimes, troubles and wars resulting in massive displacements of peoples not always fitting easily into the 1951 Convention definition, even as extended by the 1967 Protocol, and the definition of the OAU Convention was drafted with these factors in mind.

Turning to another region of the world, the Council of Europe Resolution 14 (1967) on *Asylum to Persons in Danger of Persecution*[36] recommends that member governments "should act in a particularly liberal and humanitarian spirit with regard to persons who seek asylum on their territory."[37] This Resolution is not binding.

Hence it can be seen that these international instruments which do contain provisions relating to asylum, do not, by those provisions, impose upon contracting states any duty to grant asylum to persons who are not their nationals.[38]

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33 OAU Convention, Art. II.1.

34 OAU Convention, Preamble, paragraphs 9 and 10.

35 JAEGER, *op. cit supra* note 16 at 11.

36 Adopted by the Committee of Ministers on 29 June 1967.

37 Principle 1.

38 Not all of the regional agreements have been covered. Latin American states particularly have acceded to many regional instruments pertaining to asylum which are not mentioned here. See e.g. Convention on Asylum of 20 February 1928 (Havana); OAS Official Records, OEA/Ser.X/1. Treaty Series 34; Convention on Political Asylum of 26 December 1933 (Montevideo), *ibid;* Convention on Territorial Asylum of 28 March 1954 (Caracas), *ibid.*

On the other hand, as regards *non-refoulement*, several recent instruments are stronger in their requirements than is Article 33 of the 1951 Convention. For instance, Article 3 of the UN Declaration on Territorial Asylum specifically does provide for non-rejection at the frontier. It also states categorically that a refugee who has entered the territory in which he seeks asylum shall not be expelled or returned to any state where he may be subjected to persecution. An exception is, however, allowed—"only for over-riding reasons of national security, or in order to safeguard the population as in the case of a mass influx of persons". This wording, unlike that in Article 33, does not seem to be directed at individual refugees, in that sense it may be a wider exception.[39] The UN Declaration on Territorial Asylum goes on to state that should the exception be utilised the state in question is to consider the possibility of granting to the refugee "under such conditions as it deems appropriate" the opportunity of going to another state.[40]

Article 22(8) of the American Convention on Human Rights 1969 imposes a strict obligation of *non-refoulement* on contracting states. Its provision is that:

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

However, there is no specific mention of non-rejection at the frontier. Article 22(7), referred to above, may also provide some relevant protection here.

The OAU Convention 1969 states that:

> No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.[41]

This imposes on contracting states both an unqualified obligation of *non-refoulement* and an obligation of non-rejection at the frontier.

A later paragraph of this Article ameliorates the situation of a state which finds the obligation to grant asylum unduly onerous by imposing an obligation on all the contracting states to co-operate "in the spirit of African solidarity" with member states which are experiencing difficulties.[42] The next

[39] However, GRAHL-MADSEN, *op. cit. supra* note 15 at 103, says that Art. 33 was adopted on the understanding that it would not be absolutely binding in the case of a contingency such as a mass influx of persons, and refers in particular to a statement placed on record to this effect at the Conference of Plenipotentiaries, U.N. Doc. A/Conf. 2/SR.35, 21.

[40] UN Declaration on Territorial Asylum, Art. 3.3.

[41] OAU Convention, Art. II.3.

[42] OAU Convention, Art. II.4.

paragraph makes provision for a refugee, not granted the right to reside in any country of asylum, to be given a grant of temporary residence pending arrangement for his resettlement in accordance with the paragraph providing for co-operation.[43] This concept of a grant of temporary refuge pending the provision of a permanent solution for the refugee is a most useful one and is developing into a very valuable protection for refugees. It will be discussed later.

Within the European continent Resolution 14 (1967) of the Committee of Ministers of the Council of Europe recommends that member governments should:

> . . . ensure that no-one shall be subjected to refusal of admission at the frontier, rejection, expulsion, or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. . . .[44]

There is a provision for exceptions to be made if this is necessary to safeguard national security or protect the community from serious danger. The resolution is recommendatory only.

As can be seen from the above provisions there are in existence several agreements of a regional nature relating to refugees. As with the international agreements of potentially universal application some of these agreements, for example the OAU Convention, deal specifically with refugees while others affect refugees incidentally. Examples within the latter category would include various regional human rights agreements. The situation within Asia is not only that very few countries have acceded to the major instruments of universal application—the 1951 Convention and the 1967 Protocol—but also that no binding regional agreement affording protection to refugees exists in this part of the world.

However, *recommendation* of a regional nature applicable within Asia do exist, these are the *Principles Concerning Treatment of Refugees*.[45] They were adopted by the Afro-Asian Legal Consultative Committee in Bangkok in 1966.[46] They provide in slightly wider terms than those of the 1951 Convention for the definition of a refugee.[47] They regulate refugee status, loss

[43] OAU Convention, Art. II.5.

[44] Resolution on Asylum to Persons in Danger of Persecution, Principle 2.

[45] UNHCR COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 201 (1979).

[46] The function of this Committee under its Statute was advisory only, and the view was taken that it would be up to the government of each participating state to decide how it would give effect to the recommendations. For a fuller discussion of these Principles *see* E. Jahn, *The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees*, 27 ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 122 (1967) and E. Jahn, *Developments in refugee Law in the Framework of Regional Organisations Outside Europe*, 4 A.W.R. 77, 79, 80 (1966).

[47] Principles Concerning Treatment of Refugees, Art. I. Colour is included as one of the grounds which may give rise to a well-founded fear of persecution.

of that status,[48] provide for various rights and obligations,[49] and that "treatment in no way less favourable than that generally accorded to aliens in similar circumstances" shall be accorded to refugees.[50] The provisions relevant here are as follows, Article III provides that:

> 1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.
> 2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.
> 3. No-one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.
> 4. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

As can be seen, the decision as to whether or not a grant of asylum should be made to a person, or group of persons, is still left within the sovereign discretion of the state concerned. However, unlike the terms of Article 33 of the 1951 Convention, here non-rejection at the frontier *is* included within the *non-refoulement* provision, and Article III.4 adverts to a requirement of a grant of temporary asylum in certain circumstances.

The provisions of the Principles regarding expulsion are contained in Article VIII and are as follows:

> 1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not expel a refugee.
> 2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.
> 3. A refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.

Though an exception is allowed in Article VIII.1 on the grounds of "national or public interest", Article VIII.3 allows no such exception, and is more stringent than Article 33 of the 1951 Convention, containing as it does an absolution prohibition of the *refoulement* of a refugee. However, these Principles are not binding.

In summary the position with regard to international treaty provisions is that states the world over are resisting obligations which would impose

[48] Principles Concerning Treatment of Refugees, Art. II.
[49] Principles Concerning Treatment of Refugees, Arts, Arts. IV, V, VII.
[50] Principles Concerning Treatment of Refugees, Art. VI.

upon them a duty to admit persons who seek admission within their territory. Hence the provisions relating to asylum which are contained in existing international treaties do not impose any binding obligations of asylum.

As regards *non-refoulement*, the position is somewhat different and many states have, in this regard, undertaken binding treaty obligations as a result of accession to multilateral instruments. The obligations of *non-refoulement* contained in these provisions vary to some extent in the scope of the duty which they impose.

The situation within the Asian region, however, is that very few states have acceded to treaties, and thus very few states have expressly undertaken any binding obligations to afford specific protection to refugees. Clearly then whatever the obligations of admission laid down in the various international instruments most Asian states are not bound by them as a consequence of any specific treaty commitments.

CUSTOMARY INTERNATIONAL LAW

To this point the obligations arising under international instruments have been considered. As mentioned earlier, obligations can still arise under international law, even though not expressly imposed by a treaty to which the state in question has acceded. If it can be shown that an obligation either to grant asylum or to observe the principle of *non-refoulement* exists under customary international law, or, in the words of Section 38(1)(b) of the Statute of the International Court of Justice, as a result of "international custom as evidence of general practice accepted as law", this obligation will bind all nations, regardless of whether or not they are parties to any conventions whereby they specifically accept obligations in relation to refugees.

For the customary behaviour of states to be recognised as a rule of international law two characteristics must be exhibited, firstly, a consistency of state practice and, secondly, a belief by those observing the practice that it is mandatory. The International Court of Justice in the *North Sea Continental Shelf* cases, [51] stated:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[52]

[51] [1969] I.C.J. REP. 3.
[52] *Ibid.* at 44.

What is state practice? Evidence of the practice of the state in question can be found in a variety of places. It could be found from such sources as the treaties made by a country, its national legislation, diplomatic correspondence, pronouncements of government leaders, press releases, and the opinions of its legal advisers, also in the decisions of national and international courts and in the practice of international organisations.

The fact that the custom in question must be accepted as mandatory involves an inquiry into the reasons for the adoption of the prectice by the states concerned. These may not always be easy to ascertain, but, for instance, some of the above sources may provide indications not only as to the practice itself but also as to whether those observing it feel that to do so is obligatory. The weight to be given to state practice as evidence of a rule of customary international law will vary with the circumstances. Lauterpacht has said:

> ...assuming here that we are confronted with the creation of new international law by custom, what matters is not so much the number of states participating in its creation and the length of the period within which that change takes place, as the relative importance, in any particular sphere of states inaugurating the change.[53]

or, as De Visscher puts it:

> Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.[54]

Consistent state practice may develop as a consequence of a variety of reasons. One of these is that it may be the result of almost universal observance by nations of the provisions of major international treaties. Conventions, the observance of which has resulted in the creation of customary law, are often referred to as law-making conventions, and include various international legal conventions concerning human rights. This means of the creation of customary international law was examined by the International Court in the *North Sea Continental Shelf* cases. There a contention had been put forward on behalf of Denmark and the Netherlands to the effect that even if there had been, at the date of the Geneva Convention, no rule of customary international law in favour of the equidistance principle for which the two countries were arguing, and even if no such rule was crystallised in Article 6 of the Convention, nevertheless, such a rule had come into being since the creation of the Convention. This was alleged to have occurred partly because of the impact of Article 6 and partly on the basis of subsequent state practice. Hence it was asserted that this rule was now

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[53] Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. YRBK. INT'L. L. 376, 394 (1950).

[54] DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW, 155 (3rd ed., 1960) (translation by Corbett).

a rule of customary international law binding on all states, whether parties to the Convention or not.

In dealing with this argument the Court observed:

> In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.[55]

What is required in order that an Article of a convention become a rule of customary international law? The Court in this case said that:

> It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.[56]

If this is the case then

> the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[57]

In the *North Sea* cases the Court decided that these requirements had not been met, hence Article 6 had not become a rule of customary international law.

Turning to the refugee instruments it is obvious that any provisions which do exist regarding asylum, in the sense of the grant of a permanent right to settle, cannot be said to be norm-creating. They do not even purport to impose binding obligations. Accordingly the provisions concerning *non-refoulement* are the only ones examined here.

Looking at the 1951 Convention it is apparent that its obligations are not drafted in norm-creating terms, but rather in the style of contractual undertakings. The contracting parties as such, agree to accept certain obligations. For instance, the terms of Article 33.1 are "No Contracting State

[55] [1969] I.C.J. REP. 41.
[56] *Ibid.* at 41, 42.
[57] *Ibid.* at 43.

shall expel or return..." and those of Articles 31 and 32 that "The Contracting States shall not impose penalties...", "The Contracting States shall not apply...restrictions...", "The Contracting States shall allow such refugees a reasonable period...", "The Contracting States shall not expel a refugee..." and "The Contracting States shall allow such a refugee a reasonable period..."

The provisions of many of the later instruments, however, are worded in more clearly law-making terms. Firstly, the UN Declaration on Territorial Asylum states in Article 3.1 that "No person...shall be subjected to measures such as rejection at the frontier..." and the relevant provisions of the Bangkok Principles are in similar terms, as are those of Article II.3 of the OAU Convention 1969 which states "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion...". Article 22(8) of the American Convention on Human Rights 1969 provides, "In no case may an alien be deported or returned to a country...if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions".

Thus the wording of the *non-refoulement* provisions in recent international instruments has wider law-making potential than does that of the 1951 Convention since the obligation is no longer limited by reference to a contracting party. This does lend some support to the idea that *non-refoulement* is gradually being accepted as a general principle.

Furthermore, as already noted, even Article 33 of the 1951 Convention stipulated that no reservation may be made to it. In the *North Sea Continental Shelf* cases the Court observed that the fact that reservations were allowed to Article 6 of the Geneva Convention militated against the regarding of that Article as norm-creating, saying that so long as the possibility of making reservations to the Article remained, "the Convention itself...would...seem to deny to the provisions of Article 6 the same norm-creating character as" could be attributed to those Articles to which no reservations could be made.[58] Thus the fact that no reservations are permitted to Article 33, though far from conclusive, could well be some pointer in the direction of its law-making potential.

Norm-creating provisions in multi-lateral conventions are only one reason which may cause state practice to develop into customary law. The United Nations Organisation has a significant influence on the development of customary law. This body does, of course, contribute directly to the formulation of express international legal obligations by its sponsorship and promotion of multilateral conventions. In addition to this involvement in the creation of specific treaty commitments, UN General Assembly resolu-

[58] *Ibid.* at 42.

tions and even recommendations may at the very least form the basis for state practice from which further customary law may develop.

In recent Resolutions the UN General Assembly has urged governments

> to facilitate the efforts of the High Commissioner in the field of international protection, *inter alia:* ... by following humanitarian principles with respect to the granting of asylum and ensuring that these are scrupulously observed, including the principle of *non-refoulement* of refugees,[59]

> to continue to facilitate the work of the High Commissioner...by...the scrupulous observance of humanitarian principles with respect to the granting of asylum and the *non-refoulement* of refugees.[60]

Though some writers have argued that the resolutions of the General Assembly, though not the recommendations, are legislative and binding on all UN members, there is far from unanimous agrement as to this.[61] In any case, at a minimum, such resolutions (and the recommendations also) may provide an impetus for state practice to develop along the lines advocated. It will be noted that it is not only the importance of the observation of the principle of *non-refoulement* which is stressed here, there is also emphasis upon the need to follow humanitarian principles and to grant asylum to refugees.

The Office of the United Nations High Commissioner for Refugees [UNHCR] (an organ of the UN established under Article 22 of the UN Charter on the same basis as such bodies as UNICEF, UNRWA and UNDP) has also created a body of international practice which has provided another spur to the development of customary law.

The Office was set up by the *Statute of the UNHCR*[62] and came into being in January 1951. Like many international organisations it does have some measure of international personality, and has played a vital role in ensuring that refugees do receive the protections stated in the various international treaties, and in convincing states, be they parties to the international conventions or not, of the importance of the need for the observance of humanitarian principles in the treatment of refugees. Its stated function is to provide "international protection under the auspices of the United Nations" to refugees falling within its mandate, and to seek "permanent solutions" for their problems.

When the Office was set up the UN General Assembly appealed to all governments, including the governments of states which were not members of the United Nations, to co-operate with the High Commissioner in the

[59] U.N. General Assembly Resolution 32/67, 8 December 1977.
[60] U.N. General Assembly Resolution 33/26, adopted 29 November 1978.
[61] D.H.N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. YRBK. INT'L. L. 97 (1955-6).
[62] Annex to U.N. General Assembly Resolution 428 (v) of 14 December 1950.

performance of his functions,[63] and, in a succession of solutions since this time, has continued to stress the need for governments to support these activities[64]. Also the Office is given a supervisory role in relation to the application of the two major refugee instruments—the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. States acceding to these instruments expressly undertake to co-operate with the High Commissioner.[65]

The mandate given to the High Commissioner is to assist and protect "refugees" which term is defined in very similar terms to those of the 1951 Convention definition.[66] However, the definition of "refugee" contained in the UNHCR Statute now gives a very limited and imperfect picture of the persons actually assisted by the High Commissioner. This is because over the years the UN General Assembly has authorised the Office to assist and protect additional categories of persons who find themselves in refugee-like situations and who either do not or may not actually fall within the ambit of the Statute's definition.[67] Thus the mandate of the High Commissioner has been very widely extended, and the Office has, by its ever-widening operations in the field, exerted considerable influence on the behaviour of states in the treatment which they afford to refugees. It should be noted that whether or not the term "refugee" has acquired a generally accepted meaning under customary international law is a matter about which there is some disagreement.[68] It would seem, however, that the definition contained in the 1951 Convention, as amended by the 1967 Protocol, together with that of the Statute of the Office of the UNHCR, would provide a useful starting point in establishing what the terms of a customary law definition might be.

The UNHCR has also influenced state practice by the constant emphasis which it has placed upon the necessity for the observance by states of humanitarian principles in relation to refugees. For instance, in 1977 the Exe-

63 U.N. General Assembly Resolution 428(v).

64 See e.g. U.N. General Assembly Resolution 34/60 of 29 November 1979.

65 1951 Convention Article 35; 1967 Protocol Article II.

66 UNHCR Statute Article 6.

67 ECOSOC resolutions are also in sympathy with this extension of the mandate of the UNHCR Office. Under its Statute the UNHCR "shall follow policy directives given him by the General Assembly or the Economic and Social Council", Article 3. See General Assembly Resolutions: 1167(XII) — 1388(XIV — 1501(XV) — 1671 (XVI) — 1673(XVI) — 1783(XVII) — 1784(XVII) — 1959(XVIII) — 2958 (XXVII) — 3143 (XXVIII) — 3454(XXX) — 3455(XXX), and ECOSOC Resolutions: 1655(LII) — 1705(LIII) — 1741(LIV) — 1799(LV) — 1877(LVII) — 2011 (LXI).

68 GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, (1966), p. 73 says "In customary (unwritten) international law there is no such thing as a generally accepted definition of 'refugee'." P. Weis writing in 1960 said the concept of refugee still lacked a universally accepted definition—*The Concept of Refugee in International Law,* U.N. Doc. HCR/INF.49, p. 32; and S. PARAKASH SINHA, *op. cit. supra* note 22 at 106 says, "Refugee, as such, is not a concept of international law". However, see also D.W. Greig, *The Protection of Refugees and Customary International Law,* paper presented to University of N.S.W. Seminar on Problems in International Protection of Refugees, University of N.S.W., Sydney, Australia, Aug. 2-3 1980, p. 22; and G.S. GOODWIN-GILL, *op. cit. supra* note 23 at 138.

cutive Committee of the High Commissioner's Programme (a body composed of forty nations which meets in Geneva in Ostober each year and advises the Office in matters pertaining to its functions) re-affirmed

> 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.[69]

In 1979 in the conclusions of the Executive Committee report it was stated that:

> Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of *non-refoulement*,[70]

and in 1980 "the essential need for the humanitarian legal principle of *non-refoulement* to be scrupulously observed in all situations of large-scale influx" was again re-affirmed.[71] The UNHCR has also made strong statements of this kind at international meetings called to consider solutions to refugee problems.

Such international conferences can themselves influence the creation of new customary rules, providing, as they do, international arenas for discussion and agreement as to desirable international legal provisions. A consensus at these meetings can set the groundwork for the development of behaviour along the lines discussed.

Many relevant conclusions and recommendations have been reached at international conferences. As far back as 1965, at a Colloquium of Legal Experts held in Bellagio, Italy, it was observed that there was an increasing tendency towards recognition of the principle of *non-refoulement* as a part of international law.[72] More recently, the Conference held at Arusha, Tanzania, from 7 to 17 May 1979 on the Situation of Refugees in Africa, stressed the importance of the need for the scrupulous observation of the principle of *non-refoulement*.[73] In his opening address President Nyerere said, "there has been general acceptance of the principle of *non-refoulement*, which precludes the returning of any refugee to the country from which he is fleeing or has fled",[74] and later he described the principle of *non-refoulement* as "basic humanitarian law".[75] Similar descriptions of the principle were made at the Round Table on Humanitarian Assistance to Indo-China Refugees and Displaced Persons held in San Remo, on 28-30 May 1980.[76]

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[69] U.N. Doc. A/AC.96/549, paragraph 53(4)(c).
[70] U.N. Doc. A/AC.96/576, paragraph 72(2)(b).
[71] U.N. Doc. A/AC.96/588, paragraph 48(4)(a).
[72] *See* P. Weis, *The UN Declaration on Territorial Asylum*, 1969 CAN. YRBK. INT'L. L. 92, at 143.
[73] U.N. Doc. A/AC.96/INF.158 paragraph 23.5.
[74] U.N. Doc. A/AC.96/INF.158 Annex 1, p. 5.
[75] *Ibid.*
[76] U.N. Doc. HCR/120/23/80 p. 51.

At the Meeting on Refugees and Displaced Persons in South-East Asia, convened by the UN Secretary General at Geneva on 20 and 21 July 1979, "the general principles of asylum and *non-refoulement were endorsed*".[77] A draft resolution unanimously adopted by the Committee of Parliamentary Jurisdicial and Human Rights Questions during the 1980 Spring Meetings held in Oslo on 7-12 April affirmed "the need for all States to respect fundamental principles of the granting of asylum and *non-refoulement* set out in the [UN] Declaration on Territorial Asylum".[78] The Manila Round Table in its Declaration on the International Protection of Refugees and Displaced Persons in Asia, on 14-18 April 1980, stressed "the importance of the observance of the principle of *non-refoulement* as defined in international instruments".[79] Mr. P.M. Moussalli, from the UNHCR Office, referred in his paper to "certain principles which have now acquired general recognition: the principle of *non-refoulement* and the principle, which is of particular relevance in the context of South-East Asia, that asylum should never be refused if this would lead to hardship or would expose asylum-seekers to serious danger or possibly loss of life".[80]

Thus, conclusions and recommendations of international conferences, as well as statements by the UNHCR, and UN General Assembly resolutions and recommendations, all endorse the importance that the principles of asylum and *non-refoulement* be observed by states which deal with refugees.

Another possible influence when considering whether asylum and *non-refoulement* are binding international obligations is the third source of international law described by Article 38 (1)(c) of the Statute of the International Court of Justice—the "general principles of law accepted by civilized nations". This phrase is usually taken to refer to the principles found commonly recurring in the legal systems of independent nations.[81] It would seem that since the end of the Second World War a greater moral content is evident in legal norms, and that principles of fairness and equity and humanitarianism are playing a part in creating new customary law.

These principles have been mentioned from time to time by the International Court. For instance in the *Corfu Channel Case*[82] the Court referred to certain general and well-recognised principles, namely "elementary

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[77] U.N. Doc. A/34/627 p. 6.
[78] U.N. Doc. HCR/120/23/80 p. 120.
[79] U.N. Doc. HCR/120/25/80, p. 187.
[80] *Ibid.* p. 12.
[81] There is disagreement as to the precise meaning of the phrase. Some writers suggest that it is superfluous and adds nothing to the sources of international law—conventions and custom—to be found in Article 38(1)(a) and (b). Others maintain the phrase incorporates natural law into international law, see e.g. G.I. Tunkin, *Co-existence and International Law*, 1958 III RECEUIL DES COURS, 5 at 23-26; and A.V. Verdross, *Les principes generaux du droit dans la jurisprudence internationale*, 1935 II RECEUIL DES COURS, 195 at 204-6. The majority of writers take the view that the phrase covers those general principles common to civilised legal systems and this latter phrase is now taken to signify the legal systems of independent states.
[82] [1949] I.C.J. REP 4.

considerations of humanity, even more exacting in peace than in war";[83] and in *The Reservations to the Genocide Convention Case*[84] the Court observed that the principles underlying the Genocide Convention were "principles which are recognised by civilized nations as binding on States, even without any conventional obligation".[85] It is not clear to what extent such ideas can be regarded as legal principles. Clearly before they can become law they must receive recognition in practice. If this is happening not only the principles of asylum and *non-refoulement* but the legal protection of refugees generally will be likely to develop much more rapidly.

To summarise: the combined effect of the major multilateral conventions, UN General Assembly resolutions, the activities and pronouncements of the UNHCR, the recommendations of international conferences and the impact of all these events on state practice, coupled with the increasing attention paid to general humanitarian principles has almost certainly resulted in the development of some customary international legal rules pertaining to the admission of refugees. These must then influence the standard of treatment owed to refugees under international law even by non-signatories to the refugee conventions.

HAVE ASYLUM AND NON-REFOULEMENT BECOME BINDING OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW?

So far in this section the general background considerations relating to the current status under customary international law of states' obligations to admit refugees arriving at their borders have been surveyed. The emphasis throughout—in the relevant and possibly norm-creating provisions of international instruments, the exhortations of UN General Assembly resolutions and recommendations, UNHCR meetings and concerned international conferences has frequently been in terms of the need for states to grant asylum and to observe the principle of *non-refoulement*. Accordingly, the question of the extent to which states have become subject under customary international law to any binding obligations to admit within their territory refugees arriving at their borders will be examined initially with reference to these two concepts.

Turning first to asylum; it could be argued on the basis of considerations reviewed above that an obligation to grant asylum in the meaning of a right to permanent settlement does exist now under customary international law—that it has developed from lesser obligations contained in the Convention, Protocol and the various other international and regional instruments, and from the emphasis placed by the UN General Assembly, the UNHCR, and at international meetings upon the importance of the need for a grant of asylum to be made to refugees

[83] *Ibid.* at 22.
[84] [1951] I.C.J. REP 15.
[85] *Ibid.* at 23.

arriving at a country's borders. Added to these considerations could also be the increasing weight given to humanitarian considerations and the influence they have exerted in the development of customary international law.

However, despite all these considerations the preponderance of opinion would seem to be against the existence of such a right. Today the generally accepted position, the practice adopted by states, is as follows: apart from any limitations which might be imposed by treaties, the question whether or not a state should afford a right of entry to an individual, or a group of individuals, is, states insist, something within each state's sovereignty to resolve. States are generally under no obligation to grant asylum.[86] In fact the attitude of states would be "extensive and virtually uniform" against the existence of an obligation to grant asylum (in the sense of a right to permanent settlement) to persons arriving at their borders. This position has been accepted in both domestic and international courts.[87] It has not been displaced by any provision in the Universal Declaration of Human Right, the American Convention on Human Rights, the Bangkok Principles, the OAU Convention, in European law, nor even by the UN Declaration on Territorial Asylum.

The case for the proposition that *non-refoulement* has now become part of general customary international law is a more convincing one and can be made as follows: firstly, the fact that the principle has been incorporated as a binding obligation in the international instruments noted above, is, in itself, some indication of acceptance. Also it would seem that the provision has, in recent instruments, been made in norm-creating terms.

However, it cannot be denied that the wording used in many instruments not infrequently allows for an exception to be made if the national security of a country is threatened or "in order to safeguard the populations, as in the case of a mass influx of persons". Article 3.2 of the UN Declaration on Territorial Asylum contains such an exception, as does Article III of the Bangkok Principles, and Principle 3 of the European Resolution (14) 1967 on Asylum to Persons in Danger of Persecution. Exceptions such as these are not featured in all the international instruments. Article II of the OAU Convention, and Article 22 (8) of the Ame-

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[86] S. PRAKASH SINHA, *op. cit. supra* note 22 at 108; BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 519 (1979); OPPENHEIM, INTERNATIONAL LAW (8th ed. H. Lauterpacht) 675-676 (1955); BRIERLY, THE LAW OF NATIONS 276 (6th ed. H. Waldock) 1963.

[87] For relevant statements from domestic courts see e.g. Nishimura Ekiu v. U.S. 142 U.S. 651 (1892) where the Supreme Court said at 659, "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe". See also Fong Yue Ting v. U.S. 149 U.S. 698, 705-711 (1893); Ker v. Illinois, 119 U.S. 436 at 442 (1886). For the position in Australia and the U.K. see Musgrove v. Chun Teeong Toy [1891] A.C. 272.

rican Convention on Human Rights impose absolute obligations of *non-refoulement* and, as already noted, the exceptions contained in Article 33 of the 1951 Convention would seem to be directed at the undesirable individual refugee. Nevertheless, the oft-repeated provisions for exceptions to safeguard national security cannot be ignored and may be indicative that if *non-refoulement* has become a binding principle it has become so with these limitations. When faced with a mass influx of refugees, some countries have seized upon the idea of a threat to national security as justification for rejection at the border.[88]

As further support for the proposition that *non-refoulement* has now become a part of customary international law, reliance is often placed on the Final Act of the 1954 *Convention Relating to the Status of Stateless Persons*[89] where it was assumed that the principle had received general acceptance. The Conference adopting the Convention

> ...unanimously adopted the following resolution: *The Conference, Being of the opinion* that Article 33 of the Convention Relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,
> *Has not found it necessary* to include in the Convention Relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951.[90]

The constantly recurring emphasis upon the importance that the principle of *non-refoulement* be observed which is stressed repeatedly in UN General Assembly resolutions, in the reports of the Executive Committee of the High Commissioner's Programme and in the conclusions of international meetings convened to discuss the problems of refugees, are also of significance when considering the question of whether or not *non-refoulement* is gaining acceptance as a binding legal obligation.

Overall, considerable support can be marshalled for an argument to the effect that today the principle of *non-refoulement* has become established as a customary rule of international law binding on states regardless of their specific assent A body of opinion amongst legal writers also attests to this.[91]

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[86] See e.g. Statement of Foreign Ministers, Joint Communiqué, 12th ASEAN Ministerial Meeting held in Bali, Indonesia, 28-30 June 1979, reported in 12 FOREIGN AFFAIRS MALAYSIA, 185; and speech by Malaysian Minister of Foreign Affairs at p. 177. G.S. Goodwin-Gill in *Entry and Exclusion of Refugees: The Obligation of States States and the Protection Function of UNHCR*, article written for Michigan Y. B. Intl. L. Studies 1981, (not yet published) has, said that given the strong likelihood of an international response to, and assistance in the event of, new crises a mass influx would not of itself seem to constitute an exception to the obligation of *non-refoulement*.

[89] 360 U.N.T.S. 117. Done at New York on 28 September 1954. Entry into force 6 June 1960.

[90] Final Act, Convention relating to the Status of Stateless Persons, paragraph 4.

[91] GOODWIN-GILL, *op. cit. supra* note 23, has said, at p. 141,

State practice, however, provides a flaw in this argument in that the actual and threatened behaviour of governments does not always accord with the recognition of the existence of an obligation of *non-refoulement*. Though instances of *refoulement* are exceptional their occurrence is unfortunately undeniable. For instance Thailand sent back to Kampuchea some 40,000 Kampucheans in mid-1979.[92] The point must, of course, be made that such incidents are unusual and are outweighed by the innumerable occasions on which the principle of *non-refoulement* is scrupulously observed. A striking example at the moment is the acceptance and accomodation, with no suggestion of return, of the more than million Afghan refugees currently within Pakistan.[93] Also overwhelming and seemingly impossible numbers of refugees are constantly given shelter by host countries on the African continent.[94] Nevertheless the fact that examples of the non-observance of the principle in state practice do exist, cannot be denied.

In addition, as already mentioned, not only must state practice be "both extensive and virtually uniform" including the practice "of States whose interests are specially affected" it also must "show a general recognition that a rule of law or legal obligation is involved".[95] A belief on the part of the part of states in the binding nature of a prectice is necessary before that practice can become a rule of customary international law. Several South-East Asian nations have made repeated assertions that they have no legal obligations to the refugees arriving at or crossing their borders, making the point that admission, where given, has been granted as a humanitarian gesture only, and not as a result of any duty owed under customary international law.[96] These states have stressed on several occasions

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"the prohibition on the return of refugees to countries of persecution has established itself as a general principle of international law, binding on States automatically and independently of any specific assent."

Other proponents of the view that *non-refoulement* has now attained the status of a rule of customary international law include JAEGER, *op. cit. supra* note 16 at 38; D.W. Greig, *The Protection of Refugees and Customary International Law*, paper prepared for Seminar on Problems in the International Protection of Refugees held at the University of N.S.W., Sydney, Australia, 2-3 Aug. 1980, pp. 22-30; P. Weis, *The UN Declaration on Territorial Asylum, op. cit. supra* note 72 at 148 says that the principle of *non-refoulement* "certainly constitutes a usage, and, at least as regards the part of the principle covering the non-return of persons within the territory of a state, may have acquired the character of a rule of international law"; B. Vukas, *International Instruments Dealing with the Status of Stateless Persons and of Refugees*, 8 REVUE BELGE DE DROIT INTERNATIONAL 143, at 148, 149, 153, 154 (1972). Grahl-Madsen seems to hold the view that the principle of *non-refoulement* is not binding, see *Territorial Asylum, op. cit. supra* note 4 at 42, 43, he says, "It seems as if the principle is more important as a moral means...", and see *The Status of Refugees*, Vol. II, *op. cit. supra* note 15 at 94-98, 108. Also see PRAKASH SINHA, *op. cit. supra* note 22, at 159, 280.

92 U.N. Doc. A/34/627 Annex 1, p. 3.

93 UNHCR Refugee Update No. 50, October 1981, p. 1.

94 See generally on the situation of refugees in Africa—Report of the Conference on the Situation of Refugees in Africa, May 1979, U.N. Doc. A/AC.96/INF. 158, and G. MELANDER & P. NOBEL (eds.), AFRICAN REFUGEES AND THE LAW (1978).

95 [1969] I.C.J. REP 3 at 43.

96 Speech by Malaysian Minister of Foreign Affairs, 12th ASEAN Foreign Ministers Meeting, Bali, Indonesia, June 28-30, 1979, 12 FOREIGN AFFAIRS MALAYSIA 176, 177. Also see p. 195.

that in the future admission will continue to be granted only if assurances are forthcoming to the effect that the international community will guarantee that those nations granting initial asylum will be left with no resulting long-term burdens. They have also stressed that where the refugees are unable to return to their homelands, they must be given resettlement opportunities elsewhere.[97]

South-East Asian states have frequently been careful to classify persons arriving at or within their borders by terms such as "illegal immigrants", "displaced persons", "boat people" and even as "tourists of the unwanted kind", but not as "refugees".[98] However, this, in itself, is not an argument against the existence of customary refugee law, in fact it can be an argument for its existence. It is an indication that "refugees" may be entitled to a definite standard of treatment under customary international law, even from nations under no treaty commitments, that the nations which are often careful to avoid use of the term "refugee" do recognise this, and that they are endeavouring to avoid incurring these obligations by refusing to categorise the persons in their vicinity as "refugees".

What then is the status under customary international law of the obligations of states to admit refugees arriving at their frontiers? Are obligations of asylum and *non-refoulement* owed? It would seem that refugees do not have any right to demand asylum in the sense of a right to settle permanently within any state at whose borders they may arrive seeking admission. Neither the provisions of international instruments, nor customary law, impose an obligation of this nature upon states. With regard to *non-refoulement*, as noted, some states have incurred specific treaty commitments not to *refoule* refugees. Whether or not *non-refoulement* has become a binding rule of customary international law, however, seems still to be open to argument, as does the extent of its ambit—questions for instance as to whether an exception is allowed to safeguard interests of national security still remain unclear. Also, as mentioned earlier the concept strictly can not encompass rejection at the frontier when refugees arrive at foreign coasts by boat, because the result of rejection in this situation is generally not a return of people to a country from which they are fleeing in fear of persecution.

SHOULD THE QUESTION BE RESTATED IN ANOTHER WAY?

It may be advantageous to pause here, in order to consider whether the present situation can really fit into the already existing legal categories. It may be that to concentrate upon the question of whether asylum and *non-refoulement* are developing into rules of customary international law is

[97] *Ibid.*, at pp. 186, 230, 274, 398; ASEAN Joint Communique, June 26, 1980, 13 FOREIGN AFFAIRS MALAYSIA 199, see also pp. 257-275.

[98] See e.g. 12 FOREIGN AFFAIRS MALAYSIA 170, 178, 183.

to begin the enquiry into the current legal situation from a mistaken startingpoint. The question itself may be in need of re-statement.

It is possible to approach the problem in another way and to simply enquire just what are the current attitudes and practices of states, their conscious and intentional reactions to refugees arriving at their borders in search of admission. From the information which emerges as to current state practice a picture of the present status of customary international law will be revealed. If no attempt is made to force this picture into traditional legal concepts, the enquiry might produce a clearer and more straightforward depiction of the current situation than has emerged thus far.

Looked at in this way it is possible to describe the present position as follows: governments still refuse to accede to conventions imposing binding obligations to grant a right to permanent settlement to refugees arriving at their borders, and state practice would indicate that such obligations are regarded as an unacceptable intrusion upon the sovereign right of each state to decide which persons should be accepted within its territory.

Nevertheless state practice does seem to indicate that, though countries, and particularly those within the South-East Asian region, are not prepared to grant admission to a mass influx of refugees when they fear that the result will be that they will become permanent hosts to these refugees and will be left to handle alone the costs and problems which this must inevitably entail; they are prepared to admit these people, and to do their best for them, as long as they have assurances that they will receive assistance from other states in the resolution of the ensuing difficulties and expenses. In other words these countries require assurance that if temporary refuge is given the international community will accept responsibility in a spirit of international co-operation and burden-sharing, and that a grant of first refuge does not mean an assumption of responsibility for the resolution of all the other problems of the refugees. With such assurances they are prepared to grant this refuge.

Though ultimately an influx of refugees can enhance the standard of living of the country receiving them, in the initial years the cost of suporting and integrating these persons is bound to be heavy, and it has become apparent that it is neither fair nor realistic to expect the countries closest to the refugee problems to absorb these persons and carry the resulting load unaided. International assistance is essential. This may have to be in the form of the provision of material and technical help to ensure the supply of the necessities of food and accommodation when the refugees first arrive. In addition, co-operation in the search for permanent solutions for the refugees will be required as well. Generally the most desirable solution is considered to be voluntary repatriation or, failing this, integration within a

neighbouring region,[99] but political or natural circumstances do not always permit this manner of resolving the problem. Often resettlement in a third country is the only realistic possibility. When this is the case the international co-operation required must take the form of the granting of resettlement opportunities.

It is true that governments so far have been reluctant to agree in principle to a scheme consisting of these dual obligations—a grant of temporary refuge coupled with an international assumption of responsibility for the resultant burden. Usually states prefer to maintain that the country of first asylum has the full responsibility for any refugees it has accepted. Despite this the actual practice here does indicate that these concepts are being accepted in fact.[100]

Both concepts are already recognised in provisions within the existing international instruments. As regards temporary refuge or provisional asylum the 1951 Convention, in Article 31, which concerns refugees unlawfully within the country of refuge, provides:

> The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country,

and Article 32, concerning expulsion that:

> The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country.

Article 3.3 of the UN Declaration on Territorial Asylum declares:

> Should a State decide in any case that exception to the principle of [*non-refoulement*] would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

Also a grant of temporary refuge may be the only way of complying with the recommendation of Council of Europe Resolution 14 (1967) on Asylum to Persons in Danger of Persecution that should a government decide to take measures which might entail the return of a person to a territory where he would be in danger of persecution,

> it should, as far as posisble and under such conditions as it may consider appropriate, accord to the individual concerned the opportunity of going

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[99] The UNHCR Office has made frequent statements to this effect, e.g. "The ideal solution for a refugee is voluntary repatriation. When this is not feasible, durable settlement in countries of first asylum is the best alternative course of action". U.N. Docs. A/AC.96/572 Annex, p. 7; A/AC.96/568 p. 1.

[100] On the concept of temporary refuge see G.C.L. Coles, *The International Protection of Refugees and the Concept of Temporary Refuge*, paper presented at Round Table on Humanitarian Assistance to Indo-China Refugees and Displaced Persons, San Remo, May 1980, U.N. Doc. HCR/120/23/80 p. 93. This concept has been discussed at various international meetings, see e.g. Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, San Remo, Italy, January 1981, and U.N. Doc. A/AC.96/599.

> to a country other than that where he would be in danger of persecution.[101]

Article II.5 of the OAU Convention 1969 states:

> Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

The Bangkok Principles 1969 provide, in Article III.4, that:

> In cases where a State decides to apply any of the above-mentioned measures [i.e. rejection at the frontier, return or expulsion] to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

and in Article VIII:

> 1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not expel a refugee.
> 2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

As regards international co-operation the Preamble to the 1951 Convention states:

> Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of [the] problem..., cannot be achieved without international co-operation...,

and Article 2.2 of the UN Declaration on Territorial Asylum that:

> Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.

The Council of Europe Resolution 14 (1967) on Asylum to Persons in Danger of Persecution provides in its fourth principle that:

> Where difficulties arise for a member State in consequence of its action in accordance with the above recommendations [that a liberal and humanitarian spirit be observed in relation to persons seeking asylum on their territory], Governments of other member States, should, in a spirit of European solidarity and of common responsibility in this field, consider individually, or in co-operation, particularly in the framework of the Council of Europe, appropriate measures in order to overcome such difficulties.

Article II.4 of the OAU Convention 1969 provides:

> Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States

[101] Resolution on Asylum to Persons in Danger of Persecution, Principle 3.

> and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

The very existence of these provisions indicates some acceptance of both the idea of temporary refuge and that of international burden-sharing.

Also, as briefly indicated already, actual state practice does indicate that, with assurances of co-operation, most countries are quite prepared to admit persons within their borders, and to help them as much as possible. For instance, though in June 1979 Thailand had sent back half of the 80,000 Kampucheans who had crossed her borders in the first months of that year, in October, assured of international co-operation, she announced "that all the Kampuchean refugees would be granted temporary refuge in Thailand."[102] This was a considerable undertaking since some 130,000 Kampucheans were at that time in the border areas and another 200,000 had just entered Thailand.[103] Furthermore, it was anticipated that the numbers would continue to increase.

"Boat people" rescued by passing ships and taken to ports within the South-East Asian region have been granted permission to disembark and afforded temporary refuge by states formerly adamant in their refusal to allow this, once those states were assured of, and confident about, an intertional assumption of responsibility. Often states have stressed that they will only give permission for "boat people" to disembark if they have assurances of international burden-sharing.[104]

Various co-operative schemes have been set up to provide these assurances. The very fact that the establishment of these schemes has been possible indicates that states are moving towards an acceptance of the need for an assumption of the responsibility for refugees to be undertaken at an international level—that there is recognition that the states nearest to the scene of the problems must not be left to cope with them alone. One co-operative scheme has been the establishment by UNHCR of a fund of resettlement offers guaranteed by participating states. This fund has the purpose of facilitating disembarkation from ships flying flags of convenience or flags of countries unable to provide settlement.[105] (Prior to this strong suggestions had been made that a duty be imposed on the flag state of the rescuing vessel to provide resettlement places for the rescued refugees and displaced persons, and several states have agreed in principle to this suggestion.)[106] Places from the fund are used for emergencies, in consultation with the resettlement country and with its consent. They are used only when

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[102] U.N. Doc. A/34/627 p. 14.

[103] *Ibid.*

[104] Willday, *op. cit. supra* note 2 at 2, 3, 4; 12 FOREIGN AFFAIRS MALAYSIA 185, 186, 230, 274 (1979); 13 FOREIGN AFFAIRS MALAYSIA 199 (1980).

[105] See U.N. Docs. A/AC.96/572 paragraph 124B(a)(ii); A/AC.96/588 paragraph 17.

[106] D. Willday, *op. cit. supra* note 2 at 9.

permanent resettlement offers are unavailable and are a prerequisite of disembarkation.

Appeals have been made to countries to provide opportunities of permanent resettlement for people who can have no realistic expectation of being able to return to their own country in the near future. During and after a UN convened meeting, held in Geneva in July 1979, to find solutions to the problems of the rapidly increasing numbers of Indo-Chinese refugees and displaced persons within the South-East Asian region many offers of permanent resettlement opportunities were made, in several instances by countries which had never made such opportunities available to refugees before. Resettlement offers which had numbered 125,000 in May 1979 had increased to over 260,000 by the end of the meeting.[107] As a result of these offers the number of refugees in camps awaiting resettlement in Hong Kong, Indonesia, Malaysia and the Philippines, declined steadily following the July Meeting. The monthly rate of departures for permanent resettlement abroad from the entire area reached 25,000 in September and October 1979.[108] Between the end of July 1979 and 30 August 1980, 269,111 Indo-Chinese were moved to over thirty resettlement countries.[109]

Another application of the dual concepts of temporary refuge and international burden-sharing can be seen in the establishment of holding centres to which refugees and displaced persons can be transferred for processing "for resettlement in an orderly way within a specific time scale, and against guarantees that there would be no residual problem".[110] These developments followed from a suggestion, first made in 1978,[111] designed to alleviate the concerns of countries of first asylum that grants of temporary asylum might lead to long term problems for the country providing this refuge. The idea is that refugees and displaced persons, granted resettlement opportunties by third countries, are taken from the country of first refuge to the processing centres, and, after completion of the formalities pre-requisite to admission by their new countries, they then proceed on to take up the resettlement offers. Indonesia and the Philippines have provided territory for this purpose,[112] and camps have been constructed for 10,000 persons on Galang Island on the Riau Archipelago near Singapore, and for 50,000 persons on the Bataan Peninsula in the Philippines.

Of a different nature are the attempts to ensure that refugees will not be refused admission by states at whose borders they arrive which occur

107 U.N. Doc. A/34/627, p. 7.
108 U.N. Doc. HCR/155/30/80 Rev. 1, p. 9.
109 U.N. Doc. A/AC.96/580 p. 2. This high rate "continued into 1980, reaching a record 29,924 in Feburary and averaging 24,419 over the first six months...including those travelling to Refugee Processing Centres", U.N. Doc. A/AC.96/580 p. 4.
110 U.N. Doc. A/34/627 p. 8.
111 Made first at the Consultative Meeting with Interested Governments on Refugees and Displaced Persons in S.E. Asia, held at Geneva on 11 and 12 Dec. 1978.
112 U.N. Doc. A/34/627 p. 9.

in the form of the frequent statements which have been issuing from the UN General Assembly, the UNHCR and international meetings to the effect that a generous policy of at least temporary asylum must be adopted and that states of refuge receiving great numbers of refugees must be assured that they will not be left to struggle with the resultant problems alone.[113]

In summary, although states are still resisting binding obligations to grant asylum in the sense of granting a right of permanent settlement, state practice, including the practice of countries within South-East Asia, does indicate an acceptance of humanitarian obligations—an acceptance that refugees who arrive at foreign borders seeking admission should not be rejected, whether such rejection would mean a return across the border to the country fled, or the sending of the refugees upon a further dangerous journey to seek admission at another frontier, and that they should be given temporary refuge at least, provided that this is placed within a wider context of international cooperation. As well, the necessity for this assumption of responsibility at an international level seems to be gaining increasing acceptance.

The evidence surveyed points to the conclusion that concepts of temporary refuge coupled with ideas of international cooperation and solidarity in the form of burden-sharing are in the course of being accepted as general principles of international refugee law. If this is the case then this cooperative aspect of the development of the international protection afforded to refugees is an encouraging one. It also gives to hopes for wider international co-operation in other areas. It would seem to be the only possible means of effecting a real and lasting resolution of this problem. Furthermore, it would be a major practical step towards the realisation of the first aspiration set out in the preamble to the Universal Declaration of Human Rights, namely, the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."

113 See e.g. U.N. Doc. A/34/627 pp. 3, 4; Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, Geneva, 1980, No. 11(XIX), No. 14 (XXX), No. 15 (XXX).