International Humanitarian Law and Coerced Movements of Peoples Across State Boundaries

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A principal purpose of this brief essay is to suggest that involuntary movements of people across political boundaries are most appropriately viewed as comprising a process, taking place over time and in space and within the context of particular social, 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 continuum includes 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 internatioal humanitarian law and 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. The 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 is here used, not as a contemporary if somewhat heavy substitute for the older, more succinct, phrase "laws of war",[1] but rather as a designation of those segments of international law which are infused by the principle of humanity as a basic, organic element.[2] "Principle of humanity", in turn, is utilized as a shorthand way of referring to a cluster of human values all relating in a 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

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 ILA, Manila, 7 Nov 1981).
2. See Pictet, J, *The Principles of International Humanitarian Law* (ICRC, Geneva, 1966)10: "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".

international law relating to the conduct of armed conflict, but also international law concerning refugees and displaced persons, as well as 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 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 disposition 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 claims and demands by some segment 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.

Violation of human rights and the production of refugees

We turn to the first phase which is characterized principally by intensifying social and political tension within a nation State and by 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 honoured, and population movements, 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 relation 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:[5]

> "People leave for a 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

3. See Coles, "Pre-Flow Aspects of the Refugee Phenomenon" (Background Paper for the International Institute of Humanitarian Law (San Remo), April 1982), for an instructive application of this kind of framework.
4. UN Doc E/CN.4/1503.
5. Ibid, paras 115 and 117.

> 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. . . .
> 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."

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 few in number, fleeing persecution specifically directed against them.[6] The latter type of problems have been dealt with by the traditional law on asylum and by the 1951 UN Convention on the Status of Refugees.[7] 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 focuses simply upon the "refugee-receiving" countries. Put most briefly, both causes and effects must be addressed by those

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6. See, eg, 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, UN Doc. EC/SCP/16/Add. 1 (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, UN Doc. A/36/582 (1981); Coles, "Problems Arising from the Large Numbers of Asylum-Seekers: A Study of Protection Aspects," (Background Paper by the International Institute of Humanitarian Law (San Remo), June 1981).
7. Done at Geneva on 28 July 1951, 189 UNTS 137, reprinted in *Collection of International Instruments Concerning Refugees* (UNHCR, 2nd ed 1979; hereafter: *Collection*), 10. 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, 606 UNTS 267, reprinted 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", (1953) 30 BYBIL 478 and "The International Protection of Refugees", (1954) 48 AJIL 193.

who believe that legal standards and legal controls have a significant role to play in dealing with massive forced movements of people.[8]

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."[9] 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 recognize what historical experience has abundantly and tragically 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 summarized as basic human rights. The enshrining of these universal claims into legal standards and obligations applicable in respect of sovereign States has of course been a major trend of modern international law.[10] The United Nations Declaration and Covenants on Human Rights,[11] the European

8. Particular note may be taken of the initiative on refugees exercised by the Federal Republic of Germany in 1980 and 1981 in the UN 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, fn 6 above, 19-20. The "preventive measures" envisaged here referred to "measures to eliminate the cause of flows of refugees" (ibid 20-21):
"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 debate at the thirty-fifth session of the General Assembly on item 122 showed that the vast majority of States see the main 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.
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 future be directed at their root causes."
The Observations of the Australian Government (ibid, 5) 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."
9. See Coles, fn 3 above, 15.
10. For analysis and documentation of this trend, see McDougal, M, Lasswell, H, and Chen, B, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980).
11. Reprinted in *Collection*, 99–138.

Convention[12] and the American Convention on Human Rights[13] are only the most obvious indications of this trend, which is eventually 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 groups, 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.

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.[14] The fact that the available means for enforcing observance of human

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 Nov 1950, and Protocols Nos 1 through 5, signed in Paris and Strasbourg on various dates from 20 March 1952 through 20 Jan 1966, reprinted in *Collection,* 274–300.
13. Also known as the "Pact of San Jose, Costa Rica", signed on 22 Nov 1969, reprinted in *Collection,* 207.
14. 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 (note 8 above) included the following (ibid, 23-4):

> "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 elements of the population to leave the State."

In its Observations on the same subject, the US Government stated (ibid, 39 emphasis added) that it

> "consider[ed] that *potential sending States have the following obligations* relevant to the movement of persons across national countries: . . .
> (c) To avoid policies and practices that would cause significant elements of the population to flee to other countries, i.e.:

rights standards by sovereign States in respect of their own people remain limited in scope and primitive in organization, should not detract from the validity of the above point. 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 the State of first contact of an international legal duty of *non-refoulement* may, in some instances, be counterproductive in the search for solutions. The rhetoric of international law must be exercised in a balanced manner. International refugee law, in this initial phase, may be seen to be prophylactic and preventive in its orientation and to be at one with the international law of human rights.

Community responses to mass outflows

We will 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 the adjoining States or countries of first contact, from other 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, in 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

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(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;

. . .

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."

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.[15] Further illustration is perhaps offered by the agreement entered into by the Socialist Republic of Vietnam with the UNHCR in 1979 providing for the orderly departure and resettlement of persons whose names were found both in a list prepared by the Hanoi Government and in the list of the UNHCR. 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 the viewpoint of legal policy is the nature and the 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 its 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? On 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 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 ceases 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 UN 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

15. The position taken by the US Government expressed in, among other things, its Observations on the question of International Cooperation to Avert New Flows of Refugees, note 14 above, 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.

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 receiving 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 of course 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 examining, however briefly, four areas: (a) *non-refoulement* and temporary refuge, (b) permanent settlement in the State of the 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.[16] In situations marked by mass inflows, the legal status of *non-refoulement* has sometimes been regarded as open to debate. The 1967 UN Declaration on Territorial Asylum might be read as suggesting that mass influx situations constitute a proper exception to the *non-refoulement* rule.[17] Article 3 of the Declaration reads as follows:

16. See 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", in *Transnational Legal Problems of Refugees* (1982) Mich YB Int Legal Studies 291, 304–5. See also Feliciano, "The Principle of Non-Refoulement: A Note on the International Legal Protection of Refugees", (1982) 57 Philippine LJ 598.
17. Adopted by the UN General Assembly on 14 Dec 1967 (Res 2312 (XXII)), reprinted in *Collection*, 57.

> "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.
> 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. . . .*" (emphasis added).

A comparable provision is found in Article 11(2) (b) of a Comprehensive Draft Convention on Territorial Asylum prepared by Professor Grahl-Madsen.[18] It is suggested, however, that the 1967 UN 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 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 over-all experience in respect of the hordes of Indo-Chinese refugees, the reception and treatment by Pakistan of more than a million Afghan refugees and the consistent grant of refuge over the years by African States to many millions of African refugees, offer, in our belief, sufficient 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. With the possible exception of the 1951 UN Convention on the Status of Refugees, which we shall examine a little later, none of the existing international conventions

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18. 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." Grahl-Madsen, A, *Territorial Asylum* (1980), 190–1 (emphasis added).

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 UN Declaration on Territorial Asylum,[19] the 1954 Caracas Conventions on Territorial Asylum[20] and on Diplomatic Asylum,[21] the 1977 Declaration on Territorial Asylum adopted by the Committee of Ministers of the Council of Europe,[22] the 1966 Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee,[23] and many draft conventions prepared by various bodies of experts and individual academicians,[24] all speak in terms of *the sovereign right* of a State to grant asylum to refugees.

The 1969 OAU Convention on Refugees, 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.[25] The unfortunate 1977 UN 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[ies]".[26] 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 UN Convention, as supplemented by the 1967 Protocol, 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. 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

19. Note 17 above.
20. See Art 1, reprinted in *Collection*, 264.
21. See Art 2, reprinted in *Collection*, 268.
22. See Para 2, reprinted in *Collection*, 306.
23. See Art III(1), reprinted in *Collection*, 203.
24. See, eg, the ILA's 1972 Draft Convention on Territorial Asylum, Art 1(a), reprinted in Grahl-Madsen, 19 above, 177; Grahl-Madsen's Comprehensive Draft Convention on Territorial Asylum, Art 1, ibid, 186; the *Institut de Droit International*'s 1950 Resolution on *L'Asile en Droit International Public*, reprinted ibid, 133.
25. Art (1), reprinted in *Collection*, 195. The "best endeavours" approach to the question of grant of durable asylum is also found in, eg, the Carnegie Endowment Working Group's 1972 Draft Convention on Territorial Asylum, Art 1(1), reprinted in Grahl-Madsen, note 18 above, 174; and in the UN Group of Experts' 1975 Consolidated Text of Articles, reprinted ibid, 195.
26. Articles Considered by the Committee of the Whole, Art 1, reprinted in Grahl-Madsen, note 18 above, 208. Compare, Art 1 of the 1976 Draft Convention on Territorial Asylum prepared by the Special Working Group of Non-Governmental Organizations, reprinted ibid, 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" (emphasis added).

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 indeed 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 not clear that the 1951 Convention did establish such an obligation even in respect of individual asylum-seekers not part of a mass flow.[27] 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.

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 take 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 receiving State: not more than three refugees per one hundred thousand inhabitants.[28] While the spirit and objective of these proposed provisions on international 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

27. Goodwin-Gill, note 16 above, 300, had no difficulty at all in reaching the conclusion that neither the 1951 Convention nor the 1967 Protocol impose any duty upon a State of first refuge to admit refugees to durable asylum, or any duty upon third States to offer resettlement. Cp Sadruddin Aga Khan, "Legal Problems Relating to Refugees and Displaced Persons", (1976-1) 149 Hague Recueil 287, 317–8. Hyndman, "Asylum and Non-Refoulement — Are These Obligations Owed to Refugees Under International Law?", (1982) 57 Philippine LJ 43, reached the same position in respect of asylum in both treaty law and customary international law.
28. Art 4(2), fn 24 above, 187.

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.

A second suggestion is that the 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. 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 resettlement. 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 centres under UNHCR aegis or support could devote efforts to re-training 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.

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 hostilities 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.[29]

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.[30] 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[31] and the two 1977 Protocols[32] 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 theatre of hostilities as possible. It seems worthy of note that international law concerns itself with 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.

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.[33] This conclusion is in line with the spirit of the provisions of Article 132 of the 1949 Geneva Civilians Convention which encourages 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

29. The situations referred to 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 Conflicts", Annales Dr Int Méd (July 1981), discussing Arts 44, 70 and 26 of the 1949 Geneva Civilians Convention and Arts 73–74 of Additional Protocol I of 1977.
30. See McDougal, M, and Feliciano, F, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), 520–30; and,. more generally, Migliazza, "L'Evolution de la Réglementation de la Guerre à la Lumière de la Sauvegarde des Droits de l'Homme", (1972) 137 Hague Recueil 141.
31. Arts 27 and 31–34.
32. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), Arts 48–51. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), Arts 4, 13 and 14. In this connection, see Veuthey, "Les Conflicts Armés de Caractère Non-International et le Droit Humanitaire", in Cassese (ed), *Current Problems of International Law: Essays on U.N. Law and the Law of Armed Conflict* (1975), 179, and Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts", ibid, 267.
33. See McDougal and Feliciano, 448.

detained for a long time.[34] 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 theatre as possible and in this manner takes account of the military interests of the opposing belligerent.[35] Interestingly enough, the interning neutral power may collect the costs of accommodation and support of the refugee troops from their government.[36]

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 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.

As in non-warlike contexts, the question of "solutions" arises immediately upon the beginning of mass flows of people fleeing across State 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, and from which operations people are fleeing, 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 the Hague Convention No V of 1907 and enter into agreements with adjoining or nearby 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

34. See also Arts 109–17 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.
35. Art 11, Hague Convention No V of 1907. See Stone, J, *Legal Controls of International Conflict*, (1954) 386; Greenspan, A, *The Modern Law of Land Warfare*, (1959) 564–69; and materials collected in Whiteman, M, *Digest of International Law*, (1968) Vol 2, at 366–81.
36. Art 12, Hague Convention No V of 1907. For discussion, see Freeman, "Non-Belligerent's Right to Compensation for Internment of Foreign Military Personnel", (1959) 53 AJIL 638.

care and so on incurred by the neutral State and, perhaps most important, 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.[37]

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 offers some documentation of the kind of fierce and intractable problems that such situations 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 have theretofore lived in their own country, voluntary repatriation may again not be feasible. The case of the Hungarian refugees, who streamed out of the People's 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,[38] 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 cannot compulsorily repatriate the refugees. A contrary conclusion 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

37. A brief account is offered in Coles, "Temporary Refuge and the Large-Scale Influx of Refugees", in Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva, 21–24 April 1981), Executive Committee of the High Commissioner's Programme, UN Doc. EC/SCP/16/Add.1 at 7–9.

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

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.[39] 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 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.

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 do 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-Saharan 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 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 such mass population movements may be relatively manageable.[40]

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 neighbouring States to grant entry and refuge to peoples fleeing from natural disasters and their consequ-

39. 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."

40. See the helpful Observations submitted by the Office of the UN Disaster Relief Co-ordinator (17 March 1981), Report of the Secretary-General, note 6 above, 42.

ences? 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 appropiate 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 port.[41] 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. If such be the rule of customary international law in respect of vessels and crew and passengers, it seems a modest suggestion to make that the same general organic principle that human distress should be relieved and human life saved is, or should be, applicable in respect of peoples forced to leave their homeland by natural disasters. The nature and scope of that duty must, of course, bear some relation not only to the reality and degree of the refugees' distress as it were, but to the extent to which at least temporary refuge is in fact essential for relieving and mitigating that distress. Recognition of such a duty must also take account of 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 contraposed 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.[42] 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 wellbeing 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 points or lines or areas of stable equilibrium between the humanity principle and other relevant but competing principles. The location of these points, lines or areas may be expected to differ from context to context, from age to age.

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41. For documentation, see, e.g., McDougal, M, and Burke, W, *The Public Order of the Oceans* (1962), 110; Colombos, C, *The International Law of the Sea*, 6th Rev ed (1967), 353, 329–30; Jessup, P, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), 194; Schwarzenberger, G, *International Law*, 3rd ed (1957), Vol 1, at 197–8.
42. See Protocol I of 1977, note 32 above, e.g., arts 35(2), 51(4) (a) and (b), 51(5) (b) and 52(1) and (2); McDougal and Feliciano, fn 33 above, Ch 6. Cp Schwarzenberger, G,*The Frontiers of International Law* (1962), Ch 11 ("Functions and Foundations of the Law of War"). 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.