The Protection of Refugees and Customary International Law

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Many of the difficulties of providing for the protection of refugees arise because of our perceptions of international law. Since the decline in influence of writers of a Naturalist persuasion we are left with a philosophy of international law which revolves around the State as the beneficiary of rights, bestower of rights and arbiter of rights. It is true that in the second of those roles States have created international organisations with a developing status and power of independent action, but such organisations are nevertheless in essence a conglomeration of state powers vested in corporate entities.

Whereas many international organisations can now be regarded as beneficiaries, bestowers and arbiters of rights, individuals can make no such claims. No one seriously contends that we are all subject to some universal law (unless spiritual or moral) which permeates all human society and operates on individuals and States alike. The most that Positivist doctrine is willing to acknowledge in accord with State practice is that certain individuals have had bestowed upon them the protection of international law.

In order to qualify for such protection the individual must belong to a group recognised by international law as being the recipient of rights. The most obvious illustration is that nationals of a State have a right (privilege) to seek the protection of their own State in respect of injury suffered at the hands of a foreign State while on its territory. The bond of nationality is the normal connecting factor between the individual and the protection of international law. It is of course an imperfect right because, under international law, there is no duty upon the State of nationality to exercise its right of diplomatic protection.

In considering the position of refugees the starting point must be to examine whether they constitute an identifiable group upon which States have bestowed the protection of international law. Then, assuming that the answer is in the affirmative, some comment will be made on the scope of the protection thus accorded. It is necessary to examine this issue from two aspects, the rights bestowed upon individual refugees and the mechanisms available for ensuring that those rights are effective.

The discussion will be brief because the purpose of this paper is not to define the rights in detail, but to examine how far they may be regarded as part of customary international law. In this context it will require a consideration of the processes whereby rules of customary international law are formulated and also at least some comment on the role of general principles of law in the development of international law.

Sources and evidences of international law

It is the inevitable starting point of any discussion of this aspect of international law to cite Article 38.1 of the Statute of the International Court which requires that body, in any dispute that is submitted to it, to apply:

"a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognised by civilised nations . . ."

It goes without saying that this direction to the Court is equally valuable as a guide to the foreign office legal adviser or the academic seeking to discover the appropriate rules of international law. Their purposes and objectives may differ, but they are still obliged to start with the same raw material.

Treaties

What is important in the case of our search for legal principles and their range of application is to be wary of traditional wisdom. Article 38.1 does not state that the sources of international law are treaties, customs and general principles (they may well be — up to a point — but that is too facile an assumption for the purpose of our analysis). The provision is quite clear in avoiding such an approach. It does not commence by suggesting that if State A and State B are parties to a treaty which covers the substance of a dispute, then all that a court of law can do is to apply the terms of that treaty as best it can. This rule of law[1] exists by virtue of a customary rule, or even of a general principle, but is not laid down in general terms[2] by any international convention.

What Article 38.1.a postulates is that the Court is to apply, in disputes submitted to it, conventions, whether general or particular, which establish rules expressly recognised by the contesting States. It is worth noting that it is the conventions which are general or particular — not the rules. In other words particular conventions (whether particular by virtue of the number of parties or by the subject matter is not at all clear) can give rise to rules which by express recognition (not because the States are actually parties to the convention) are applicable to the dispute.

The proposition that paragraph 1.a relates to rules of international law, and is not simply a direction to apply a treaty if that treaty creates the rights

1. As the Court said in the *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3 at 24:
"The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding for all the Parties in this case — that is to say whether, as contended by Denmark and the Netherlands, the use of this method is rendered obligatory for the present delimitations by virtue of the delimitations provision (Article 6) of that instrument, according to the conditions laid down in it. Clearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source. On that basis the Court's reply to the question put to it in the Special Agreements would necessarily be to the effect that as between the Parties the relevant provisions of the Convention represented the applicable rules of law — that is to say constituted the law for the Parties — and its sole remaining task would be to interpret those provisions, in so far as their meaning was disputed or appeared to be uncertain, and to apply them to the particular circumstances involved."
2. There are terms in treaties which purport to give that term, or certain others, a primacy over other rules whether those contained in a treaty or existing under customary international law.

and obligations which constitute the substance of the dispute between the parties, is borne out by a reference to Art. 36.2 of the Statute of the Court which enables States parties to the Statute to make a declaration accepting the jurisdiction of the Court "in all legal disputes concerning" inter alia "the interpretation of a treaty" or "any question of international law". The Statute of the Permanent Court contained an identical Article 38.1 and an Article 36(2) which was the same as the present provision except that it read "in all or any legal disputes". It was open to a State to accept the Court's jurisdiction with respect only to "the interpretation of a treaty". Article 38.1.a would have been meaningless in such a situation should it be taken as stating no more than that, in a dispute concerning a treaty, the Court should apply the provisions of that treaty!

We shall be examining shortly the provisions of, amongst other instruments, the 1951 Status of Refugees Convention. Between parties to the Convention its application to a particular situation is a matter first of interpretation (according to rules deduced from the various sources[3]); and, then, if it is not applicable on that basis, it is a matter of whether it has been extended by "express recognition" or "State practice" to the situation in issue. For example, following the 1956 Hungarian uprising, a number of governments were prepared to regard the exodus from that country as being covered by the 1951 Convention despite the fact that the definition of refugees required that a fugitive's presence outside his country of residence or former habitual residence be "as a result of events occurring before 1 January 1951".[4] Only by an extremely elastic interpretation could it be said that the uprising was the "result" of the Communist control of that country which had occurred at the end of the Second World War. However, an "agreed interpretation" which distorts the normal interpretation of an instrument is not necessarily "invalid" or "ineffective"; it can amend the treaty between the parties to the understanding. It would certainly seem to qualify as a rule "expressly recognised" if the States concerned are involved in a dispute to which the understanding is relevant.

Custom

When it comes to Article 38.1.b, the directive to apply "international custom, as evidence of a general practice accepted as law", has been regarded with some puzzlement. It is usually suggested that the paragraph was misdrafted: it is surely the practice which is evidence of international custom accepted as law. Be that as it may, it is the custom which has to be applied, and a custom which is evidenced by, as much as evidence of, the practice of States.

Whatever doubts might be raised about the choice of wording for paragraph 1.b, it does seem to emphasise the need for two elements in the function of customary international law: (a) the factual element of State practice; and (b) the psychological element of acceptance of the practice as law.

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3. Including presumably the Vienna Convention on the Law of Treaties 1969.
4. This temporal limitation was later removed by the 1967 Protocol to the Convention.

State practice encompasses the widest range of State activities in its external relations. Thus it is not limited to pronouncements by a Prime Minister, President or Foreign Minister, nor emanations from the Foreign Office itself. It would include the arrest of an individual in respect of some foreign-related conduct, or the exclusion or expulsion of an alien. An Act of Parliament or a decision of a court might also concern relations with other States. What is particularly important for our purposes is where such conduct concerns the pattern of treaty provisions that deal with human rights.

The other requirement in the formation of customary international law is that the custom in question must be accepted as law. Given the variety of forms which State practice can take, it is a matter of importance to be able to decide *why* the States concerned have adopted a particular course of conduct. While pronouncements by governments or their principal advisers do constitute State practice, such statements can also provide valuable evidence of the attitude of the makers towards the obligatory nature of the alleged custom. While one may not accept D'Amato's contention that statements relating to international law by national officials cannot be considered as part of the corpus of State practice,[5] his emphasising of their relevance to *opinio juris* is valuable. "The simplest objective view of *opinio juris*", according to D'Amato,[6] "is a requirement that an objective claim of international legality be *articulated* in advance of, or concurrently with, the act which will constitute the quantitative elements of custom."

As far as refugee law is concerned, this paper will concentrate on three issues:

1. the status of refugees;
2. the concept of asylum; and
3. the nature of the protection afforded to refugees.

In carrying out this task, it will be necessary to examine a range of international instruments and the practice related thereto.

The relationship between treaties and the development of customary law is fundamental to such an examination. There would seem to be a number of possibilities.

1. (a) A multilateral treaty which seeks to codify the law is accepted as accomplishing this objective.
   (b) A multilateral treaty which is designed to codify the law in fact modifies such law, or perhaps chooses between conflicting views on a particular matter, but is nevertheless regarded as crystallising the law.
2. A multilateral treaty, drawn up to codify the law, in certain aspects creates new rules. With regard to those rules, it would require a measure of subsequent acceptance by non-parties before it could be regarded as a rule of customary international law binding upon them.

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5. *Concept of Custom in International Law*, 88:
   "Many contradictory rules may be articulated, but a State can only act in one way at one time . . . Once the act takes place, the previously articulated rule that is consistent with the act takes on life as a rule of customary law, while the previously articulated rules contrary to it remain in the realm of speculation."
6. Op cit, p 74.

3. A multilateral treaty is drawn up to create a legal regime in an area largely unregulated by international law, or a new regime that is substantially different from the existing regime. It cannot be creative of law other than for the parties, but it can be evolutionary in its effects, either by design or by virtue of later developments.
4. A number of treaties, creating obligations on a bilateral or group (e.g., regional) basis, may in time have the effect of creating or developing rules of customary international law of general application.

This list is in no sense intended to be exhaustive, nor is it more than a very "rough and ready" guide. However, some such categorisation would appear to be an essential tool in examining the role of particular treaties in relation to customary international law.

In the *North Sea Continental Shelf* cases,[7] the two applicant States, Denmark and the Netherlands, were attempting to establish that the Federal Republic of Germany was bound by the provisions of the 1958 Convention on the Continental Shelf, and more especially that the allocation of continental shelf between the three states was governed by the equidistance principle expressed in Article 6 of the Convention.[8]

It was admitted that the Federal Republic was not formally a party to the Convention, but it was argued by the applicants that "by conduct, by public statements by proclamations, and in other ways", the Republic had "unilaterally assumed the obligations of the Convention", or had "recognised it as being generally applicable to the delimitation of continental shelf areas." The Court, adopting a cautious approach, rejected these contentions: "only a definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the court in upholding them".[9]

It reinforced this approach by posing the question that, even if this consistent course of conduct had existed, "then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention."[10] There may be various reasons why a State does not wish to go through the formal procedures of ratifying a particular convention. For example it might wish to avoid opening

7. ICJ Rep 1969, p 3.
8. Article 6 reads:
   "1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.
   2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."
9. ICJ Rep 1969, p 25.
10. Ibid.

the issue to public or parliamentary scrutiny. If the constitutional procedures are complicated, it would be simpler to acknowledge the applicability of the convention or to act in accordance with its provisions. It might be added that these factors might be highly relevant with regard to refugee agreements which could give rise to public disquiet about the possible entry of large numbers of "foreigners" into the national territory. It also needs to be pointed out that, if there is a "very consistent course of conduct", that of itself should render the question about non-ratification irrelevant.[11] It is only where the practice is more equivocal that the question might reasonably be raised.

If the conventional rule on delimitation was not binding by virtue of being "expressly recognised" by the Federal Republic (to use the words of Article 38.1.a of the Statute of the Court), had it become part of an "international custom, as evidence of a general practice accepted as law"? It certainly could not be contended that Article 6 was part of received custom, but could it be said that it had crystallised an "emerging customary law"?[12]

This suggestion was also rejected. It may have been correct to regard other provisions of the Convention in this light, but Article 6 was a proposal of the International Law Commission made "with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda,* and not at all *de lege lata* or as an emerging rule of customary international law."[13] Moreover, as Article 6, unlike Articles 1 to 3, was subject to reservations by States acceding to the Convention, it was unlikely that it was regarded at the time as approximating to an emerging rule of customary law.

The final and most cogent of the arguments addressed to the Court on behalf of the applicants was that a rule identical with that laid down in Article 6 had "come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice".[14] The Court suggested that there were a number of requirements which had to be satisfied before this development would be regarded as having occurred:[15]

1. "the provision concerned should, at all events potentially, be of a fundamentally norm-creating character";
2. there had to be "very widespread and representative participation in the convention";
3. "State practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked"; and
4. the practice should "have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

The Court gave three reasons why the provision did not satisfy the first requirement:

> that the equidistance principle was made subordinate to a possible agreement between the states concerned to adopt some other principle;

11. It might also be observed that such a question was not regarded as significant in the *Nuclear Tests* case (ICJ Rep 1974, p 253): if France intended to be bound by its statements to "go underground" in the following year, why had it not adopted the more obvious course of becoming a party to the Nuclear Test Ban Treaty 1963?
12. ICJ Rep 1969, p 38.
13. Ibid.
14. At 41.
15. At 41-3.

> that the application of the equidistance principle was made subject to "special circumstances", a concept the meaning of which was far from clear; and
> finally, that "the faculty of making reservations" added considerably to the difficulty of regarding the equidistance principle as capable of being received as general law on the basis of the convention.[16]

A moment's reflection would be sufficient to raise doubts as to the logic of the Court's view.

In the first place, it is not unreasonable to accept the premise that, to be capable of becoming a customary rule, a treaty provision must itself be stated in the form of a rule. It may be more impressive to state this proposition in the manner adopted by the Court, — the treaty provision must be of a "fundamentally norm-creating character". This phraseology also serves to disguise the logic (or lack of it) of the process whereby the Court reached its conclusion. It is easier for the Court to assert that Article 6 in some self-evident way does not satisfy the "norm-creating" requirement than it would be to suggest that Article 6 did not in some way lay down a rule.

Patently, Article 6 did lay down a rule applicable to continental shelf delimitations. In the absence of agreement, the allocation was to be based upon equidistance, ameliorated in appropriate cases by special circumstances. The Court's references to agreement and reservations as affecting the character of the provisions are inadequate, because such adjustments to the operation of treaty provisions are too frequent to be a relevant factor. As far as "special circumstances" is concerned, the Court was closing its eyes to the nature of such a device.

In the later *Namibia* case, the Court asserted[17] that "the concepts embodied in Article 22 of the Covenant (of the League of Nations) . . . were not static, but were by definition evolutionary". Article 22, in nine paragraphs, set out the basis of the Mandate system, but it was to paragraph 1 that the Court was principally referring:

> "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and the securities for the performance of this trust should be embodied in this Covenant."

Article 22 thus envisaged a treaty regime, rather than providing a particular rule. There are numerous major international instruments which may readily be regarded as potentially evolutionary in this sense. The Antarctic Treaty and the Nuclear Non-Proliferation Treaty are examples which spring readily to mind.

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16. At 43. As to the first reason advanced, that it was unusual to make express reference to such a possibility was true enough, but it is no more than acknowledging the notion that, *jus cogens* apart, rules of customary international law may be excluded or modified by agreement.
17. ICJ Rep 1971, p 6 at 31.

However, there is no reason why particular provisions in treaties should not have similarly evolutionary characteristics. In employing the terminology "potentially . . . norm-creating", the Court presumably had in mind the concept of a rule that was capable of being adopted and acted upon by States in their relations. However, it is an expression which could equally be applied to terms of an evolutionary nature.

The Antarctic Treaty and Nuclear Non-Proliferation Treaty create regimes which are, by their specific provisions, to be implemented by a variety of different arrangements involving the parties to the treaties. In some areas of the treaties' operation, it was envisaged that the scope of the rights and obligations would be extended or modified by subsequent practice. Similarly, Article 6 of the Continental Shelf Convention was by its very nature evolutionary.

Many treaty provisions are drafted in general terms because the parties cannot agree on anything more specific. Similarly, provisions are drafted which make use of terminology which gives an illusion of agreement or precision though, in reality, one or other of these elements is lacking. A phrase like "special circumstances" is an example of both types of approach. It was not possible to be more specific; and it was a device which gave the appearance of consensus. Nevertheless, it was obvious that the real meaning to be attributed to such an expression was left to future determination, whether by tribunals or in the practice of States.

In the *North Sea* cases, the International Court apparently refused to acknowledge that such a situation could exist, or was relevant to the application or Article 6. Yet the use of ambivalent terminology in the drafting of law-making treaties is becoming common. The Negotiating Texts produced by sessions of UNCLOS III were replete with similar examples: "legitimate interests"; "legitimate activities"; "on an equitable basis"; "with due consideration for the interests of other States"; "special needs"; "special considerations"; "best practicable means". Presumably such provisions, now embodied into the new Law of the Sea Convention, are intended to be normative amongst parties, and not without legal significance for States which do not become parties to the Convention.

Significantly, the blinkered approach of the Court was largely ignored in the more recent arbitration between Britain and France over the *Delimitation of the Continental Shelf*.[18] In the first place the tribunal had no doubt that Article 6 was intended to lay down a rule and not just a "principle" or "method":[19]

> "Article 6, as both the United Kingdom and the French Republic stress in the pleadings, does not formulate the equidistance principle and 'special circumstances' as two separate rules. The rule there stated in each of the two cases[20] is a single one, a combined equidistance-special circumstances rule."

18. (1977) 54 ILR 6.
19. 54 ILR at 48.
20. That is to say, the two cases covered by Article 6, paragraph 1 (opposite States); paragraph 2 (adjacent States).

Moreover, in the tribunal's view, the rule laid down in Article 6 was an appropriate guideline, even in a situation to which it did not apply as a conventional rule. The concept of "special circumstances" was introduced into the Article "because it was recognised that, owing to particular geographical features or configurations, application of the equidistance principle might not infrequently result in an unreasonable or inequitable delimitation of the continental shelf. In short, the role of the 'special circumstances' condition in Article 6 is to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule', in effect, gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles."[21]

There is not the space here to become involved in a jurisprudential inquiry into the justification for the tribunal's different attitude to that displayed earlier by the International Court. Suffice to say, the tenor of Article 6 did play a part in identifying a principle of law that was necessary to the delimitation of a geographically integrated shelf amongst the States abutting that shelf. By its very nature the provision was evolutionary and was in effect accepted as such by the arbitral tribunal in this case.

General Principles of Law

The idea that general principles, to operate on the international plane, must be "recognised by civilised nations" can only be understood if one tries to view the expression, initially at any rate, from the standpoint of those who drafted the Statute in the 1920s. To a common lawyer, these principles would have included a variety of procedural rules which would be applicable as much in an international forum as before a municipal court. Continental jurists were more concerned about gaps in the law and the problem of *non liquet*. Hence, they saw general principles as having a more substantive application. This latter view has become increasingly important, particularly in light of the expanded role that equity has come to play in the development of international law.

There remains the difficulty of knowing precisely when, and in what form, these general principles will be received into the corpus of international law. In the *North Sea* cases, a proposition was advanced by the applicant States that the equidistance principle operated automatically to determine the delimitation of the continental shelf. In the Court's own words:[22]

> "In its fundamentalist aspect, the view put forward derives from what might be called the natural law of the continental shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State and therefore as having an *a priori* character of so to speak juristic inevitability."

The Court proceeded to reject this view. It was inconsistent with the records of the work of the International Law Commission which showed that, far

21. 54 ILR at 48.
22. ICJ Rep 1969, pp 28-9.

from being a self-evident principle, it was only adopted with hesitation upon the far from emphatic advice of a Committee of Experts. The solution adopted in what became Article 6 was "governed by two beliefs; — namely, first, that no single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement . . .; and secondly, that it should be effected on equitable principles."[23]

Given the fact that the tribunal in the later U.K.-France *Continental Shelf* arbitration was prepared to regard the equidistance-special circumstances rule as a particular application of the underlying principle of equity, we are faced with problems of terminology and classification. The former rule did not exist as an inevitable feature of continental shelf delimitation. The over-riding principle was one of equity or fairness — a general principle recognised by all nations. The adoption of the Convention and State practice had given to the rule at least a putative validity in assessing what was equitable. The general principle was thus capable of concrete application.

For the purposes of this paper, the crucial issue in relation to general principles is whether they have any value in furthering the legal position of refugees. Does the notion of what is just and fair *between States* have a role to play in adjusting the relationships between States and individuals who come within their jurisdiction?

"Humanitarian" principles (by which is presumably meant what is just and fair to individuals) are called in aid to support various different aspects of international law. Intervention, in the form of forcible entry into the territory of another State, to protect the safety of a State's own nationals might be justifiable on "humanitarian" grounds. The protection of non-combatants caught up in hostilities is now generally regarded as constituting part of "humanitarian law".

The International Court has on occasion placed reliance on such principles in support of propositions upon which it wished to bestow a particular status. In the *Corfu Channel* case,[24] the Court was prepared to award compensation to the United Kingdom in respect of damage suffered when a number of its warships struck mines while asserting a right of innocent passage through Albanian waters in the northern part of the Corfu Strait. In the course of its judgment the Court said:[25]

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on *certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war;* the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States."

23. At 36.
24. ICJ Rep 1949, p 4.
25. At 22 (emphasis added).

It was not made clear in what sense "elementary considerations of humanity" could be classified as a *legal* principle. Presumably it related to the duty to warn of the danger, the existence of the danger being the potential breach of the principle and obligation to which reference was then made.

In the course of its advisory opinion in the *Reservations to the Genocide Convention* case,[26] the International Court observed that the principles underlying the Convention were "principles which are recognised by civilised nations as binding on States, even without any conventional obligation." Furthermore the Convention was "adopted for a purely humanitarian and civilising purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."[27]

The reason for the General Assembly adopting the Convention is not without interest. Article 6 of the Charter of the Nuremberg Tribunal stated that the "following acts . . . are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility"; there then followed as category (c):

> "CRIMES AGAINST HUMANITY: namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

Despite the temporal extension to acts committed "before . . . the war", the Tribunal adopted the view that inhumane acts could only constitute crimes within its jurisdiction if they were connected with acts which were criminal under other bases of the Tribunal's jurisdiction (which in effect meant were related to "CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression"). The Tribunal commented:[28]

> "The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of the Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime".

It was to avoid the possible implication of this pronouncement that the mass murder of a particular group, if carried out in time of peace, or not in relation to activities in breach of the laws of war, was not contrary to international law that the General Assembly passed resolution 96(I) in

26. ICJ Rep 1951, p 15.
27. At 23.
28. IMT Vol 1, p 254.

December 1946. By that resolution it was stated that "Genocide is a denial of the right of existence of entire human groups" and it was affirmed that genocide was "a crime under international law". Subsequently in 1948 the Assembly unanimously approved the Genocide Convention by Article I of which the Contracting Parties confirmed that "genocide, whether committed in time of peace or in time of war, is a crime under international law" which they undertook to "prevent and punish". However, underlying the notion that such conduct was contrary to international law was the philosophy that (to use the words in the preamble to the Convention) it was "condemned by the civilised world".

Elementary notions of humanity, or whatever similar expression is used, are available as a basis for principles or rules of law, but they have to be transformed into such principles or rules by the practice of States or through being recognised and acted upon by an international tribunal. In the case of genocide, the principle became rapidly established; in relation to certain other human rights the process has been much slower. The Universal Declaration of Human Rights adopted by the General Assembly in 1948 referred in its preamble to the fact that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind". It proclaimed the rights contained therein as a "common standard of achievement for all peoples and all nations." However, it was left to later instruments, particularly the European Convention on Human Rights of 1950 and the two UN Covenants of 1966, to incorporate similar tenets into binding legal commitments.

Refugees as a protected group

It is sometimes suggested that the term refugee is a post-First World War creation of the upheavals that had been caused by events in various parts of Europe. In fact the term was first applied to the Huguenots who fled to England from France following the revocation of the Edict of Nantes in 1685. Thus, from the very outset, refugees were people who were fleeing from persecution and seeking refuge in another country. Indeed the *British Digest of International Law* provides ample evidence of how jealously the right of asylum was guarded by Britain. The section from volume 6 commences with the following extract from May's *Constitutional History of England:*[29]

> "It has been a proud distinction for England to afford an inviolable asylum to men of every rank and condition, seeking refuge on her shores, from persecution and danger in their own lands. England was a sanctuary to the Flemish refugees driven forth by the cruelties of Alva; to the Protestant refugees who fled from the persecutions of Louis XIV; and to the Catholic nobles and priests who sought refuge from the bloody guillotine of revolutionary France. All exiles from their own country — whether they fled from despotism or democracy, — whether they were kings discrowned, or humble citizens in danger, — have looked to England as their home. Such refugees were safe from the dangers which they had escaped. No solicitation or menace from their own government

29. (1906), Vol 3, 50, cited *British Digest,* Vol 6, 43.

> could disturb their right of asylum; and they were equally free from molestation by the municipal laws of England. The Crown indeed had claimed the right of ordering aliens to withdraw from the realm: but this prerogative had not been exercised since the reign of Elizabeth (viz. in 1571, 1574 and 1575). From that period, — through civil wars and revolutions, a disputed succession, and treasonable plots against the state, no foreigners had been disturbed. If guilty of crimes, they were punished: but otherwise enjoyed the full protection of the law."

It was only in the present century that official attitudes changed and entry to the United Kingdom became more difficult. This development commenced with the First World War and its ensuing problems (Alien Restriction Act 1914 and the Amendment Act of 1919).

During the inter-war years various attempts were made under the League of Nations to ameliorate the conditions of the many thousands who were fleeing from conditions which they found intolerable. However, the treaty arrangements of that period,[30] undoubtedly accepting the notion that certain groups of people had been obliged to uproot themselves for fear of persecution,[31] defined their entitlement to protection by reference to two factors:

(1) their ethnic origin (Russian, Armenian, Assyrian, Turkish, Spanish, German, Austrian);
(2) the facts that they no longer enjoyed the protection of their own (former) government and had not acquired another nationality.

The Statute of the Office of the United Nations High Commissioner for Refugees[32] was the first international instrument to offer a comprehensive definition of refugees in that it incorporated the hitherto assumed concept of refugees as fugitives from persecution. The same definition was used in the 1951 Convention relating to the Status of Refugees, Article 1A(2), which provided that the term "refugee" shall apply inter alios to any person who:

> "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The Statute had an additional provision (Article 6.B) which applied the mandate of the High Commissioner to persons otherwise qualifying who

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30. 89 LNTS 47, 89 LNTS 63; 159 LNTS 199; 192 LNTS 59; 198 LNTS 141.
31. Hence, writing in 1939, Simpson stated that the "essential quality of the refugee" was "that he has left his country of residence . . . as a result of political events in that country which render his continued residence impossible or intolerable, and has taken refuge in another country, or, if already absent from his home, is unwilling or unable to return, without danger to life or liberty, as a direct consequence of the political conditions existing there": *The Refugee Problem*, 3 et seq, cited Grahl-Madsen, *The Status of Refugees in International Law*, Vol 1, 74.
32. GA Res 428 (V) of 14 December 1950, Annex, Art 6. A(ii).

were outside the country of nationality or former habitual residence without any temporal limitation. Nor was there any reference in the Statute to the other optional limitation in the Convention allowing a party to adhere to that Convention on the basis that the date limitation applied either to events occurring in Europe or to events occurring in Europe or elsewhere.

Writing in 1966, Grahl-Madsen expressed the opinion that in "customary (unwritten) international law there is no such thing as a generally accepted definition of 'refugee'".[33] Like many of that commentator's utterances it has a certain delphic quality. It may have been true that, prior to the various conventions, refugees were not a defined group because they had no standing and no rights under (customary) international law. It may also be true that the early conventions were too specific to be capable of creating or giving rise to a customary rule (those of the League of Nations period lacked any specific definition that was capable of being norm-creating, nor in any case, as each of them dealt with a very specific national group, would it have been possible to regard the treaties as developmental of customary international law except perhaps under the category 4 (above p 112)).

However, the same obstacles cannot be attributed to the Statute of the UNHCR nor to the 1951 Convention, certainly once the definition of refugees had been freed from its temporal and geographical limitations by the 1967 Protocol. Recently, Grahl-Madsen has published a work entitled *Territorial Asylum*. In it he deals with various potential "rights" which might be available to refugees. He is rather circumspect about the juridical status of these rights. For example, in relation to *non-refoulement* he makes a number of observations that are scarcely illuminating. "It seems as if the principle is more important as a moral means of convincing a government than as a basis for a legal argument . . . [T]he principle . . . has most certainly acquired a high degree of general acceptance."[34] On asylum he suggests that "our generation has witnessed an impressive development towards an internationally guaranteed right for the individual to be granted asylum . . . The right to gain admission to a country of refuge still belongs to the moral sphere, but it has been strengthened by the adoption of the Declaration on Territorial Asylum and Resolution (67) 14 by the General Assembly of the United Nations, and the Committee of Ministers of the Council of Europe, respectively."[35] However, as the existence of these (moral) rights depends upon a class of persons being entitled to their benefit, presumably refugees have at least a moral right to be regarded as the appropriate beneficiaries! Perhaps this is to treat the author's approach too lightly. It may be that he is prepared to regard refugees as being a legally identified (and not just a morally recognized, whatever that might be) category: it is only their rights which have an ambivalent status. In his earlier reference to the UN Declaration and Council of Europe Resolution, the author suggests that they go "beyond the principle of *non-refoulement* to include non-rejection at the frontier, and thus give *refugees* a moral choice to be given asylum if they are in need of it."[36]

33. Op cit, Vol 1, 73.
34. *Territorial Asylum* (1980), 42.
35. Loc cit, 43.
36. Ibid.

If one takes up our earlier classification of law-defining treaties, the combined effect of the UNHCR Statute and the Status of Refugees Convention and Protocol must, in relation to the definition of refugees, have been developmental of the law. It has already been pointed out that the temporal limitations of the 1951 Convention were interpreted in a most elastic fashion to link 1956 escapees from Hungary to an event occurring prior to 1 January 1951, i.e., the original Communist takeover of power in that country. More important is the scope of the competence of the UNHCR, a competence which is recognized by all members of the United Nations by virtue of GA Resolution 428(V) of 14 December 1950 which promulgated the UNHCR Statute.[37]

The role of the High Commissioner is defined initially in Article 1 of the Statute, which reads in part:

> "The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."

Article 8 goes on to specify the range of activities he is entitled to pursue:

> "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:
>
> (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
>
> (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
>
> (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
>
> (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
>
> (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
>
> (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
>
> (g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
>
> (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
>
> (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees."

37. Operative para 2 of the Resolution called upon governments "to co-operate" with the UNHCR "in the performance of his functions concerning refugees".

Without going into the nature of the High Commissioner's functions, it will be apparent that many of the activities of the Office, whether conducted in relation to States parties to the Refugees Convention and Protocol, or to States that have not acceded to those instruments, will be dependent upon the status of the individuals with which those dealings are concerned. The competence of the UNHCR extends to persons having the status of refugees as defined in the Statute (and subsequently in the Protocol). Hence, relations between the UNHCR and non-parties (as well as parties) to the Convention and Protocol are based upon recognition of the individuals as falling within the category of refugees.

There is, however, a complicating factor in that the competence of the UNHCR has been extended by a series of General Assembly resolutions, whereas the scope of protection afforded by the Convention has been extended formally only in the terms of the Protocol.

At a relatively early stage, the General Assembly specifically requested the UNHCR to take responsibility for various categories of refugees who would not have the protection of the original Convention because they came from outside Europe (for example, Algerian refugees fleeing to Tunisia and Morocco: see GA Resolution 1286(XIII) of 5 December 1958 which in effect endorsed action *already* taken by the High Commissioner; and Chinese refugees escaping to Hong Kong: see GA Resolution 1167(XII) of 26 November 1956; 1784(XVII) of 7 December 1962). Moreover, the Convention and Protocol envisaged dealing with refugees on an individual basis, which in the increasingly common cases of mass influx, was impossible at least at an initial stage. To such persons, even in the absence of individual classification, UNHCR intervention was necessary to provide or co-ordinate relief work and assistance, and to ensure a degree of protection against maltreatment at the hands of the host authorities. Furthermore, within the range of persons seeking refuge, there were those who did not, for a variety of reasons, satisfy even the Statute's definition (many fled to escape, not persecution as such, but the dangers, starvation and disease caused by civil strife).

The UNHCR was encouraged by the Assembly to develop ways of dealing with such problems. Thus, in Resolution 1499(XV) of 5 December, 1960, the Assembly, after *noting in particular* "that, pursuant to its resolutions 1167(XII) of 26 November 1957 and 1388(XIV) of 20 November 1959, increasing attention is being paid in many countries, by Governments and by non-governmental organizations, to the problems of refugees who do not come within the immediate competence of the United Nations", *invited* UN Members "to continue to devote attention to refugee problems still awaiting solution" by "continuing to consult with the High Commissioner in respect of measures of assistance to groups of refugees who do not come within the competence of the United Nations".

After this initial hesitation over the *competence* of the UN itself (and not just of the HCR), a distinction was drawn in the following year between "activities on behalf of refugees within his mandate" and "those for whom he extends his good offices" (GA Resolution 1673(XVI) of 18 December 1961). This came close to recognising a right of quasi-diplomatic intervention on the

part of the former, and a more limited standing in relation to the latter, category.

However, a further step towards assimilating the two groups was taken subsequently when this dual classification was abandoned. In renewing the Office of High Commissioner for a further five year period from 1 January 1969, the General Assembly *commended* the UNHCR "for the efforts he has made in finding satisfactory solutions of problems affecting groups of refugees who are his concern" (Resolution 2294(XXII) of 11 December 1969), an expression also used in Resolutions 239(XXIII) of 6 December 1968, 2594(XXIV) of 16 December 1969, 2650(XXV) of 30 November 1970, and so on. Thus, in 1971, the General Assembly *having noted with appreciation* "the results obtained by the High Commissioner in the accomplishment of his humanitarian task of providing international protection to refugees within his mandate", *requested* the UNHCR "to continue to provide international protection and assistance to refugees who are his concern" (Resolution 2789(XXVI) of 6 December 1971).

The role of UNHCR had become so important that it was regarded as the principal co-ordinator of UN aid to situations in which large numbers of people had been driven from their place of residence. While such a movement of people or the circumstances causing the migration might have political implications, the motives of the individuals concerned were far removed from the conventional definition of a refugee. In the Sudan, years of civil strife had rendered a large part of the population of the south homeless. Some had fled to neighbouring countries; others were adrift in their own country. Writing in the UNHCR Bulletin,[38] the then High Commissioner wrote of the role of his Office in the Sudan as a "new one", of co-ordinating the task of helping not only refugees "but also displaced people inside the country". It was not just a question of bringing people back, but also of looking after them once they were home. At about the same time ECOSOC adverted to the distinction between refugees who were outside a country and displaced persons who were still in the country in Resolution 1655(LII) of 1 June 1972.

The expression "displaced person" was not a new one, though the meaning now attributed to it as a contrast to the term "refugee" was novel. It had been in common usage in the immediate post-1945 period to denote the millions of people who had been displaced from their homelands during the war. According to a resolution adopted by ECOSOC on 16 February 1946,[39] a displaced person was one who, as a result of the activities of the Nazi regime and its allies, "has been deported from, or has been obliged to leave, his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons." It is far from clear how far such persons were to be distinguished from refugees except that displaced persons were forcibly moved either for economic reasons or as part of a persecution, whereas

38. UNHCR Bulletin, Vol 1, July 1972, cited Holborn, *Refugees: A Problem of Our Time*, Vol II, 1352.
39. The resolution was incorporated as part of Annex I to the Constitution of the abortive International Refugee Organisation: text in UN Year Book 1946-47, 816.

refugees went of their own volition to escape persecution. The two categories therefore overlapped in so far as persecution was a factor.

The difference and the similarity were reflected in the reactions of the General Assembly and of ECOSOC. The Assembly Resolution of 12 February 1946,[40] which referred the matter to ECOSOC, asked the latter to "take into consideration . . . the following principles", one of which was that "the main task concerning displaced persons is to encourage and assist in every way possible their early return to their countries of origin." However, it was recognised that *both* refugees *and* displaced persons were to have the right to refuse repatriation. Both categories were to become the concern of the new International Refugee Organisation "if they have definitely, in complete freedom and after receiving full knowledge of the facts, including adequate information from the Governments of their countries of nationality or former habitual residence, expressed valid objections to returning to those countries."[41]

The uncertainty over the meaning of "displaced persons" and their entitlement to protection has thus been a long-standing issue. In the early 1970s, a new meaning was attributed to the expression, but that meaning (persons "displaced" within their own country) was not the one which was intended when the term was used in relation to South-East Asian refugees.

It is at this point that it is interesting to consider the reaction of a number of ASEAN countries to their recent — and continuing problem. Their approach, when faced with an influx of fugitives from Laos, Kampuchea and Vietnam far larger than they could cope with, has been to avoid as far as possible employing the term "refugee" in relation to such people. Although none of the States involved was a party to the Convention or Protocol (though the Philippines ratified both instruments in July 1981), presumably each of them was concerned to avoid incurring obligations under developing rules of customary international law towards these people. The measures they were prepared to take were to be regarded as humanitarian gestures to assuage world opinion and not out of any sense of legal duty.

In the case of Malaysia, a number of government statements have been recorded in the official foreign affairs journal under such headings as "Vietnamese Illegal Immigrants", and "Policy Towards Illegal Immigrants".[42] In the latter statement it was pointed out that, as "a small developing country, Malaysia can ill-afford to shoulder the burden of sheltering these people especially as there is no certainty that they will be accepted for permanent settlement elsewhere. Nevertheless, out of humanitarian consideration and in the expectation that they will be accepted for permanent settlement by the developed countries . . . we have allowed well over a hundred thousand boat people to enter Malaysia on transit."[43] The Prime Minister went on to announce that the Government had decided "to take effective measures to ensure the security and stability of the country and the well-being of the

40. Ibid. 819.
41. Annex I. ibid. 816-7.
42. (1979) 12 Foreign Affairs Malaysia 194. 216.
43. Statement by the Prime Minister on June 18. ibid. 216.

people . . . Any boat carrying Vietnamese *illegal immigrants* that tries to enter Malaysian waters or attempts to land will be towed away and given assistance to proceed on its journey."[44]

The view of Thailand was explained by that country's Ambassador to Australia in the following terms. Thailand was not a signatory to the UN Convention on Refugees and was not therefore "bound by legal obligations to accept or give temporary refuge to any refugee". Nevertheless, out of "a deep sense of moral obligation", Thailand had over the preceding four years or more provided shelter for nearly 170,000 "so called 'refugees' under UNHCR and another 7,798 'boat people'". Later in the same address, the Ambassador observed that such an "enormous number of illegal immigrants and displaced persons has caused severe political, socio-economic problems and a great threat to the security of Thailand".[45] In other words, despite the fact that Thailand was denying that any of the conventional rules was applicable, that State was still attempting to avoid using the appellation "refugee" in case to do so would involve Thailand in legal obligations arising outside the scope of the rules of international law operating on a purely conventional basis.

The Indonesian attitude was more sympathetic to classifying the "boat people" as refugees. That country was prepared as a matter of "humanitarian principle" to allow the establishment of a temporary processing centre for refugees on Galang Island in the Riau Archipelago. It was the Indonesian view that, being a non-aligned State, it was inappropriate for it to grant "political asylum". Hence the centre would provide only a temporary refuge. Responsibility for the refugees lay with the world community as a whole, including those States which were responsible for the exodus of such people in the first place. However, with the increasing flow of refugees in mid-1979, the Indonesian government announced a policy similar to that being threatened by Malaysia. From the date of the announcement boat people would be "considered as displaced persons or illegal immigrants subjected to Indonesian law," and they would not be classified in the "category of refugees".[46]

The predominant ASEAN view, reflecting these various pronouncements, was expressed in the report of the twelfth Ministerial Meeting held on 28-30 June, 1979. In the course of their discussions, the Foreign Ministers "expressed great concern over the deluge of illegal immigrants/displaced persons (refugees) from Indo-China". They stated that their countries had "reached the limit of their endurance" and had "decided to take firm and effective measures to prevent further inflow of illegal immigrants/displaced persons (refugees)". The ASEAN countries would expel "the illegal immigrants/displaced persons (refugees) in their existing camps should they

44. Ibid. 218 (emphasis supplied). See also the statements by the Home Minister attacking outside countries for encouraging the outflow of refugees by "waiving their flag of human rights" and Vietnam for "throwing rubbish into its neighbours' gardens": Keesing's Contemp Arch. 8 Feb 1980. 30079.
45. Address by the Ambassador of Thailand at a Conference on the Indo-China Refugee situation held at the Australian National University, Canberra on 30-31 July, 1979.
46. Address delivered on behalf of the Ambassador of Indonesia at the Canberra Conference 30-31 July, 1979.

not be accepted by resettlement countries or by the Indo-Chinese countries within a reasonable time-frame."[47]

Of course, the ASEAN States were attempting to put pressure on two groups of countries: the developed countries in an attempt to persuade them to take greater numbers more quickly for resettlement; and the countries of origin of the fugitives in an effort to dissuade them from encouraging such a large exodus of people. Nevertheless, a crisis had been reached and, in response to an invitation from the UN Secretary-General, a Conference was convened at Geneva in July 1979. The immediate effects of the pressure from ASEAN countries were an increase in resettlement offers, an increase in contributions towards the UNHCR's South East Asian Programme and an expansion on the arrangements made earlier in the year between the UNHCR and Vietnam for the Programme for Orderly Departures from that country.

A combination of two factors eased the situation: the more energetic prevention of refugee departures by Vietnam, and the increased numbers of refugees resettled in third countries during 1980. Although this number slowed in 1981, the improvement continued because of the greater reduction in the number of people leaving Vietnam, a trend which persisted during 1982.

However, the position is still far from satisfactory from the point of view of the "temporary" hosts. Many refugees have been in camps for as long as eight years. Those that have not been resettled tend to be those with particular problems such as ill-health or extreme poverty.

In addition, Thailand has been faced with a "land" influx from neighbouring Kampuchea which is occupied by the Vietnamese army. The exiles have been classified as illegal immigrants for the purposes of Thai law, but have been categorised as "displaced persons" for external purposes. This terminology has been employed in order to emphasise the fact that the most appropriate solution is that these people should one day return to their country of origin. However, the continuing hostility between the refugees and the Vietnamese forces in Kampuchea has prevented the Voluntary Repatriation Programme having much effect. The principal alleviation of the situation has come through resettlement in third countries. The policy of the Thai Government towards its unwelcome guests has remained one of trying to balance a variety of competing interests. As the Secretary-General of the National Security Council said at the 1982 Annual Conference on Displaced Persons in Thailand,[48] "the Thai Government continues to uphold humanitarian principles, in alleviating the plight of Indo-Chinese Displaced Persons, coupled with the consideration of our sovereignty and national security, as long as other countries and International Organisations concerned continue to honour their commitments and fully share the burdens placed on Thailand."

The use of the expression "displaced persons" in this context is useful, as long as it is realised that some (indeed many) of them may be genuine refugees. They are displaced in the sense that they were forced to move, either

47. Official communique, Jakarta, 30 June 1979, paras 22, 24.
48. Unpublished: Conference held at Nurai Hotel, Bangkok, on 15 July, 1982.

because they were politically involved in the civil strife in Kampuchea, or because they were economically affected, e.g., by being unable to continue earning their living in areas caught up in the hostilities. The circumstances which would enable them to return might differ from one group to another. However, the other aspect of their classification — as being illegal immigrants — is to prevent their being "lawfully" on Thai territory and therefore within the conventional definition of refugees. What the Thai authorities are saying is that, as long as the principles of international solidarity and burden sharing are adhered to, Thailand will abide by a humanitarian policy. In terms of the identification of refugees, the semantic caution of the Thai government would seem to support the present thesis that there is a concept of refugee under customary international law which does create rights against a non-signatory State to the 1951 Convention,[49] rights exercisable through the medium of the UNHCR.

Given the fact that the principal function of the UNHCR, set out in Article 1 of the Statute, is that of "providing international protection . . . to refugees who fall within the scope of the present Statute", this development was inevitable. The inference is inescapable that the definition of refugee for purposes connected with the obligations contained in the Convention and Protocol has attained a general currency. Furthermore, it is arguable that certain at least of the rights which are granted by those instruments have also become established as part of customary international law. The conclusion on the preliminary issue with which this section has been concerned must be to agree with an observation of a former High Commissioner that "the 1951 Convention . . ., supplemented by the 1967 Protocol . . . gives a general and universally applicable definition of the term 'refugee'".[50]

The right of asylum and the principle of non-refoulement

The so-called right of asylum lacks definition. Grahl-Madsen, having pointed out that the term "asylum" has "no clear or agreed meaning", went on to suggest that "as it is used in the draft Conventions on Territorial Asylum prepared by the Carnegie group and the UN Group of Experts, the term 'asylum' must clearly mean something more, or something different from both *non-refoulement* and non-extradition."[51]

The difficulty is compounded by the fact that asylum is used to denote a number of different legal situations. In the first place it is concerned with entry (and therefore exclusion) as well as with expulsion and extradition. If a State allows entry to an alien because he claims to be subject to persecution

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49. For a Thai view, see Muntarbhorn, "International Protection of Refugees and Displaced Persons: the Thai Perspective", Topic 4.3 Seventh Lawasia Conference, Bangkok, August 1981. The writer comments (at 30):
    "the fact that Thailand is not a party to the 1951 Convention and 1967 Protocol has not meant that Thailand has, in practice, totally neglected the rights and benefits entwined in those instruments".
50. Aga Khan, S, "Legal Problems Relating to Refugees and Displaced Persons", (1976-I) 149 HR 287 at 311–2.
51. *Territorial Asylum*, 86; the Carnegie Group Draft Convention (1972) appears as Appendix KK, op cit, 174-6; the UN Experts Consolidated Text (1975) as Appendix RR, 194-7.

elsewhere, it is said to be granting asylum. If an alien, given access to that State on other grounds, is then subject to extradition proceedings, a successful plea that, should he be returned, he would be punished for a political offence would be tantamount to a finding that he was entitled to asylum.

If a refugee is *lawfully* in the territory of a State, then Article 32 of the Convention prohibits his expulsion "save on grounds of national security or public order" and then "only in pursuance of a decision reached in accordance with due process of law." In any case, the contracting States are to "allow a refugee a reasonable period within which to seek legal admission into another country."

The vital aspect of the protection afforded by Article 32 is the use of the term "lawfully". It is a very limited right if it is dependent upon a prior categorisation of the refugee as a "lawful resident", or some such expression, instead of an "illegal immigrant", one of the expressions presently favoured by ASEAN countries. The Convention itself does not deal specifically with the grant of asylum ("lawful entry"). States have jealously guarded their right to exclude aliens from their territory; yet, of course, a right of entry in some form is an essential element in the protection of refugees.

The hesitation with which this sensitive issue has been approached is well known. Even in an instrument, which was not intended to be binding, such as the Universal Declaration of Human Rights, the original text of Article 14(1), that everyone "has the right *to seek and be granted* in other countries asylum from persecution", was unacceptable. The final version was that everyone was to have "the right *to seek and enjoy"* such asylum.

A case can be made that a right of asylum has been established by the practice of states as part of customary international law. It could be argued, for example, that one can hardly "enjoy" asylum without it being granted; that the moral force of the Declaration has in time brought about legal consequences; and that a variety of other instruments such as the OAU Convention governing the Specific Aspects of Refugee Problems in Africa,[52] the American Convention of Human Rights,[53] and the UN[54] and European[55]

52. (1969) No 14691; entered into force 20 June 1974: text in 8 ILM 1288. According to Article II.1:
"Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality."

53. (1969), entered into force 18 July, 1978: text in 9 ILM 99. According to Article 22.7:
"Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes."

54. GA Res 2313 (XXII) of 14 December 1967, the preamble of which referred to Article 14 of the Universal Declaration, stated in Article 1:
"1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.
2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

Declarations on Territorial Asylum, have reinforced the sense of legal obligation (*the opinio juris* required in the formation of customary rules).

It is not, however, a convincing case. The language employed is for the most part qualified, emphasising the right of the State to decide, rather than of the individual alien to claim to be entitled to admission. The situation is reminiscent of the situation with which the International Court was faced in the *Asylum* case.[56] There the issue was whether the grant of diplomatic asylum by one State (Columbia) was conclusive as to the nature of the offence, for which the fugitive was sought by the local authorities, and binding therefore on the territorial State (Peru). The right to qualify the offence in this way was, according to Colombia, established under customary international law, or, to be more particular, under so-called "American international law". In denying that any such customary rule existed, the Court used a well-known passage which is equally apposite to the situation with which we are at present dealing:[57]

> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases that it is not possible to discern in all this any constant and uniform usage, accepted as law".

However, even if the so-called right of (territorial) asylum has not attained the status of a right enuring to the benefit of particular individuals, the need to provide protection for refugees has given rise to legal principles of more limited scope. While a refugee has no right to be admitted to (permanent) residence, and many of the entitlements of the 1951 Convention are dependent upon some formal act of admission, he is granted by the Convention certain limited rights to safeguard him against further persecution.

The cardinal provision is contained in Article 33 (headed "prohibition of expulsion or return ('refoulement')"), paragraph 1 of which reads:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or

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3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."

55. In particular paragraph 1 of the 1977 Declaration reaffirmed the intention of member States of the Council of Europe "to maintain, in particular on the basis of the principles set out in Resolution 67(14), their liberal attitude with regard to persons seeking asylum on their territory". Paragraph 2 of Resolution 67(14) recommended that member Governments should "ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion".
56. ICJ Rep 1950, p 266.
57. At 277.

> freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The significance of this principle will be considered shortly. However, at the outset it needs to be noticed that there is no limitation (as there is in Article 32) to persons "lawfully" in the country. In other words, *non-refoulement* applies to all refugees. It is recognised that there will be situations in which fugitives enter the territory of the State, but have yet to be classified for lawful admission. This will particularly be so in a case where there are common borders between the State of former residence and the State to which the escape is made. Indeed, this problem is dealt with (at least in part) by Article 31.1:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

The problem of the "land refugee" exiting across a common border is in many respects similar to that of the "boat people" who succeed in making landfall in a more remote country but in circumstances where they are unable to proceed further. In the one case, the refusal of entry would amount to *refoulement*; in the latter case refusal of entry could well result in loss of life from drowning.

The drafting of the 1951 Convention reflected an existing European situation in which the majority of refugees came from an already identifiable group of persons displaced by the ravages of war and its aftermath in the Communist take-over of Eastern Europe. On the whole the continued migration of people, disaffected with the "Communist way of life", into Western Europe was welcomed. There were no problems of racial difference; their presence had possible economic and certainly propaganda advantages. Rejection at the border was not a problem; nor therefore was the precise ambit of the principle of *non-refoulement.*

With the post-colonial erruptions of the 1960s and 1970s, the pattern changed dramatically. The 1951 Convention was given wider application, at least temporally, by the 1967 Protocol. But the gaps in the earlier instrument assumed a new significance. The political, and now social and economic motives, which gave rise to the persecution that produced the new waves of refugees, were likely to engender a degree of intolerance amongst States where the refugees sought asylum. How were the legal prescriptions of the 1951 Convention to cope with the changed circumstances, particularly as many of the States of potential first refuge were not parties to that Convention?

The 1969 OAU Convention incorporated three specific extensions of the principles embodied in the UN Convention. Article II.3, relating to *non-refoulement,* included in the proscribed measures "rejection at the frontier", as well as "return or expulsion". Article II.4 dealt with burden-sharing "in the spirit of African solidarity and international co-operation". Article II.5 concerned "temporary residence" pending resettlement.

The principal concern of this paper is with the concept referred to in Article

II.3 but there is one general observation that is worth making. The 1951 Convention was not intended to be "law making" in the sense earlier described. Its provisions were couched in terms of purely contractual obligations: "The Contracting States shall not impose penalties . . ." (Article 32.1); "No Contracting State shall expel or return . . ." (Article 33.1). In contrast the OAU Convention has no such inhibitions: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion . . ." (Article II.3). The reference to "a Member State" relates to the regional nature of the Convention: the principle contained in Article II.3 is potentially law-creating because it is not limited by reference to a "Contracting Party". Even more general in application is Article 22 of the American Convention on Human Rights. After paragraph 7 states that every person "has the right to seek and be granted asylum", paragraph 8 goes on to provide that in no case may an alien be deported or returned to a country "if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

It would be reasonable to deduce from this evidence that between 1951, the year of the UN Convention, and 1969, the year in which the OAU Convention was adopted and the American Convention signed, there had been a change in attitude towards this area of refugee law in general and to *non-refoulement* in particular. In 1951 it required a special commitment before the general principle, recognised only in a limited way with respect to non-extradition for political offences, could be regarded as obligatory. By 1969, the principle was becoming accepted at least to the extent that it could be written into legal instruments in a norm-creating form.

Since then the crucial issue is not so much as to the existence of the principle, but as to its scope. Even if one accepts that today the principle defined in Article 33.1 of the 1951 Convention is generally applicable, there is still room for disagreement. In the first place, the conventional rule concerns "refugees". Hence, not only must a person satisfy the conventional definition, but some would argue that his status must be recognized as such before he is entitled to such protection. Secondly, the OAU Convention specifically mentions "rejection at the frontier" as well as "return or expulsion" in Article II.3 as proscribed activities, which tends to suggest that the principle of *non-refoulement* does not provide the necessary protection to prevent rejection at the frontier where that would involve a case of return to the country of persecution.

The answer to the second of these difficulties must be that an express mention of "rejection at the frontier" was felt necessary in the OAU Convention because it covers situations not involving *non-refoulement*. In the African context crossing a frontier undetected is readily accomplished, so that detection at a frontier may occur at a later stage (i.e., in trying to enter a third country) when rejection would simply involve the refugee remaining in the territory of an intermediate State and not the State where the persecution took place. It would therefore be possible to argue that the principle of *non-refoulement* applies to prevent rejection at the frontier where it would have the consequence of the fugitive remaining in the territory of the State from which he was trying to escape. In the case of "boat people" the

equivalent of rejection at the frontier (i.e., at the coast) creates physical hazards but would not be covered by *non-refoulement*.

As far as the first problem is concerned, the better view would seem to be that the principle of *non-refoulement* goes beyond the technicalities of the text of Article 33 and applies to potential refugees (i.e., those who are seeking to be thus classified) as well as those in respect of whom such a determination has been made. The development of the concept of temporary refuge (or temporary asylum or temporary residence, as it is variously called), though dependent upon some further duty of burden sharing by other States, is a recognition that potential refugees are entitled to a minimum degree of protection even if it is initially only against the hazards of being returned whence they came or against the dangers of an enforced further sea journey.

The latter issue is outside the scope of this paper, but the former is crucial to the status of *non-refoulement* as a principle of customary international law. Despite some ambiguity in the terminology used, it is believed that State practice does support the legal quality of the principle of temporary refuge.

In 1976, the UNHCR Director of Protection had referred to "recurring violations of the basic rights of refugees, in particular that of *non-refoulement*".[58] In 1977, the Executive Committee of the High Commissioner's Programme reached the following "conclusions" on *non-refoulement*:[59]

> "(a) Recalling that the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.
>
> (b) Expressed deep concern at the information given by the High Commissioner that, while the principle of *non-refoulement* is in practice widely observed, this principle has in certain cases been disregarded.
>
> (c) Reaffirms the fundamental importance of the observance of the principle of *non-refoulement* — both at the border and within the territory of a State — of persons who may be subject to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."

These pronouncements were made on the basis of a "Note on Non-Refoulement"[60] submitted by the High Commissioner to the Executive Committee's Sub-Committee on International Protection. The document referred to the principle as expressed in Article 33, in the OAU and American Conventions and in the UN Declaration on Territorial Asylum of 1967.[61] In conclusion it had this to say:

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58. Report of the Executive Committee of the High Commissioner's Programme, 27th Session (A/AC. 96/534), 11.
59. Report, 28th Session (A/AC. 96/549), 13.
60. EC/SCP/2.
61. According to Article 3(1) of the Declaration:
> "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."

> "While the principle of *non-refoulement* is universally recognized, the danger of *refoulement* could be more readily avoided if the State concerned has accepted a formal legal obligation defined in an international instrument. This underlines the importance of further accessions to the 1951 Convention and the 1967 Protocol. States that have not yet acceded to these instruments should nevertheless apply the principle of *non-refoulement* in view of its universal acceptance and fundamental humanitarian importance.
>
> In the field of *non-refoulement,* particular regard should be had to the fact that a determination of refugee status is only of a declaratory nature. It should not, therefore, be assumed that merely because a person has not been formally recognized as a refugee he does not possess refugee status and is therefore not protected by the principle of *non-refoulement*."

During 1979 a number of developments occurred. The Conference held at Arusha (Tanzania) from 7-17 May, on the Situation of Refugees in Africa, "reaffirmed a number of fundamental principles concerning the treatment of refugees and asylum-seekers, notably the principle of *non-refoulement* and . . . the granting of temporary asylum".[62] In the Executive Committee's Report, the Director of Protection referred to a number of disquieting developments which "called for a reaffirmation by the international community of the universal character of the principles established in the humanitarian field for the protection of refugees and asylum seekers — notably the principle of *non-refoulement* and the principle that asylum at least of a temporary nature, must under no circumstances be refused if this would expose asylum-seekers to danger".[63] Even more emphatic was the statement by one representative, referred to in the Report, that "the Convention and the Protocol were universal instruments which laid down principles for the international community as a whole": "some of the standards defined in the Convention and in the Protocol might already have acquired an independent normative character".[64] In the same document the Executive Committee noted with concern "that refugees had been rejected at the frontier or had been returned to territories where they had reasons to fear persecution in disregard of the principle of *non-refoulement*"; and suggested that States should be guided by, inter alia, the following general principles: "Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a gross violation of the *recognised* principle of *non-refoulement*".[65]

The 1981 meetings of the Executive Committee of the High Commissioner's Programme were particularly important because of the adoption of measures of protection for asylum seekers in situations of large-scale influx.[66] The first requirement was that they "should be admitted to the State

62. "Note on International Protection" (A/AC. 96/567), 3.
63. A/AC. 96/527, 11.
64. Ibid, 13.
65. Ibid, 15, 16 (emphasis added).
66. Report of Thirty-Second Session of the Executive Committee of 22 October 1981 (A/AC. 96/601), 15.

in which they first seek refuge" even if that is only on a temporary basis. However, whatever the basis of admission, in all cases "the fundamental principle of *non-refoulement* — including non-rejection at the frontier — must be scrupulously observed".[67]

Finally it is worth calling attention to a number of recent resolutions of the General Assembly. In the first, Resolution 34/60 of 29 November 1979, on the Report of the High Commissioner for Refugees, the Assembly urged Governments to "intensify their support for the humanitarian activities of the High Commissioner by, among other things, . . . facilitating the accomplishment of his tasks in the field of international protection, in particular by granting asylum to those seeking refuge and by scrupulously observing the principle of *non-refoulement*". It is arguable that "scrupulously observing" a particular principle is a concomitant of legal obligation. Similarly, in Resolution 34/61 on the same date on the Situation of African Refugees, the Assembly, having noted with satisfaction the conclusions of the Arusha conference, fully endorsed the recommendations adopted by that Conference. Among the recommendations adopted at Arusha[68] was one stressing "the importance of the scrupulous observation of the principle of *non-refoulement* expressed in various international instruments and notably in Article II paragraph 3 of the OAU Refugee Convention which prohibits measures such as rejection at the frontier, return or expulsion, which would compel a refugee to return to or remain in a territory where he has reason to fear persecution, and recommends that this principle be incorporated, as appropriate, in the national law of African States". In the context of countries facing a mass influx of refugees, it was recognised that special arrangements should "ensure that individuals are protected by virtue of the principle of *non-refoulement*". Later, in Resolution 36/125 of 14 December 1981 on the Report of UNHCR, the Assembly once more urged Governments to facilitate the High Commissioner's "efforts in the field of international protection, in particular by scrupulously observing the principle of asylum and *non-refoulement*".

There are of course a number of interesting features of these various texts and observations. However, of particular significance is the use of the expression "asylum-seekers" (i.e., persons seeking recognition of their status as refugees) and also of the term refugees in situations prior to the stage where such recognition has been accorded. In other words, *non-refoulement* has been regularly asserted as applicable at a stage before persons are formally given the status of refugees. It would also seem to follow that, in this twilight period between coming under the sovereignty of a foreign state and formal admission, an asylum-seeker is entitled to something akin to temporary refuge. Be that as it may, there seems to be no doubt as to the reception of *non-refoulement* as a rule of customary international law, drawing its inspiration from considerations of humanity.[69] Indeed, in the Report on the Thirty-Third Session of the Executive Committee of the High Com-

67. At 16.
68. Report of the Conference (A/AC. 96/INF. 158).
69. This emergent rule could be said to be based upon the principle of international solidarity in the face of humanitarian problems on an enormous scale. The mere processing of such large

missioner's Programme of October 1982, there is a reference to the principle of *non-refoulement* as "a peremptory rule of international law".[70]

International protection and the determination of rules of law

This paper has been concerned with the processes whereby law is developed in the international community; how treaty rules may give rise to rules of general application. In the field of refugee law, this potential is particularly important because of the fact that many of the States most affected by recent refugee movements have not been parties to the principal Conventions. It would be a sorry admission for any legal system that it provided no rules to deal with such a situation.

Unfortunately our approach to the theory of international law comes dangerously near to acceptance of such an absurdity. If States are sovereign and are only subject to legal obligation in so far as they have agreed to the limitation of their sovereignty, it would seem to follow that States have a free hand in how they deal with interlopers on their national domain. The corollary of the absolute power to exclude aliens is the liberty to condemn particular aliens to the fate of persecution or the danger of drowning at sea.

This is one area in which general principles of law must be called in aid to avoid the harshness of Positivist doctrine. To say the least, if international law recognises a duty to rescue lives in peril on the sea, it must acknowledge a rule that asylum-seekers should not be deliberately put into such peril. In this situation humanitarian principles support the logic of legal analogy.

With respect of *non-refoulement*, the rule had to be created from a variety of material sources. The notion of non-extradition for political offences provided at least a measure of common ground. The 1951 Convention suffered from a number of obvious defects. Apart from the limited definition of "refugees", which in any case was partly cured by the 1967 Protocol, the Convention was a contractual document and not at its inception drafted as law-creating. In addition, the principle of *non-refoulement* was not sufficiently clearly defined to cover the rejection at the frontier situation; indeed as it applied to "refugees" the inference was presumably against it protecting the asylum-seeker at the frontier.

The refugee also suffered from the disadvantage that he was dealing with the officials of a State who might not be sympathetically inclined towards his

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numbers of people (deciding whether to grant them refugee status, where to resettle them etc.) requires time and that time can only be provided by means of temporary refuge. It is noteworthy that the dire threats made by a number of ASEAN countries (see above pp. . .) to refuse access to "boat people" and others to their territory were withdrawn when aid and support were provided (thus acknowledging the notion of burden-sharing) by developed countries: see the Report by the UN Secretary-General on the Meeting on Refugees and Displaced Persons in South-East Asia held at Geneva, 20-21 July 1979 (A/34/627 of 7 November 1979), 14:

> "On 19 October 1979, the Prime Minister of Thailand announced that all Kampuchean refugees would be granted temporary asylum in Thailand, that there would be no *refoulement* and that the refugees would be housed initially at holding centres until the setting up of a national refugee centre."

70. A/AC. 96/614 of 21 October, 1982, 13. See also the Report of the previous year, A/AC. 96/601, 11, 12.

plight. Moreover, refugees were, at least in theory, dependent for the development of rules of international law upon the whims of States who might be reluctant to assume particularly onerous obligations towards a class of people who might be a nuisance rather than a potential asset.

If one looks at paragraph d of Article 38.1 of the Statute of the International Court, it refers to "judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law". There is a degree of ambiguity about this proposition. Are judicial decisions and scholarly teachings subsidiary to the content of paragraphs a, b and c, (but nevertheless material sources in their own right); or are they subsidiary to the primary means of determining the rules which are the recognition or acceptance by States of the material sources referred to in those paragraphs?

Of the two alternatives, the latter is clearly preferable. That is to say, despite the paragraph numbering and the introductory words (the "Court . . . shall apply"), judicial decisions and scholarly teachings are in a different category from the materials referred to in the preceding paragraphs. However, whichever interpretation one accepts, there is an additional inference that can be drawn from the "subsidiary" nature of the materials referred to in d. When discussing the different varieties of treaty in the early part of this paper, type 3 was described as including treaties dealing with an area unregulated by international law, or treaties in an area already regulated by international law, if they laid down new rules which produced a change in the pre-existing regime. The significant factor in either situation is that States, being the primary determinators of rules of law, have the power to effect such changes. Similarly the direction of customary international law can be changed by the evolving practice of States. The only difference is that the convention itself provides the clearest indication of the intention on the part of States to "change direction"; the evidence of the practice of States would have to be particularly clear to demonstrate that an intention existed to effect a change through the medium of international custom.

On the other hand, the materials mentioned in paragraph d are subsidiary in the sense that they cannot in themselves produce a change in international law. The legal commentator must be able to draw on evidence from "primary sources" in order to substantiate his case; and even if he can produce a persuasive argument for a particular view it would need to be taken up in the conduct of international relations before it could qualify as "international law". In this respect the position of the International Court is less readily explained. In making a choice between conflicting views of the law, it is itself "making law". However, it only does so in the light of the existing "primary materials" and, particularly when making use of "general principles of law", it will do so only within the prevailing mores of the international system. As Judge Tanaka has said of the "creative element" in the activities of international judges:[71]

> "What is not permitted . . . is to establish law independently of an existing legal system, institution or norm. What is permitted . . . is to

71. *South-West Africa* cases, ICJ Rep 1966, p 6 at 277.

> declare what can be logically inferred from the *raison d'etre* of a legal system, legal institution or norm."

The dilemma of refugee law is that it has the advantage of an appeal to humanitarian principles (which, as we have seen, are occasionally employed by the International Court to support legal developments), and the disadvantage that it conflicts with the sovereignty of States and their primary position in the international legal system.

On the one side reference is made to the importance of the UN Charter in this regard. The Charter reaffirms "faith in fundamental human rights" and states as one of its purposes (Article 1.2):

> "To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

The purposes and principles of the Organisation set out in Articles 1 and 2 can readily be seen as entitling the UN to act in furtherance of those objectives, but it is more doubtful whether, in themselves, the purposes create legally enforceable rights.[72] Nevertheless, the International Court has undoubtedly made use of them on occasions.

In the *Namibia* case, the International Court was called upon to consider whether "the policy of apartheid as applied by South Africa in Namibia is in conformity with the international obligations assumed by South Africa". The Court's reply was that, under the UN Charter, "the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[73]This pronouncement should be treated with a degree of caution. The Charter provisions were applicable because the obligations stemmed, so it would appear, from South Africa's position as a "mandatory" responsible for "a territory having international status".

It should be pointed out, however, that the second sentence quoted above (commencing "To establish instead . . .") would, if taken alone, appear to be of much wider ambit. Similarly, in *Barcelona Traction,*[74] the Court observed, in relation to what it described as obligations owed by a State "towards the international community as a whole", that such obligations "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[75] Apart from anything else, such a statement was

72. Contrast the *Expenses* case, ICJ Rep 1962, p 151 at 168, with the *South-West Africa* cases, ICJ Rep 1966, at 34.
73. ICJ Rep 1971, at 57.
74. ICJ Rep 1970, p 3.
75. At 32.

clearly obiter in a case dealing with the right of diplomatic protection on behalf of the nationals of one State who were shareholders in a company incorporated in another State, but operating in the territory of the respondent State. Nor is it specific enough in relation to what rights are subject to international protection for our present purposes.

On the other side, the perception of international law as being dependent upon the will of States operates not just in relation to the law-creative process, but also in the procedures whereby law is applied to a given situation. As far as the former aspect is concerned, we have already seen how the 1951 Convention was framed in purely contractual terms and the various limitations placed upon its operation. These limitations were removed by the 1967 Protocol but the application of the protective principles of the Convention has always been a contentious issue. Indeed, the impetus towards extended protection has come from the activities of UNHCR operating on the basis of its Statute.

The UNHCR is the crucial nexus between the rights of refugees and the practice of international relations which is creative of international rights and duties. It is a creature of the General Assembly and is required to act under the authority of the Assembly (Statute, Article 1), and subject to the directives of the Assembly or of ECOSOC (Article 3). Nevertheless, like a number of subordinate organs established by the UN, it undoubtedly has a measure of international personality. If one considers the indicia of such personality suggested by the International Court in the *Reparations* case,[76] the UNHCR displays a number of these attributes. The High Commissioner is entitled to "present his views" (i.e., represent the Office) before the Assembly, ECOSOC and their subsidiary bodies (Article 11). Under Article 12, the High Commissioner may "invite the co-operation of the various specialised agencies", a provision which gives the Office a measure of equality of status with such agencies. In addition, as part of its protective function, the High Commissioner is to promote "through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection" (Article 8(b)). This provision is of particular significance. In the *Reparations* case, the Court made specific mention of the importance of treaty-making capacity in establishing the international personality of the UN:[77]

> "The Charter . . . has defined the position of the Members in relation to the Organisation . . . by providing for the conclusion of agreements between the Organisation and its Members. Practice — in particular the conclusion of conventions to which the Organisation is a Party — has confirmed this character of the Organisation, which occupies a position in certain respects in detachment from its Members . . . The 'Convention on the Privileges and Immunities of the United Nations' of 1946 creates rights and duties between each of the signatories and the Organisation. . . . It is difficult to see how such a convention could operate except upon

76. ICJ Rep 1949, p 174.
77. At 179.

> the international plane and as between parties possessing international personality."

In a less spectacular way, UNHCR does negotiate various arrangements on the international level with member governments.

However, there is one major factor that needs to be emphasised. In the *Reparations* case, the matter in dispute, and which was settled in the UN's favour, was whether it had the "capacity to maintain its rights by bringing international claims".[78] True the UNHCR does not have the capacity to pursue its own claims, but its principal *raison d'etre* is the provision of international protection for refugees. Whereas the UN therefore has implicit authority to exercise a power of quasi-diplomatic protection, the UNHCR has an express authority to exercise a power of international protection. As Article 1 of the Statute lays down, the UNHCR is to "assume the function of providing international protection" to refugees who fall within the scope of the Statute.

No definition is provided of what is meant by "international protection". Under the Constitution of the short-lived International Refugee Organisation,[79] the functions specified in Article 2.1 included "legal and political protection". Taken in the abstract, one would suppose that "legal protection" related to the provision of support in legal transactions including pressing claims to the enjoyment of legal rights to which refugees were entitled. This would merge into the political function which would involve the advancing of the cause of refugees to the benefit of wider or new rights. The protection would also extend to representing the interests of refugees, as a group, in disputes with States that concerned political rather than legal issues.

This interpretation is more difficult to apply to UNHCR. It would be possible to regard the expression "international protection" as being a substitute for "legal and political protection" were it not for the fact that the Statute specifically states that the "work of the High Commissioner shall be of an entirely non-political character; it should be humanitarian and social" (Article 2). This proscription patently does not cover the (potentially political) role of advancing new arrangements for international protection because Article 8(a) of the Statute includes within the competence of the Office "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto". Indeed, various of the activities set out in Article 8[80] are bound to involve the assertion of a degree of political pressure upon States to alleviate the plight of refugees. The limitation expressed in Article 2 must be read as no more than a requirement that the UNHCR should eschew political commitment to a particular ideology in carrying out its functions.

It goes without saying that the scope of the protective function has necessarily been wide. Persons in the position of refugees now include not just fugitives who have escaped from persecution, but large numbers of people

78. Ibid.
79. (1946) 18 UNTS 3: text also in UN Year Book, 1946-47, 810.
80. See above p 122.

who have been encouraged to leave their homeland by the government in power. If this flood of unwanted humanity is released upon the world for economic, ethnic or political reasons, the responses must involve political as well as legal action. The UNHCR has to take a stand on a matter which is as critical for the peace of some parts of the world as the prevention of military posturing is for the peace of others. Whatever Article 2 might have been intended to mean, the UNHCR has a vital role to play and one that cannot be insulated from political realities. As Weis wrote as long ago as 1954:[81]

> ". . . diplomatic protection of citizens has as its purpose the assertion of the rights of nationals. This is also, on behalf of refugees, the task of the international agencies charged with their protection, but these agencies have never limited themselves to the protection of established rights. The promotion of the rights of refugees, the improvement of their legal status by means of the establishment of international instruments or the enactment of appropriate municipal legislation, have always been an important part of their functions. Apparently, the particular precariousness of the legal position of refugees, the vagueness of their position in international law, has led to the inclusion of this reformatory task in the mandate of the various international bodies . . . [I]t involves an activity of a legal-political nature".

The legal status of the UNHCR and the political importance of the part it is increasingly being called upon to play have enabled it to make up, at least to an extent, for the lack of procedural capacity of individuals under international law. These factors have enabled it to extend the measure of legal protection beyond the boundaries of purely conventional rules. The restrictive nature of the 1951 Convention was remedied by the 1967 Protocol, but certain basic tenets of refugee law have attained universal currency through the activities of UNHCR. The status of refugees as a group entitled to international protection is firmly established. While asylum in the form of admission to permanent residence is still resisted by States, the principle of *non-refoulement* is now generally accepted as part of international law. The notion of non-rejection at the frontier is in the process of acceptance as part of that principle, and carries with it the concomitant duties of the granting of temporary refuge and of burden sharing. The UNHCR has thus played a pivotal role in translating the concept of international protection into legal terms and in convincing States that they themselves will benefit from the acceptance of legal obligations towards refugees, including refugee seekers, and towards each other in the interests of "international solidarity".

81. "The International Protection of Refugees", (1954) 48 AJIL 193, 220.