COERCED MOVEMENTS OF PEOPLE ACROSS STATE BOUNDARIES: SOME PROBLEMS OF INTERNATIONAL HUMANITARIAN LAW *

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A principal purpose of this essay is to suggest that involuntary movements of people across political boundaries are most appropriately viewed, for purposes of scientific inquiry, as comprising a *process,* taking place over time and in space and within the context of particular social and political and economic environmental conditions. Accordingly, it is sought firstly to try to mark out, albeit impressionistically, the continuum of time and events within which large groups of people, after a period of rising levels of coercion and deepening tension, become a critical mass as it were and begin to flow across national boundaries, from the state of origin into the territories of adjoining states. The actors in the process include the adjoining and other states as well as international organizations who respond to the involuntary movement of peoples, sometimes by absorbing at least part of the flow for a shorter or longer period of time, sometimes by promptly resisting and repelling the flow, and sometimes by eventually reversing the flow in the process we know as voluntary repatriation. Next, in respect of each phase of this process, the effort is to identify the principal legal policy issues addressed by international humanitarian law. These issues are posed by the conflicting claims of asylum-seekers on the one hand and states on the other, and between states of origin and states of first and subsequent asylum *inter se.* A constant focus is on the elusive question of how much law exists, if any, in each phase of this process and the prospects of developing more law—and more effective law—for the regulation of coerced population movements.

A summary note on the scope of "international humanitarian law" as used in this essay might be conducive to clarity. International humanitarian law has been used as a contemporary if somewhat heavy substitute

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for the older, more succinct, phrase "laws of war."[1] Here, however, we use the term as a designation of those segments of international law which are infused by the principle of humanity as a basic, organic principle.[2] "Principle of humanity," in turn, is utilized as a shorthand way of referring to a cluster of human values all relating in greater or lesser degree to the physical and moral integrity and well-being of the human person. So understood, international humanitarian law would comprehend not only international law relating to the conduct of armed conflict but also international law concerning refugees and displaced persons and as well much, perhaps most, of the international law of human rights.

For convenience in presentation and analysis, a framework is utilized which relates principally to the time dimension of events occurring in human history. It seems useful to distinguish between the time period preceding the actual flow of people across state boundaries both from the time period during which the actual human flow occurs and persists and from the immediately succeeding phase where the search takes place for more or less permanent dispositions of the people who have crossed national boundaries.[3]

History tells us that involuntary movements of individuals and peoples are no new phenomena in the international arena. They are as old at least as the exodus of the Hebrews from the Egypt of the Pharaohs. It is probably a commonplace observation that most coerced movements of peoples have resulted from any one or more of three general kinds of causes: (a) "persecution" where we refer to the classic situation and variations thereof, all marked by denial or disregard on the part of the ruling elites of demands by some segments of the population for respect for basic human rights; (b) armed conflict, whether international in scope or not, or serious and persisting breakdown of law and order; and (c) natural disasters or upheavals of nature.

I. Violations of Human Rights and the Causation of Mass Refugee Flows.

(1) *Refugee-Producing Behaviour and the International Law of Human Rights.*

[1] It is in this narrower sense that "international humanitarian law" is commonly used by the International Committee of the Red Cross; see, in this connection, Gasser, International Humanitarian Law: Past, Present and Future, Paper delivered at a Seminar of the Philippine Branch of the International Law Association, Manila, 7 November 1981.

[2] *Cf.* Pictet, *The Principles of International Humanitarian Law*, 10 (ICRC. Geneva, 1966): "International humanitarian law, in the wide sense, is constituted by all the international legal provisions, whether written or customary, ensuring respect for the individual and his well-being." Dr. Pictet went on to say that "Humanitarian law now comprises two branches: the law of war and human rights." *See also* Calogeropoulos-Stratis, Droit Humanitaire et Droits de L'Homme.

[3] *See* G.J.L. Coles, Pre-Flow Aspects of the Refugee Phenomenon, Background Paper for the International Institute if Humanitarian Law (San Remo) (April, 1982) for an instructive application of this kind of framework.

We turn to the first phase which is characterized principally by intensifying social and political tension within a nation state. In this phase, there is a growing conviction of a substantial part of the population that sooner or later they must leave their country of normal residence if they are to maintain their fundamental human values.

The existence of a causal or contributory relationship between the degree to which peoples' demands for sharing of basic human rights — whether civil and political or economic and social—are met and honored on the one hand, and population movements on the other hand, has long been known or at least suspected. The complexity of this relationship, and the multiplicity of the factors which operate upon and affect this relationship in our contemporary world, have been carefully presented in former UN High Commissioner for Refugees Sadruddin Aga Khan's "Study on Human Rights and Massive Exoduses."[4] This Study offers a succinct summary of the major factors which tend to force people out of their country of habitual residence and of the circumstances which tend to attract the same people to move to other countries in the expectation of finding a better life:

> People leave for variety of reasons, and usually as a combination of factors rather than a single [reason]. The social contract has failed temporarily or permanently. Modernization and progress have made casualties of people who held certain customs and traditions too dear. In the chaos of war and post-war reconstruction, populations may have been repeatedly uprooted, and thereby conditioned for a further uprooting—from their country—when the going is hard. Colonialism left a heritage of artificial boundaries and structurally imbalanced economies. The repressive tactics of white minority regimes have made many victims. Most provisions of the Declaration of Human Rights have been violated.[5]
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> The other side of the coin is a series of 'pull factors' which include an increasingly free flow of information from North to South on economic opportunity, and a belief widely shared by beleaguered potential refugees/migrants that their problems will be better understood by the authorities of countries which uphold human rights. The existence of liberalized immigration regulations or refugee quotas must exert some degree of magnetism, particularly in the case of skilled manpower seeking upward mobility, as may the institutionalization of aid close to a troubled country's border.[6]

At least two points which emerge from Prince Sadruddin's Study may be usefully underscored. The first is that the really difficult and urgent problems which international humanitarian law must, in our time, confront are those presented by the phenomena of mass movements of peoples rather than the problems posed by individuals or families, relatively

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[4] U.N. doc. E/CN.4/1503.
[5] *Id.*, sec. 115.
[6] *Id.*, sec. 117.

few in number, fleeing persecution specifically directed against them.[7] The latter type of problems have been dealt with by the traditional law on asylum and by the 1951 Convention on the Status of Refugees.[8] The adequacy of the traditional law and the 1951 UN Convention, when measured against the task of mitigating the human suffering involved in coerced mass movements, and of regulating and balancing conflicting state interests engaged by such movements, must seem open to substantial doubt. A second point worth noting is perhaps obvious but nonetheless of fundamental importance: that international humanitarian law must concern itself not only with the stage where people have in fact begun to move *en masse* across national frontiers, but also with the antecedent stage where governmental acts are taking place in the state of origin which might be characterized as "refugee-producing" behaviour. The burdens and problems created by massive movements of peoples are of such nature, scope and impact that, realistically, the international community cannot expect to prevent or regulate them with any success if it focused simply upon the "refugee-receiving" countries. Put most briefly, both causes and effects must be addressed by those who believe that legal standards and legal controls have a significant role to play in dealing with massive forced movements of people.[9]

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[7] *See, e.g.,* Executive Committee of the High Commissioner's Programme, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx,* U.N. doc. EC/SCP/16/Add.1, 17 July 1981; International Institute of Humanitarian Law (San Remo), *Report of the Round Table on the Problems Arising from Large Numbers of Asylum Seekers* (25 June 1981); *International Cooperation to Avert New Flows of Refugees,* Report of the Secretary General, U.N. doc. A/36/582, 23 October 1981; G.J.L. Coles, Problems Arising from Large Numbers of Asylum-Seekers: A Study of Protection Aspects, Background Paper by the International Institute of Humanitarian Law (San Remo) (June, 1981).

[8] Done at Geneva on 28 July 1951; text in 189 U.N. Treaty Series p. 137; also in COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES, 10 (UNHCR, Geneva, 1979; 2nd ed.) (hereafter, COLLECTION). The 1951 Convention was modified for the great bulk of the states parties to it by the Protocol Relating to the Status of Refugees of 31 January 1967; text in 606 U.N. Treaty Series 267 and in COLLECTION, 40. For a general examination of the 1951 Convention, see Weis, *Legal Aspects of the Convention of 28 July 1951 Relating to the Status of Refugees,* 30 BRIT. YB. INT'L. L. 478 (1953); *id., The International Protection of Refugees,* 48 AM. J. INT'L. L. 193 (1954); and *id., The 1967 Protocol Relating to the Status of Refugees and Some Questions on the Law of Treaties,* 42 BRIT. YB. INT'L. L. 39 (1967).

[9] Particular note may be taken of the initiative on refugees exercised by the Federal Republic of Germany in 1980 and 1981 in the U.N. General Assembly. This initiative consisted, in part, of stressing the need for going beyond the organizing of humanitarian responses to massive refugee flows which have occurred or are occurring, and for establishing "a system of preventive measures for the protection of refugees within the framework of the United Nations." Comments of the Federal Republic of Germany on *International Cooperation to Avert New Flows of Refugees,* Report of the Secretary General, *supra* note 7 at pp. 19-20. The "preventive measures" envisaged here referred to "measures to eliminate the causes of flows of refugees" (*id.,* p. 20).

> "9. Flows of refugees across national frontiers are a special problem in the sphere of international relations. Their causes and effects belong in part to the province of maintaining international peace and security as well as friendly relations and co-operation among States, and in part to the province of promoting and encouraging respect for human rights and fundamental freedoms.

The concept of causality in social processes is of course a complex one. In respect of involuntary mass movements of people, it may very well be that "root causes" relate to "a religious or philosophical explanation concerning the origins and nature of Man and of matter."[10] For purposes of developing and strengthening international refugee law, it seems useful to recognize that a whole series of explanatory statements (i.e., statements about the relationships of events) can be made about mass movements (as about any social process), from the most abstract to the more specific and concrete, from "ultimate causes" to more "proximate causes." International law concerning refugees must deal with the latter and recognizes what historical experience has abundantly and tragic-

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The debate at the thirty-fifth session of the General Assembly on item 122 showed that the vast majority of States see causes of flows of refugees as being, on the one hand, certain forms of conduct by States and, on the other, natural disasters and similar unforeseeable emergency situations beyond the control of States.

"10. From the conceptual and the institutional point of view it is important that ways and means be found, in conformity with the Charter of the United Nations, of coping with refugee problems even before they begin to occur. The ever-increasing number of refugees, particularly in Third World countries, demonstrates quite clearly that steps to avert flows of refugees must in the future be directed at their root causes." (*Id.*, p. 21)

The Observations of the Australian Government (*id.*) also stressed the necessity of examining root causes of mass flows:

"Australia believes that a useful and essential first step in determining what further international measures are required to respond adequately to the present situation is to ascertain what are the causes of the mass flows..." (*Id.*, p. 5)

The need for a comprehensive and integrated view that would encompass both causes and effects and that would project as appropriate objectives not only mitigation of suffering and solution but also prevention of refugee flows, is well stressed in the *Conclusions of the IXth Round Table on Current Problems in International Humanitarian Law: Physical Safety, the Activities of Refugees and National Security* (San Remo, 7-10 September 1983) Int'l. Inst. of Humanitarian Law. Useful excerpts include:

"(1) in order to deal adequately with a refugee problem, including such of its manifestations as affect physical safety and national security, it is necessary to deal with the problem *as a whole.* This entails dealing with *causes, manifestations and solutions, and understanding the interrelationship of these basic aspects;*

. . . .

(3) *the issue of the responsibility of the country of origin for a refugee situation should be a fundamental element in determining the appropriate overall response, particularly in regard to a durable or permanent solution.* It would be *a grave distortion of the purposes and principles of refugee law, rightly conceived, to see them as unrelated to general issues of human rights and humanitarian law and to the responsibilities of statehood generally.* Obligations in regard to a refugee problem, including those relating to the eventual obtaining of conditions necessary for a satisfactory solution, may devolve also on the refugees themselves and on the country of asylum or refuge, as well as on other States, and on the competent international organizations;

. . . .

(6) *In a general scale of values and priorities, the avoidance of conditions which could give rise to refugee situations should be considered as the first humanitarian priority.* The question of preventive measures, while difficult and complex, requires continued urgent and careful study by the international community, particularly in the context of improved international co-operation to avert, or to put an end to, such occurrences as the grave and systematic violations of human rights, and breaches of the peace; ...." (Underscoring supplied).

[10] *See* Coles, *supra*, note 3 at p. 15.

ally documented: certain governmental policies and acts lead to people finally leaving their homes and country.

What are the basic policy issues with which international law must concern itself during this antecedent or pre-exodus stage? One way of approaching this question is by thinking in terms of claims and countering claims being asserted by the population and the government of a potential state of origin and the governments of other states, potentially recipients of refugees.

The relevant demands that peoples everywhere assert vis-a-vis their own governments may be summed up as demands for the human values most commonly known as basic human rights. The enshrining of these universal claims into legal standards and obligations applicable in respect of sovereign states has been a major trend of modern international law.[11] The United Nations Declaration and Covenants on Human Rights,[12] the European Convention[13] and the American Convention on Human Rights[14] are only the most obvious indications of this trend, which is eventually the bringing into the province of international law what were, and still primarily are, matters of internal constitutional and administrative law. The contraposed claims that sovereign states typically make is to broad competence to control and protect the basic components or bases of state power—territory, population and decision-making structures and institutions. The legitimacy of these state claims appears implicit in the very notion of international law as a law *among* nation states; it is made explicit in the territoriality principle of jurisdiction and in its companion principle of jurisdiction on the basis of nationality. These claims are of special importance to new and developing states, the great bulk of which have only fairly recently emerged from the condition of colonial dependency. These new or young states typically must devote their energies to modernizing their community and economy, to consolidating and developing a sense of national identity and loyalty among frequently diverse ethnic or racial or religious groupings, in short, to building a modern nation state. There is special poignancy in the fact that many, perhaps most, of the mass exoduses which have occurred in the last forty years or so have been from developing states or have been occasioned by the social and political upheavals and military hostilities which have frequently attended the transition of territories from colonies into independent states.

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[11] For analysis and documentation of this trend, see MCDOUGAL, LASSWELL AND CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

[12] Texts in COLLECTION, pp. 99-138.

[13] European Convention for the Protection of Human Rights and Fundamental Freedoms; signed in Rome on 4 November 1950, and Protocols Nos. 1 through 5, signed in Paris and Strasbourg on various dates from 20 March 1952 through 20 January 1966; texts in COLLECTION, pp. 274-300.

[14] Also known as the "Pact of San Jose, Costa Rica," signed on 22 November 1969; text in COLLECTION, p. 207.

Viewing the contraposed demands for human rights, and for protection of state interests within the framework of an international law applicable to potential sources of refugee flows, one fundamental point needs to be made, it is submitted. And this is that legal norms found both in many multilateral conventions and in general international law forbid precisely the gross, widespread and systematic violations of fundamental human rights which have in the past precipitated or materially contributed to massive cross-border flows of peoples desperately seeking a more bearable life, a more human quality to existence.[15] Thus, international law does establish standards for appraising in legal terms the behavior of states of origin which generated the refugee flows. Put in somewhat different terms, international law concerns itself not only with the *effects* (as we shall see shortly) but also with the *causes* of mass refugee flows. International refugee law, in this initial phase, may be seen to be prophylactic and preventive in its orientation and to be one with the international law of human rights.

[15] The Guidelines for the conduct of states formulated by the Federal Republic of Germany in its Comments on *International Cooperation to Avert New Flows of Refugees,* (*supra,* note 9) included the following:

"Guideline 6: The principle that no State shall compel by the threat or use of force elements of its population to leave its territory, thereby imposing burdens on other States.

"Guideline 7: The principle that no State shall through administrative measures deprive elements of its population of the minimum political, economic, social and cultural requirements for their existence, thereby compelling them to leave the State and imposing burdens on other States.

"Guideline 8: The principle that no State shall take administrative measures discriminating against elements of its population on account of nationality, ethnic origin, race, religion or language, thereby compelling them to leave the State and imposing burdens on other States.

"Guideline 9: The principle that all States seek to achieve a domestic political, economic and social order which does not compel any element of the population to leave the State." (*Id.,* pp. 23-24)

In its Observations on the same subject, the U.S. Government stated that it "consider [ed] that *potential sending States have the following obligations* relevant to the movement of persons across national boundaries:

. . . .

(c) To avoid policies and practices that would cause significant elements of the population to flee to other countries, i.e.:

(i) Refraining from political, economic or social discrimination against elements of the population within a country on the basis of ethnic, religious, racial, linguistic or economic characteristics;

(ii) Refraining from arbitrary and forced expulsions of persons from a country;

. . . .

(f) To respect the immigration laws, relating to entry, of other States; specifically, no State should instigate flows of refugees from its territory into that of another State against the will of the receiving State;

(g) To refrain from use of refugee flows to cause instability or other harm to other States; . . . ." (Underscoring supplied).

8. *It is the opinion of the United States Government that all of the above listed obligations on States are explicitly or by clear and strong implication contained in existing customary or conventional international law.* Nevertheless, the practice of some Governments in recent years inescapably indicates a need for the State Members of the United Nations to review, reaffirm and, if necessary, augment the body of international law dealing with the obligations of States as they affect the creation of new flows of refugees." (*Id.,* p. 39; underscoring supplied).

The fact that the available means for enforcing observance of human rights standards by sovereign states in respect of their own people remain limited in scope and primitive in organization, should not detract from the importance of the above point. It has sometimes been suggested that for the international community to address the problem of causes of mass refugee movements, is to grapple with an intractable political problem, for which existing institutions (e.g., UNHCR) charged with purely humanitarian tasks have no particular competence. It may be true that in subsequent time phases where massive refugee flows are actually taking place or have just ceased, allocation of blame and vigorous condemnation of human rights violations in the state of origin may, as a pragmatic matter, impede the search for solutions whether temporary or durable. If so, however, it would probably be equally true that to speak of rejection of asylum-seekers at the frontier or of their expulsion back to the state of origin as a breach by an adjoining state of an international legal duty of *non-refoulement* may, in some instances, be counterproductive in the search for solutions. The level of willingness of states which happen to be situated right next to a state of origin to observe the duties of *non-refoulement* may well significantly decrease if states of origin consistently escape any responsibility for the production of refugees. The rhetoric of international law must be exercised in a balanced manner.

(2) *Mass Flows in Process: International Law and the Responses of Adjoining and Third States.*

We would consider next the second principal time phase where an involuntary mass outflow of people has begun and is taking place from the state of origin. The mass flow triggers off a whole series of responses from an adjoining state or country of first contact, from third states in varying degrees removed from the area of immediate flow, and from international organizations both governmental and non-governmental.

The people streaming pell-mell across the frontier are in effect asserting a claim or demand, in the name of humanity, to entry and refuge and relief. What was, in the preceding time phase, a demand addressed to their own government for respect for basic human rights becomes, at this time phase, a demand addressed to the adjoining or recipient states. This is straightforward enough.

The state of origin may present a more ambiguous posture. Its military or police forces may be actively pursuing the fleeing population and seeking to intercept them and to prevent their exit. The state of origin might, on the other hand, seek to regularize and facilitate, if not deliberately to bring about the outflow; it might, in other words, have adopted a deliberate policy of expelling a portion of its population which it regards as undesirable from a long-term viewpoint, or of permitting or

even encouraging the departure of a dissatisfied ethnic, economic or political minority. Illustration of these situations—where the outflow of people is in effect consented to, perhaps promoted, by the state of origin — is offered by the outflow of many thousands of Cubans into the State of Florida in the United States in 1980, in ships and craft of all kinds and sizes. The sudden and mass outflow could have taken place only with the approval, tacit or otherwise, of the Castro Government. The media reports indicated that the people who flooded in included many common criminals released in droves from Cuban prisons and those who could not or would not work in the socialist economy of Cuba.[16] Further illustration is perhaps offered by the agreement entered into by the Socialist Republic of Vietnam with the UNHRC in 1979 providing for the orderly departure and resettlement of persons anxious to leave Vietnam. By the end of October 1983, the beneficiaries of this orderly departure programme numbered 50,345 people who thus did not have to join the boat-people.[17] It is sometimes supposed that the presence, express or implied, of consent on the part of the state of origin to the mass exodus somehow invalidates, or at least weakens, the humanitarian claims of refugees to entry and relief. It may be submitted, with diffidence, that what is relevant from viewpoint of legal policy is the nature and degree of the governmental coercion or compulsion which precipitated the mass exodus. Where generalized coercion of significant intensity is in fact present, the express or tacit consent of the state of origin to the actual departure of the refugees—which signals precisely the success achieved by the expelling government — should not be relevant in evaluating the claims of refugees. What made the case of the mass exodus from Vietnam so problematical was the fact that some of the governments in the region entertained substantial doubts as to the reality or degree of the governmental compulsion that is supposed to have impelled the mass exodus. Do presumptions of human rights deprivations arise by reason of the Marxist ideology of a successor state or government? Upon the other hand, where people flee from the anticipated establishment of a socialist or other totalitarian economy and government, are such people appropriately regarded as "economic migrants" merely, not entitled to the status of refugees?

The adjoining state or country of first contact may allow the mass of people in, or may seek to repel them, or may allow some in and repel others. The actual treatment or reception given to a continuing flow of people may well differ over time and is a function of multiple factors. The volume, rate and duration of the mass inflow help shape the response

[16] The position taken by the U.S. Government expressed in, among other places, its Observations on the question of *International Cooperation to Avert New Flows of Refugees, supra* note 11, was that Cuba was under a legal duty to refrain from expelling portions of its own population and in particular from using refugee flows to destabilize or otherwise inflict prejudice upon another country.

[17] *See* REFUGEES—News from the UNHCR, No. 24—December 1983, p. 12.

of the state of first contact. So do the expectations of the government of such state about its own capacity to assimilate the refugees and about the willingness of third states to accept some or all of the refugees for resettlement in their territories. It will be recalled that Thailand ceased repelling the flood of Kampuchean and Vietnamese refugees, and that Malaysia relaxed the vigor and ruthlessness with which she repelled and forcibly towed out to sea boatloads of Vietnamese refugees, after the 1979 U.N. Conference in Geneva on Indo-Chinese refugees had accelerated resettlement of such refugees in other parts of the globe. The perceived ability of the international community to extend prompt and organized and adequate assistance in the handling, housing, feeding and in general caring for the people flowing in, clearly influences the willingness of receiving states to grant at least temporary refuge. The ethnic or cultural affinities, or lack thereof, of the refugees with the indigenous population of the adjoining state, and in general, the degree of sympathy felt in the adjoining state for the political cause or plight of the refugees, do have an impact upon the response of that state.

In the course of responding to the mass inflow, the adjoining or rereceiving state is in effect asserting a right to determine for itself to whom entry into its territory is to be granted. In essence, this is a claim to authority to protect its territorial integrity and political independence and all the related processes that we call security. That the legitimate and the fundamental nature of this claim to jurisdictional competence is recognized in international law does not need documentation. That extravagant claims have in the past been made by states in the name of protection of security, should not prevent us from recognizing that the security of a state has many aspects and that military invasion is not the only way by which that security may be seriously threatened. It is also important to note that this is the same claim that third states, more or less distantly located from the point or zone of flow, assert. Such states are frequently concerned about their own absorptive capabilities and the protection of their own social and economic standards from erosion, especially in periods of economic recession. The ability of large groups of people from a very different cultural and social environment to integrate into the community and economy of a potential state of resettlement, cannot be casually assumed.

How are the claims of peoples in a massive exodus for survival and relief made in the name of humanity, and the contraposed claims of receiving and potential receiving states for protection of their own territories and populations to be accommodated and reconciled within the framework of international humanitarian law? Are there any legal obligations established by international law to grant entry and temporary refuge or permanent asylum in situations of massive influx? It is proposed to deal with these general questions by examininng however briefly four areas:

(a) *non-refoulement* and temporary refuge, (b) permanent settlement in the state of first refuge, (c) resettlement in third states, and (d) repatriation.

Non-refoulement may be very quickly described as prohibiting both rejection at the frontier and expulsion of asylum seekers where the effect thereof is to return the asylum seekers to their country of origin where real and substantive dangers to life, physical integrity or liberty await them. In respect of situations *not* involving massive flows of refugees, it seems an easy and reasonable generalization that *non-refoulement* has become a norm of customary international law at least in the non-Socialist part of the globe.[18] In situations marked by mass inflows, the legal status of *non-refoulement* has sometimes been regarded as open to debate. The 1967 U.N. Declaration on Territorial Asylum[19] might be read as suggesting that mass influx situations constitute a proper exception to the *non-refoulement* rule. Article 3 of the Declaration reads as follows:

> 1. No person referred to in Article 1, Paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.
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> 2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, *as in the case of a mass influx of persons.* (Underscoring supplied)

A comparable provision is found in Article 11(2)(b) of a Comprehensive Draft Convention on Territorial Asylum prepared by Professor Grahl-Madsen.[20] It is our suggestion, however, that the 1967 U.N. Declaration is more appropriately read simply as permitting exceptions to be made to *non-refoulement* for "overriding reasons of national security or in order to safeguard the population." The "case of a mass influx" is properly viewed as illustrating situations which *might* (but need not, necessarily) present such "overriding reasons of national security." Whether or not such "overriding reasons" are in fact engaged in a concrete case

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[18] *Cf.* Goodwin-Gill, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees,* Transnational Legal Problems of Refugees, 1982 MICHIGAN YB. INT'L. LEGAL STUDIES, 291, 304-305. *See also* Feliciano, *The Principle of Non-Refoulement: A Note on the International Legal Protection of Refugees,* 57 PHIL. L. J. 598 (1982).

[19] Adopted by the U.N. General Assembly on 14 December 1967 (Resolution 2312 [XXII]); text in COLLECTION, 57. *See generally,* Weis, *The United Nations Declaration on Territorial Asylum,* 7 CAN. YB. INT'L. L. 92 (1969).

[20] Article 11(2) (b) of Grahl-Madsen's Draft Convention reads:

> "*If* absolutely necessary in order to safeguard the population *in the event of a mass-influx of asylum-seekers,* the provisions of paragraph (1) of this Article [on *non-refoulement*] may be suspended, provided that the agency mentioned in Article 5 has been clearly notified at least one month in advance of this eventuality, and relief in accordance with Article 4 has not been forthcoming or offered on a sufficiently large scale." (Underscoring and brackets supplied).

Text in GRAHL-MADSEN, TERRITORIAL ASYLUM, pp. 190-191 (1980).

of mass inflow of refugees, must be regarded as a matter for specific and empirical inquiry.

Examination of state practice shows that, by and large, states do observe *non-refoulement* and do grant at least temporary refuge in mass influx situations, where they have some assurance of international cooperation and solidarity concerning resettlement of all or part of the refugees streaming in, or at least in respect of the care and support of such refugees. The overall experience in respect of the care and support of do-Chinese refugees, the reception and treatment by Pakistan of about three million Afghan refugees, the treatment accorded by India to the masses of refugees from Tibet in the early 1950's and from East Pakistan in the early 1970's, and the consistent grant of refuge over the years by African states to many millions of African refugees, offer, in our belief, persuasive documentation of the acceptance of *non-refoulement* as a custom or practice in mass refugee flows. There appears nothing to suggest that observance of such custom or practice cannot be projected into the future. Even the most insistent demands of national security are normally met and satisfied by placing the refugees in camps or zones of assigned or compulsory residence away from the frontier area, pending determination of the availability of the more durable "solutions" of resettlement in third countries (or in the state of temporary refuge itself) or voluntary repatriation. While available documentary sources do not readily permit one, at the present time, to determine whether such practice has commonly been accompanied by the element of *opinio juris,* it may be submitted that *non-refoulement* in mass influxes of people is either already a norm of customary international law, or is well in the process of maturing into one.

Asylum understood either as *permanent* settlement in the state of first refuge, or permanent resettlement in a third state, presents quite another matter. Setting aside for the time being the 1951 U.N. Convention on the Status of Refugees, which we shall examine a little later, none of the existing international conventions dealing with refugees even purport to establish an obligation on the part of contracting states to grant durable asylum to refugees. It is widely recognized that no prerogative or interest is guarded more zealously by states than the control of access into their territory. States have not been willing so far to assume a *legal duty* to grant entry even where the conscience of humanity cries out for such entry, preferring to grant such entry as an exercise of *sovereign right* or *discretion.* Thus, the 1967 U.N. Declaration on Territorial Asylum,[21] the 1954 Caracas Conventions on Territorial Asylum[22] and on Diplomatic Asylum,[23] the 1977 Declaration on Territorial Asylum adopted

[21] *Supra,* note 19.
[22] Article 1; text in COLLECTION, p. 264.
[23] Article 2; text in COLLECTION, p. 268.

by the Committee of Ministers of the Council of Europe,[24] the 1966 Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee,[25] and many draft conventions prepared by various bodies of experts and individual academicians,[26] all speak in terms of *the sovereign right* of a state to grant asylum to refugees. The 1969 OAU Convention on Reguees, perhaps the most progressive international instrument of its kind, could only enjoin OAU member states to "use *their best endeavours consistent with their respective legislations*" to grant asylum.[27] The unfortunate 1977 U.N. Conference on Territorial Asylum failed to obtain agreement on a Draft Convention which would have required Contracting States merely to "*endeavour* in a humanitarian spirit *to grant asylum* in [their] territor[ries]. . . ."[28] This most notable reluctance of states to acknowledge an obligation to extend asylum pointed to, so far, applies both to individual refugees and to refugees moving as part of a mass influx.

Only a summary examination can be attempted here of the 1951 U.N. Convention, as supplemented by the 1967 Protocol (which was adhered to by the Philippines in 1981), but perhaps several points may be made usefully. The first is that there is no provision in the Convention which explicitly sets forth an undertaking by or a duty of the Contracting Parties to grant durable asylum to a refugee. What the Convention does lay down in fair detail are the standards of treatment to be accorded to a refugee once he has been granted entry and refugee status.

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24 Paragraph 2; text in COLLECTION, p. 306.

25 Article III(1); text in COLLECTION, p. 203. *See, generally,* Jahn, *The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees,* 27 ZEITSCHRIFT FÜR AUSLANDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT 122 (1967).

26 *See, e.g.,* the International Law Association's 1972 Draft Convention on Territorial Asylum, Article 1(a), text in GRAHL-MADSEN, *supra* note 19, at p. 177; Grahl-Madsen's Comprehensive Draft Convention on Territorial Asylum, Article 1, text in *id.,* p. 186; *Institut de Droit International's* 1950 Resolution on *L'Asile en Droit International Public* (Session de Bath), text in *id.,* p. 133.

It is perhaps well to recall that a sovereign state's prerogative to grant asylum is *not* unlimited under international law; *see, e.g.,* Morganstern, *Asylum for War Criminals, Quislings and Traitors,* 25 BRIT. YB. INT'L. L. 382 (1948); *id.,* The Right of Asylum, 26 *ibid.* 327 (1949), Neumann, *Neutral States and Extradition of War Criminals,* 45 AM. J. INT'L. L. 495 (1951). Green, *Hijacking and the Right of Asylum,* in MCWHINNEY, AERIAL PIRACY AND INTERNATIONAL LAW 124 (1971): Garcia-Mora, *Crimes Against Humanity and the Principle of Non-extradition of Political Offenders,* 62 MICHIGAN L. REV. 927 (1964); and Brooks, *Skyjacking and Refugees: The Effect of the Hague Convention upon Asylum,* 16 HARV. INT'L. L. J. 93 (1975).

27 Article(1); text in COLLECTION, p. 195. The "best endeavours" approach to the question of grant of durable asylum is also found in, e.g., the Carnegie Endowment Working Group's 1972 Draft Convention on Territorial Asylum, Article 1(1), text in *Grahl-Madsen, supra* note 20 at p. 174; the U.N. Group of Experts' 1975 Consolidated Text of Articles, text in *id.,* p. 195.

28 Articles Considered by the Committee of the Whole, Article 1, text in GRAHL-MADSEN, *supra* note 20 at 208. *Compare,* Article 1 of the 1976 Draft Convention on Territorial Asylum prepared by the Special Working Group of Non-Governmental Organizations, text in *id.,* p. 198, which provided that "*A Contracting State shall,* subject to the provisions of this Convention, *grant asylum on its territory to any person entitled to its benefits* who requests it . . ." (Underscoring supplied).

The second is that determination of eligibility under the Convention of any particular person for refugee status is a prerogative and a function of each contracting party from whom asylum is sought, a prerogative and function, however, to be exercised in good faith. Thirdly, the reality and significance of the eligibility provisions of the Convention would seem open to substantial doubt if a contracting party, having determined a person to be eligible under those provisions, were not also obligated in good faith by the Convention to grant that status, and therefore asylum to that same person. The fourth point is that the Convention does not purport to deal at all *with mass movements* of refugees where determination of individual eligibility is not ordinarily practicable, at least not without acceptance of *non-refoulement* as importing a grant of temporary refuge pending completion of such determinations. Another point is that all the conventions, declarations and draft conventions referred to above are later in point of time than the 1951 Convention and would seem substantially pointless if the 1951 Convention were correctly and generally regarded as having established a legal obligation to grant durable asylum. Thus, and this is the modest conclusion here submitted, it is far from clear that the 1951 Convention did establish such an obligation even in respect of individual asylum-seekers not part of a mass flow.[29] What is clear, however, is that no rule of *customary* international law importing such obligation exists at present, for states of first contact as for third states. Realistically, such a customary law norm would be perceived by many as imposing too heavy a burden upon states, certainly at least in respect of mass movements of refugees.

(3) *The Strategic Tasks: Constructing and Organizing Incentives for International Solidarity.*

Looking to the foreseeable future, there appears little basis for supposing that a legal duty to grant durable asylum is likely to develop and emerge. Professor Grahl-Madsen, in his 1975 Comprehensive Draft of a Convention on Territorial Asylum, included provisions requiring, in a mass influx situation, contracting parties to offtake for resettlement in their own territories a certain number of refugees from a country of first refuge. He suggested a ratio based upon the size of the population of the offtaking state: not more than three refugees per one hundred thousand inhabitants.[30] While the spirit and objective of these proposed provisions on in-

[29] Goodwin-Gill, *supra* note 18 at 300 had no difficulty at all in reaching the conclusion that neither the 1951 Convention nor the 1967 Protocol imposes any duty upon a state of first refuge to admit refugees to durable asylum, or any duty upon third states to offer resettlement. *Cf.* Sadruddin Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons,* (1976) HAGUE RECUEIL par. 71. Hyndman, *Asylum and Non-Refoulement—Are These Obligations Owed to Refugees Under International Law?* 57 Phil. L. J. 43 (1982) reached the same position in respect of asylum in both treaty law and customary international law.

[30] Article 4(2); *supra* note 20 at 187.

ternational solidarity are doubtless widely shared, the practical probabilities of such provisions being generally accepted by states do not at present seem large. The size of its population is by itself rarely a meaningful measure of the ability of a state to absorb or support any particular number of refugees. It is noteworthy that Professor Grahl-Madsen's Comprehensive Draft Convention would impose an obligation to accept refugees only upon contracting parties located in the same "major region" as the state of first refuge. Regional solidarity, at least in a region marked by cultural homogeneity, is probably easier to organize than global solidarity. Nonetheless, one must concede that Professor Grahl-Madsen is well ahead of his time and that, for the present and the immediate future, both settlement and resettlement as permanent solutions to problems posed by mass refugee movements must be regarded as voluntary in nature.

For those who share this somewhat depressing estimate of the future but who remain committed to the ideal of enlarging the domain and increasing the effectiveness of international humanitarian law, the submission may be made that one strategic task is to focus upon how to create and support incentives for international solidarity. Put a little differently, the task is how to generate and develop realistic expectations on the part of a country faced with a mass inflow of refugees that the organized international community will indeed and promptly bring to bear effective financial and other material assistance and that the country may expect some benefit from accepting some of the refugees for durable settlement. These are obviously huge topics and only a very few, very tentative and minor statements can be offered for present consideration.

The first is that provision of financial, technical and other material assistance from international organizations and third states should extend *throughout the entire process*—immediately upon or even before initial reception of the refugees, through temporary refuge, and until final settlement and integration into the community and economy of the receiving state or repatriation back to the source state of the original flow.

A second suggestion is that a state granting permanent asylum might be regarded as entitled to pick and choose from the masses of refugees those with skills potentially useful to such state, those likely to be better able to adapt to the new social and economic environment because of cultural or ethnic affinities with the indigenous population, and those likely to contribute to the economic development of the receiving state. The thrust of this suggestion is that states of first asylum should in some measure have, as it were, a right of first refusal in respect of the particular refugees to be given durable asylum in consideration of its grant of such asylum. Refugees without useful professional or occupational skills, and those with special cultural problems, can perhaps be brought directly under the care of the UNHCR and distributed among several states of re-

settlement. Such distribution should seek to ensure that no single state becomes exposed to special risks of refugees subsequently becoming a dissident economic or cultural minority. In most general terms, the distribution should be managed so as to reduce to a minimum the potential adverse impact of the refugees upon the military security, social and political fabric and economic resources of the various receiving states. One should perhaps hasten to add that this is not to suggest that the state of first refuge should be allowed, so to speak, to take all the cream for itself. A judicious mix of the promising with the not so promising refugees is probably essential, if third states are not to be left with only unpromising residuals to choose from, which would almost ensure their rejection by the third states. A related thought is that refugee processing centers under UNHCR aegis or support could devote effort to re-training of refugees and to equipping the unskilled with new skills which should make them more attractive and less burdensome to receiving states. The Refugee Processing Centre in Bataan, Philippines, is apparently already engaged in this effort.

II. Mass Flows of Refugees In Times of Armed Conflict

We come to situations where the events precipitating the mass outflow of people are events of war. The reference here is to armed conflict which has reached a certain degree of intensity and a certain geographic spread. Characterization of the military hostiilties as either international or internal by legal technicians on the basis of who the parties to the conflict are, is of secondary importance, however. Armed conflict may produce mass refugee movements, whatever the legal character of the conflict.[31]

Here, as in respect of the first type of refugee-generating behaviour, i.e., the widespread and persistent denial of basic human rights, it is relevant to note that the international communiy has succeeded in establishing fundamental norms regulating recourse to armed force, the second type of refugee-producing behaviour. The most fundamental of these norms distinguishes between lawful and unlawful recourses to force in the relations of states.[32] Clearly, refugee flows may be a result of the physical applica-

[31] There are, it is reported, more than 100,000 Filipino refugees in Sabah who fled from Mindanao and Sulu to escape the fighting between the Moro National Liberation Front (MNLF) guerrillas and Philippine government troops. Mahoney, *Finding Refuge in Sabah,* in Refugees: News from the UNHCR, No. 24, December 1983, p. 8. Most of these refugees are Muslims and are said to be well-treated by the Malaysian government authorities.

The situations referred to in the text should be distinguished from situations involving persons admitted as refugees into the territory of a state which subsequently becomes a belligerent party vis-a-vis the state of origin of the refugees; as to these latter situations, see Patrnogic, *International Protection of Refugees in Armed Conflcts,* Annales de Droit International Medical (July, 1981) discussing Articles 44, 70 and 26 of the 1949 Geneva Civilians Convention and Articles 73-74 of Additional Protocol I of 1977.

[32] *See* McDougal and Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, chap. 3 (1961), Falk, Legal Order in a Violent World (1968) examines some basic issues.

tion of military force in which both the unlawfully attacking belligerent and the lawfully defending belligerent engage. To the extent, however, that international law forbids the resort to force, it concerns itself to that same extent with state activity that impels mass flows of refugees.

(1) *Legal Protection of Refugees in Combat Situations and in Belligent Occupation.*

The parties to the armed hostilities, under the ancient claim of military necessity, reciprocally attack each other's bases of power in the effort to compel the other to submit to certain political demands.[33] In this context of active combat, the competing principle of humanity embodied in the law of war, or international humanitarian law strictly so called, manifests itself as a demand for immunity from direct attack for civilians who do not constitute significant elements of belligerent power. The 1949 Geneva Civilians Convention[33a] and the two 1977 Additional Protocols[34] in explicit terms forbid belligerents to attack civilians as such, whether, one may add, the civilians are *in situ* in their ordinary residences or in zones of safety established under the Geneva Civilians Convention, or in flight. Mass flight of the civilian population may be the result of deliberate application of violence against them or their homes and food supplies, in disregard of the basic norms of the law of war, or the result simply of an urgent desire of civilians to get as far away from the theater of hostilities as possible. It seems worthy of note that international law concerns itself with the protection of civilian refugees fleeing from hostilities even though no border is crossed and although such flight takes place entirely within the territory of one of the parties to the armed conflict.

It also bears mention that international law concerning the conduct of armed conflict prohibits a belligerent power who has been successful in occupying enemy territory, from forcing out the people of such territory and creating thereby new refugee flows. Both the 1949 Civillians Convention[35] and Additional Protocol I of 1977[36] forbid a belligerent oc-

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[33] *See* MCDOUGAL AND FELICIANO, *supra* note 32 at pp. 520-530; and more generally, Migliazza, *L'Evolution de la Reglementation de la Guerre a la Lumiere de la Sauvegarde des Droits de l'Homme,* 137 HAGUE RECUEIL 141 (1972).

[33a] Articles 27 and 31-34.

[34] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), Articles 48-51 (ICRC, Geneva, 1977).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), Articles 4 and 13-14 (ICRC, Geneva, 1977). In this connection, see Veuthey, *Les Conflicts Armés de Caractere Non-International et le Droit Humanitaire,* in CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON U.N. LAW AND THE LAW OF ARMED CONFLICT, 179 (Cassese, ed., University of Pisa, 1975) and Kalshoven, *Applicability of Customary International Law in Non International Armed Conflicts* in *id.,* 267.

[35] Article 49, last paragraph.

[36] Article 85 (4) (a).

cupant from deporting or otherwise transferring or displacing all or part of the population of the occupied territory whether within or outside such territory. The practices during World War II of National Socialist Germany in occupied Europe, and some more recent actions of Israel in respect of occupied Egyptian, Jordanian and Syrian territories, underscore the amount of human suffering involved in converting the populace of occupied territory into masses of refugees through mass expulsion or deportation.[37]

Where the civilians fleeing from approaching combat or from belligerent attacks upon them, do cross the frontier into neutral territory, the claim for refuge and relief in the name of humanity is then addressed to the neutral state. It is clear that the neutral state may give refuge and succour to the fleeing civilian nationals of one belligerent without the other belligerent being entitled to regard such refuge as an unneutral or unfriendly act.[38] This conclusion is in line with spirit of the provisions of Article 132 of the 1949 Geneva Civilians Convention which encourage a neutral state and a belligerent party to enter into agreements, during hostilities, for the release to and accommodation in the neutral country of certain classes of civilian internees detained by the belligerent party — the wounded and sick, children, pregnant women, mothers with infants and those who have been detained for a long time.[39] Moreover, Hague Convention No. 5 of 1907 concerning Rights and Duties of Neutral Powers and persons in War on Land authorizes (but does not obligate) a neutral state to receive and grant refuge to *troops*—whether as individual members of armed forces or *en masse*—of one belligerent seeking to avoid capture by the enemy. The same Convention—which is expressive of customary law — of course requires the neutral power to disarm and intern such troops, for the duration of the war, as far from the war theater as possible and in this manner takes account of the military interests of the opposing belligerent.[40] Interestingly enough, the interning neutral power may collect the costs of accommodation and support of the refugee troops from their government.[41]

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[37] See the *Report of the Working Group on Mass Expulsion (San Remo, 16-18 April 1983)*, Int'l. Inst. of Humanitarian Law.

[38] *See* MCDOUGAL AND FELICIANO, *supra* note 32 at 448.

[39] See also Articles 109-117 of the 1949 Geneva Prisoners of War Convention which encourage belligerent parties to enter into agreements with neutral states providing for accommodation in neutral territory of prisoners of war who are seriously wounded or sick or who have undergone a long period of captivity. These agreements may also provide for direct repatriation of such prisoners of war.

[40] Article 11, Hague Convention No. 5 of 1907. See STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 386 (1954); GREENSPAN, THE MODERN LAW OF LAND WARFARE, 564-9 (1959); and materials collected in 11 WHITEMAN, DIGEST OF INTERNATIONAL LAW 366-381 (1968).

[41] Article 12, Hague Convention No. 5 of 1907. For discussion, see Freeman, *Non-Belligerent's Right to Compensation for Internment of Foreign Military Personnel*, 53 AM. J. INT'L. L. 638 (1959).

Does international law lay *a duty* upon the neutral state to grant refuge either to fleeing civilian masses or to troops seeking to avoid capture by the enemy? The submission may be made, again with diffidence, that the rule of *non-refoulement* should be deemed applicable by analogical extension, where rejection at the frontier or expulsion by the neutral power of the civilian refugees would in fact place them in substantial danger of death or serious injury. The same submission may, with even more caution, be made in respect of soldiers fleeing capture by the enemy: for the neutral state to refuse entry to such troops would be to compel them either to submit to capture by, or to give battle to, the presumably superior pursuing belligerent's forces. The first will impose a disadvantage upon the belligerent party to whom the refugee troops owe allegiance and which could constitute an unneutral and hostile act; the second will expose the refugee troops to substantial and unnecessary danger of death or maiming and thus directly engage the principle of humanity.

One problem that must be noted is that of armed attacks upon camps and other facilities for the handling and care of refugees given at least temporary refuge either by an adjoining neutral state or a belligerent occupant of enemy territory. The deliberate bombardment of refugee camps and the dreadful massacres perpetrated within them by one or another party to the conflict—sometimes made possible or easier by a sovereign or occupying power exercising less than determined vigilance and high dedication to the security and welfare of refugees—mark new milestones in the deepening cycle of terror and violence in the Middle East. The prevention of such occurrences must be recognized as a minimum legal duty of the state or authority granting temporary refuge. One submission here made is that that duty of prevention is likely to be more effectively carried out if an organ of the United Nations like the UNHCR, or the International Committee of the Red Cross, assisted the territorial sovereign or belligerent occupant by extending international protection to refuge camps. Consideration should also be given to the development and elaboration of a protected status for refugee camps by international agreements. The zones of immunity or protected localities provided for in the 1949 Geneva Civilians Convention[42] and the Additional Protocol I of 1977[43] may well offer an appropriate model.

(2) *The Matter of "Solution": Belligerent—Neutral Agreements and Voluntary Repatriation.*

As in non-warlike contexts, the question of "solutions" arises immediately upon the beginning of mass flows of people fleeing across state

[42] Articles 79-135 set forth detailed regulations for the treatment of internees and the establishment of internment camps.

[43] Articles 59 and 60, dealing, respectively, with "non-defended localities" and "demilitarized zones." See, in this connection, the "Draft Principles on the Prohibition

boundaries from the terror and destruction of war. The initial point should perhaps be made here that, by and large, the belligerent party in whose territory military operations are taking place, has a very real interest in the refugees—its own people—finding protection and relief for the duration of the war. Such belligerent party may well take a lesson from both the 1949 Geneva Civilians Convention and Hague Convention No. 5 of 1907 and enter into agreements with adjoining neutral states for the reception and grant of refuge to portions of its civilian population while the war continues. Such voluntary agreements between the belligerent state of origin and the receiving neutral state could cover a wide range of matters—including the treatment of refugees, the location and security of refugee camps and installations, the reimbursement of the costs of food, clothing, shelter, medical care and so on incurred by the neutral state and, perhaps most importantly, the repatriation of the refugees after the war. The writer is personally unaware of any historical example of such a belligerent-neutral agreement.

Even in the absence of such an agreement, however, it might be supposed that upon the cessation of armed conflict, the repatriation of the refugees would be the obviously appropriate durable solution. Consideration of permanent settlement in the state of refuge or resettlement in third states should not ordinarily be necessary. Recall the millions of Bengali refugees who fled into Indian territory during the Indo-Pakistan war which accompanied the secession of East Pakistan and the establishment of a separate Bengali state. India made clear from the outset that settlement of the refugees in India was out of the question. At the end of the fighting, the refugees were repatriated to what had just become the new Republic of Bangladesh.[44]

History tells us, however, that the territory from which the refugees fled may not end up with the same sovereign, or the same kind of government, which had held title and control at the beginning of the conflict. When this happens, the refugees might not wish to go back after the end of the war; or the new territorial authority, the victorious belligerent, might not want the refugees back having, perhaps, plans to settle or resettle the territory with its own people, or with people who identify more readily with the new political order. The history of the Palestinian refugees driven from their homes by the successive Arab-Israeli wars offer some documentation of the kind of fierce and intractable problems that such situations

of Military and Armed Attacks on Refugee Camps and Settlement," particularly Principles 16 and 17, in Executive Committee of the High Commissioner's Programme, *Report of the Eighth Meeting of the Sub-Committee of the Whole on International Protection,* UNDoc. No. A/AC.96/629, 11 October 1983, p. 9.

[44] A brief account is offered in Coles, G. J. L., *Temporary Refuge and the Large-Scale Influx of Refugees,* in Report on the Meeting of Expert Group on Temporary Refuge in Situations of Large-Scale Influx, pp. 7-9 (Geneva, 21-24 April 1981) Executive Committee of the High Commissioner's Programme, EC/SCP/16/Add.1, 17 July 1981.

may visit upon a long-suffering world. Where the refugees seek to escape not only the armed conflict but also, and perhaps more importantly, the kind of life they had therefore lived in their own country, voluntary repatriation may again not be feasible. The case of the Hungarian refugees who streamed out of the Peoples' Republic of Hungary during the short-lived 1956 revolution, illustrates this point. The dispatch with which the bulk of the refugees were resettled from Austria and Yugoslavia in various Western European countries and in the U.S.A. is worth recalling,[45] even if it was probably in part the result of cold-war strategy.

A general question of legal policy which must be considered, regardless of the specific kind of events which impelled the mass outflow of people, is whether repatriation must always be *voluntary* repatriation on the part of the refugees. Clearly, this question is fraught with difficulties and only very provisional submissions can be made. Where the circumstances which lead the refugees to refuse repatriation after the end of a war are of such a nature as reasonably to indicate that the refugees would have left their homeland, even without a war, had those circumstances existed from the beginning, and rendered the rule of *non-refoulement* applicable, it is submitted that the state of refuge may not compulsorily repatriate the refugees. A contrary conclusionn would seem to reduce the *non-refoulement* rule substantially to naught. The state of refuge must thus determine the degree of reality and imminence of the serious dangers pleaded by the asylum-seekers when they resist repatriation as when they first sought refuge. The requirements of humanitarian law are the same and as insistent in one as in the other context.

It is said that all persons, including refugees, have a right to return to their country of nationality.[46] Analytically, this would mean that the state of origin has a duty to accept its nationals. Still on an analytical plane, this duty would import a further duty to refrain from the kind of gross and systematic human rights violations which we earlier referred to as "refugee-producing" behaviour and which may be expected to drive the returning nationals to flight once more. On a less abstract and more pragmatic level, repatriation must be voluntary repatriation on the part of the receiving state as well. Repatriation constitutes one nexus between the international law of human rights and international refugee law.

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[45] Goodwin-Gill, *Non-refoulement and the Concept of Temporary Refuge in Situations Involving Large Numbers of Asylum-seekers,* 3 (mimeo., August 1981), offers some numbers.

[46] Universal Declaration of Human Rights, Art. 13(2): "Everyone has the right to leave any country, including his own, and to return to his country."

International Covenant on Civil and Political Rights, Art. 12(4): "No one shall be arbitrarily deprived of the right to enter his own country."

American Convention on Human Rights, Art. 22(5): "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it."

III. Refugees from Natural Disasters.

We consider finally those situations where the events impelling masses of people to flow across national boundaries are natural disasters. There does not appear to be many instances in recent history of upheavals of nature so severe and widespread in their consequences as to force people to flee from their country of normal residence. Sometimes, forces of nature may combine with wars and political disturbances to propel people across frontiers. The prolonged, severe drought that struck sub-Sahara Africa, especially around the Horn of Africa and which appeared to accelerate the phenomenon referred to as "desertification" in this region, is reported to have caused peoples to leave their homes and migrate in search for water and food supplies and land areas more amenable to agriculture. In this process, the African peoples in flight have crossed ill-defined boundaries inherited from former colonial sovereigns. In principle, if the effects of the upheavals of nature are not prolonged or permanent, or can be substantially mitigated by prompt and organized national or international action, the problems presented by mass population movements may be relatively manageable.[47]

The question may here again be posed: are there international legal principles or norms that apply specifically to the above situation? Insofar as the country stricken by the natural disaster is concerned, perhaps the most that can be said is that general international law concerning respect for basic human rights is operative to require governments to exert their utmost to mitigate the resulting suffering and deprivation of their own populations. Here perhaps is a very clear case for international solidarity being organized quickly and with a minimum of political complications. If enough relief assistance can be organized with sufficient promptitude and efficacy within the stricken country's own territory, cross-border mass movements of refugees might perhaps even be forestalled or reduced to a minimum.

Does international law impose any duty upon neighboring states to grant entry and refuge to peoples fleeing from natural disasters and their consequences? Examination of collections or series of treaties has not disclosed any international agreement or convention expressly establishing such a duty. If there is no treaty law on the matter, is there perhaps a rule or principle of general customary law embodying such a duty? At this juncture, it would seem appropriate to recall the immemorial rule of customary international law giving vessels in distress the right to enter the territorial waters of any coastal state and there to make the nearest

[47] See the helpful Observations submitted by the Office of the U.N. Disaster Reilef Co-ordinator (17 March 1981), Report of the Secretary-General, *Supra*, note 7 at p. 42.

port.[48] The duty of the coastal state is to receive the vessel in distress and to relieve that distress by enabling the vessel to become seaworthy again, or to revictual and refuel, before sending the vessel out to sea again. The textwriters recognize that the relevant distress may be that of a vessel or of its crew and passengers. Moreover, international law requires the ships of all nations to rescue any persons in distress at sea and to disembark such persons at the next port of call. This ancient rule has recently been invoked by the Executive Committee of the UNHCR's Programme in respect of the so-called "boat people" or asylum-seekers from Indo-China found in distress on the high seas.[49] If such be the rule of customary international law in respect of vessels and crew and passengers in distress, it seems a modest suggestion to make that the same general organic principle that human distress should be relieved and human life should be saved is applicable in respect of peoples forced to leave their homeland by natural disasters. This may be seen to be the same general principle which underlies the rule of *non-refoulement* applicable in respect of people fleeing from systematic human rights violations and from the destruction of war. The nature and scope of a duty to grant entry and succour to peoples in distress must, of course, bear some relation not only to the reality and degree of the refugees' distress as it were, and to the extent to which at least temporary refuge is infact essential for relieving and mitigating that distress. Recognition of such a duty must also take account of the indigenous resources of the state of refuge and of the kind and amount of assistance made available by international organizations and third states. Where the inflow of destitute and starving foreigners is sufficiently massive and prolonged, it is idle to pretend that the state of refuge will not be confronted with very real security problems.

It will perhaps have been noted that the principle of humanity is commonly not found standing alone in international law. In contexts relating to management of armed conflict, the principle of humanity is con-

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[48] For documentation, see, e.g., MCDOUGAL AND BURKE, THE PUBLIC ORDER OF THE OCEANS, 110 (1962); COLOMBOS, THE INTERNATIONAL LAW OF THE SEA, sec. 353, pp. 329-330 (6th Rev. ed., 1959); JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 194 (1927); 1 SCHWARZENBERGER, INTERNATIONAL LAW 197-8 (3rd ed., 1957).

[49] Conclusion No. 23 (XXXII) *Conclusions on the International Protection of Refugees,* adopted by the Executive Committee of the UNHCR's Programme, entitled "Problems Related to the Rescue of Asylum Seekers in Distress at Sea" (1981) reads in part:

> 1. It is recalled that there is a fundamental obligation under international law for ships' masters to rescue any persons in distress at sea, including asylum seekers, and to render them all necessary assistance. Seafaring States should take all appropriate measures to ensure that masters of vessels observe this obligation strictly.
>
> . . . .
>
> 3. In accordance with established international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied in the case of asylum seekers rescued at sea. . . ."

traposed to the principle of military necessity and the resulting compromises generally accord greater weight to the latter principle: the humanity principle forbids only such destruction of values as is irrelevant to or unnecessary for the achievement of a specific belligerent purpose.[50] In other contexts, the principle of humanity is balanced by principles of state jurisdiction: here, greater scope is accorded to the former principle, at least in situations of clear and imminent deprivations of life and well-being where *non-refoulement* is applicable. These principles may be seen to be at once competing and complementary, and the development both of general international humanitarian law and of international refugee law may be thought of as constituting a continuing search for lines or areas of stable equilibrium between the humanity principle and other relevant but competing principles. The location of these lines or areas may be expected to differ from context to context, from age to age.

[50] See Protocol I of 1977, *supra* note 34, e.g., articles 35(2); 51(4) (a) and (b); 51(5) (g); and 52(1) and (2); MCDOUGAL AND FELICIANO, *supra* note 32 chap. 6. *Compare* SCHWARZENBERGER, THE FRONTIERS OF INTERNATIONAL LAW, chap. 11 ("Functions and Foundations of the Law of War") (1962). Dr. Schwarzenberger contraposed "standard of civilization" and "necessities of war" and sought to classify rules of warfare on the basis of the extent to which the one purports to limit the other; he came up with four sets of rules of war. The adequacy of Dr. Schwarzenberger's framework for trend analysis as for formulation of possible lines of equilibrium awaits demonstration.