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Problems with the International Definition of a Refugee and a Possible Solution

Toby D.J. Mendel*

The discourse of altruism that characterizes most discussions of refugee law as currently established is therefore simply misplaced. To reflect a commitment to attaining a humane and dignified response to the needs of involuntary migrants, the time is clearly right to engage in a fundamental reassessment of strategy.

Par conséquent, le discours altruistique qui caractérise la plupart des discussions du droit des réfugiés tel que nous le connaissons aujourd'hui est tout simplement déplacé. Si nous voulons prôner un engagement envers l'établissement d'une réponse, tant humanitaire qu'empreinte de dignité aux besoins de ces émigrés involontaires, le temps est à une réévaluation en profondeur de notre stratégie.

Wla wesku'taqn wjit ktlamite'taqn tan telamkwa'toqleikl mawaknutmagn', wjit wesimkultitewk tepultaqnmwow, tan nike kisutasik, Lpajel opli ika'tasik. We'kayiw kisi tli ankamkuk nkutey elapukwemkel elnuey aqq kepmeq teli maliaptasik tan teli nutatij wesimkultitewk, nike mawi nutak amskwesewey nekaqn wjit tan tla'taqititen.**

J.C. Hathaway

"A Reconsideration of the Underlying Premise
of Refugee Law"

(1990) 31 *Harvard Int'l L. J.* 129 at 181.

INTRODUCTION

The plight of refugees is one of the most urgent and complex problems confronting the international community. The estimated number of refugees in the world today varies significantly depending, among other things, on how one defines a refugee and the exact date of the count. All agree, however, that refugees number in the millions and most estimates range between ten and fifteen million.¹

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International legal protection for refugees is primarily codified in the 1951 *Convention Relating to the Status of Refugees*² and the 1967 *Protocol on the Status of Refugees*.³ To engage the protection of the international community today requires a potential refugee to fit within the definition found in Article 1(A)(2) of the *Convention*:

[Someone who,] ... 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.⁴

This definition has attracted widespread municipal support⁵ and many countries have incorporated this definition directly into local statutory regimes dealing with refugees.⁶ A significant problem with this definition, however, is that more than one-half of the world's *de facto* refugees (those who are, for reasons other than personal convenience, outside of their country of normal residence) do not fall within its ambit.⁷ In addition, there is no binding obligation on states to grant asylum to those who are covered.

In addition to the definition of a refugee, there is the principle of *nonrefoulement*, codified in Article 33 of the *Convention*, which reads as follows:

No Contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁸

This applies only to those who are already within a contracting state and not to those seeking refuge from abroad.

In the first part of this study I review the history of the *Convention* and the *Protocol* as it is relevant to the shortcomings of these two documents. I then discuss more fully the problems, summarized above, associated with the *Convention* definition of refugee. Finally, I will canvass some possible practical solutions to the international refugee situation.

HISTORICAL OVERVIEW

The international community's concern with refugees, as we use that term today, began after the First World War. In 1921, the Office of the High Commissioner for Refugees, the first institution to deal with

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refugees, was created by the League of Nations.⁹ This was conceived of as a temporary office to deal with the exodus of Russians from the Soviet Union. In 1928 a similar arrangement was concluded to cover Assyrian and Turkish nationals fleeing their respective states.¹⁰ This was followed by a series of agreements providing protection for a host of other specific groups of refugees.¹¹

The League of Nations did not attempt to define a refugee in general terms but chose to deal with each crisis as it came along. The refugees covered by these agreements had the following general characteristics:

- (1) they [were] nationals of a particular territory; (2) they [had] lost the protection, in law or in fact, of the particular government controlling the said territory; and (3) they [were] stateless or possessed no other nationality.¹²

The main focus was not on the racial, ethnic, political or religious characteristics of the refugees, but on the loss of protection of a national state. For example, the agreement covering the Russian exiles noted that they "no longer enjoyed the protection of the Government of the Union of Socialist Soviet Republics and had not acquired another nationality."¹³

The first general principle of international law concerning refugees appears in Subarticle 14(1) of the *Universal Declaration of Human Rights*:

- 14(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.¹⁴

The Second World War generated tremendous refugee problems which made it necessary to promulgate a more comprehensive scheme for dealing with refugees and to create a regime to administer it. In 1950 the *Statute of the Office of the United Nations High Commissioner for Refugees* was passed by a United Nations General Assembly resolution, establishing a body to deal with refugees.¹⁵

The *Convention* defined refugees in two ways:¹⁶ it included those already considered refugees by the various agreements and conventions dealing with stateless persons,¹⁷ and it added a general definition of a refugee.¹⁸ The definition, however, was restricted in its application to those displaced by events occurring before January 1, 1951. In addition, exposing the European focus of the *Convention*, Subarticle 1(B)(1) allowed states to restrict the ambit of the definition to events occurring in Europe.¹⁹ The *Convention* improved on previous instruments by applying generally, to all nationalities, and by substituting persecution for lack of national protection as the main criterion for granting refugee status. It retained, however, the temporal and geographical limitations of the previous agreements.

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By 1967 it was clear that events occurring outside of Europe or since 1951 continued to generate refugees who were in need of protection but who were not covered by the *Convention*. It was equally clear that these refugees had as much right to asylum as those already covered by the *Convention*. Accordingly, a *Protocol* was passed by the United Nations General Assembly. Article I, Sections 1 and 2, remove the temporal and geographical limitations, in the *Convention* definition of a refugee. Article I, Section 3, however, preserves the declarations of limitation made under Subarticle 1(B)(1)(a) of the *Convention*.²⁰ As Fragomen points out, any state which acceded to the *Convention* before the *Protocol* could elect to restrict the application of both the *Convention* and the *Protocol* to events in Europe, thereby circumventing the main purpose of the *Protocol* while reaping the political benefits.²¹

PROBLEMS WITH THE DEFINITION OF A REFUGEE

The definition of a refugee found in the *Convention* is problematic mainly because it excludes a large number of *de facto* refugees.²² The tension between the moral imperative to help those who are no longer being adequately looked after by their state of normal residence and the demands of state sovereignty has affected both the formulation and the application of the definition.²³ It would appear, however, that moral imperatives have had less influence. Hathaway argues that neither humanitarian nor human rights principles were important in formulating the *Convention* definition of a refugee.²⁴ On the other hand, several factors have contributed to the disproportionate influence of state sovereignty on the development of the definition. For example, a mass influx of refugees into a country compromises the independence of that country and in some cases subverts national goals.²⁵ Due to the United Nations General Assembly's recognition of the high status of state sovereignty, the drafters were well aware that if they worded the definition too strongly it would fail to attract sufficient support from the international community. Lack of good faith on the part of states jealous to safeguard their sovereignty compounds the problems inherent in a weak definition.

Unlike the earlier attempts to deal with refugee crises which were concentrated in Europe, modern refugee problems often involve people from diverse cultural backgrounds. The prospective receiving state feels little affinity to these people and, hence, its commitment to helping them is weak.²⁶ The perception that some states manipulate mass exoduses to achieve political ends in an international ideological battle, further erodes support for effective refugee relief.²⁷

Other problems flow from the fact that the definition was essentially designed to deal with the situation in Europe after World War II. The circumstances generating refugees today are profoundly different. The persecutors of today are not conquered submissive governments but independent sovereign nations.²⁸ Motivations for both persecution and fleeing have changed²⁹ and technological changes have also had their impact on the global refugee crisis. Technological

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contributions include the enhanced capability of states to persecute, the proliferation of air travel allowing people to move rapidly and safely around the globe, and the massive increase in the flow of information generating a greater impetus to leave.

The Definition of a "Well-Founded Fear of Being Persecuted"

Problems associated with the definition of a well-founded fear of persecution fall into two categories: those relating to the standard of proof required and those relating to the definition of 'persecution'. Most countries accept that proof of a well-founded fear of persecution involves both an objective and a subjective component. There is, however, considerable disagreement over what the standard of proof should be, who should bear the onus of proof, and what evidential strictures should be applied. It is crucial to those seeking asylum to know the answers to these questions in advance. For the definition to be effective internationally it is imperative that the standard of proof be uniform among receiving states.

The requisite standard of proof has attracted considerable attention in the United States. The United States Supreme Court decided that different standards should apply to granting asylum and withholding deportation.³⁰ The court held that withholding of deportation, which gives rise to an absolute right not to be deported, requires proof on the balance of probabilities, while eligibility for asylum, which only grants discretionary admittance, requires something less. The United States is alone among the Western countries³¹ in that it has created different standards of proof for *nonrefoulement* and asylum.

The requirement adopted by most Western countries that both objective and subjective components must be proved in order to establish a well-founded fear of persecution works injustice on those who have, in the heat of the moment, overreacted to what they perceive as persecution.³² It is unreasonable to expect those who fear for their physical integrity to weigh with nicety the probability of danger. In addition, prospective refugees often have limited information and insufficient time to come to a reasoned decision on their chances of being abused.

It is widely recognized that the lack of a definition of persecution in the *Convention* definition of a refugee causes serious problems.³³ At the moment, there are great discrepancies between the definitions applied in different countries;³⁴ definitions range from very liberal to fairly restrictive. The liberal view encompasses several viewpoints: those who argue that an affront to human dignity constitutes persecution,³⁵ those who view violations of human rights as a useful criterion for defining persecution,³⁶ and those who think that deprivation of life or liberty for more than a negligible period of time would best demarcate the limits of persecution.³⁷ The restrictive view equates persecution with loss of life or serious deprivation of physical freedom.³⁸ Hathaway criticizes the definition for being flexible enough to allow states to manipulate it to accord with their national interests, thereby depriving the *Convention* definition of a refugee of much of its effect.³⁹ A definition

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intended to be used for legal purposes requires clarity and the *Convention* definition fails to satisfy this basic requirement.

V. P. Nanda suggests that, in practice, the definition of persecution generally adopted is restrictive and applies only to individuals who "face discrimination or maltreatment ... of a very serious kind."⁴⁰ This suggestion is supported by case law from various countries. Indeed, even in Canada, a country traditionally regarded as liberal in formulating refugee policy,⁴¹ the interpretation of the definition seems to result in the exclusion of many *de facto* refugees. In *Re Iyar*⁴² the applicant was an Indian living in South Africa. Although she was segregated and not allowed to vote, the Immigration Appeal Board held that since she failed to identify any incident in which she had been physically persecuted, she was the subject of discrimination and not persecution. R. Plender identifies a British case where the Immigration Appeals Tribunal held that prosecution for breach of a country's laws could not amount to persecution.⁴³ If this is correct, then millions of Jews deprived of their property and put into camps in Nazi Germany, under the laws of that country, would have been ineligible for relief.

Cognizable Grounds of Persecution

To qualify as a refugee under the *Convention* definition, establishing persecution is not sufficient. The persecution must also be based on one of the enumerated grounds: race, religion, nationality, membership in a particular social group or political opinion. This is an illogical additional burden for someone who has been persecuted. If the essence of refugee status lies in the loss of protection of the state of residence due to persecution, the basis of that persecution should be irrelevant. D. P. Gagliardi argues convincingly that the grounds of persecution should not be confused with the fact of persecution itself and, therefore, should not be incorporated into the definition of persecution:

The cognizable grounds simply describe the tormentor's motive; but it is the intent to do harm, not the motive, that defines persecution. In short, the cognizable grounds focus attention on the wrong question ... Their inclusion invites inquiry into factors that are tangential to the notion of persecution itself and to the humanitarian purpose of providing relief to victims of persecution.⁴⁴

In addition, the definition does not make it clear whether persecution based on the fact of membership in one of the cognizable grounds is enough or whether persecution for acts taken pursuant to membership is required.⁴⁵

There are two main ways in which people who are persecuted can fail to fit within the cognizable grounds: first, the categories simply do not cover all the grounds upon which people are commonly persecuted, and second, since a substantial amount of persecution does not have a clear motivation but relates to general conditions of violence and repres-

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sion, activity which amounts to persecution may nevertheless fall outside the definition.

Race, religion, and nationality, while subject to different interpretations, are reasonably well defined terms. The political opinion category, however, is subject to widely varying interpretation, largely based on one's ideological perspective. The United States, for example, regularly defined those who had fled from communist countries for political reasons as refugees, while declining to do so for those who had fled from countries friendly to the United States.⁴⁶ Political exiles, an important group of refugees, are often at the mercy of the international political scene and factors irrelevant to their persecution may determine their international status.

Hyndman points out that it may be difficult to establish a link between a political opinion and the repressive measures taken by the state, thus precluding protection despite clearly established persecution.⁴⁷ Western countries have generally accepted that the test as to whether something qualifies as political activity should be based on the classification of that activity by the ruling government of the country from which the refugee fled.⁴⁸ This is often problematic, however, since states generally do not link sanctions explicitly to the political activity that inspired them. In some countries the repressive organs that carry out persecution have developed sophisticated techniques to mask their motivation, particularly when the object is political repression.

Membership in the 'particular social group' category is also subject to varying interpretation, often based on ideology, international relations or fear of a massive influx of refugees. In a case from the United States, *Acosta*,⁴⁹ the applicant belonged to a taxi co-operative in El Salvador which refused to join in a work stoppage at the request of the anti-government guerrillas. Subsequently, several of the members were killed and Acosta himself received death threats. Although the Immigration Appeal Board accepted Acosta's testimony and held there was a well-founded fear of persecution, it denied him relief, holding that the taxi co-operative did not qualify as a social group. In a Canadian case, *Sévère*,⁵⁰ the applicant was a member of a socialist theatrical group in Haiti which was critical of the government and whose leaders had been harassed constantly by the Tonton Macoute Militiamen. The Board classified the group as analogous to a 'literary circle', not a 'social group', and rejected the claim.⁵¹ In another Canadian case, *Belfond*,⁵² the Board further limited the term 'social group':

Either the group must be political and proclaim and exhibit dissidence with the regime or be a religious sect which has been persecuted by the civil authorities because of its religious beliefs. In a multinational state, a racial minority might constitute such a group.⁵³

Such a restrictive interpretation of 'social group' essentially voids the category of meaning.

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Often, a government under attack from guerillas, in what amounts to a civil war, will either randomly persecute in areas where it suspects the populace generally of supporting the guerillas, or retaliate in an over-inclusive way because of inability to effectively identify destabilizing elements.⁵⁴ Many of those affected may be apolitical or even supportive of the government; in such a cases the persecution cannot properly be said to be based on political opinion. The real cause is the government's paranoia or the techniques they have adopted to deal with insurgency. The definition is simply not designed to cover such situations. In *Coriolan v. I.N.S.*⁵⁵ the court quoted from an Amnesty International report on conditions in Haiti under the Duvalier regime:

There may have been no political activity whatsoever, as a large number are imprisoned indiscriminately ... We cannot believe, however, that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its oppression.⁵⁶

The need for the international community to provide protection from random government persecution is as acute as it is when the persecution is based on one of the cognizable grounds.

As Gagliardi points out, random or over-inclusive persecution is to be distinguished from destabilization directly associated with civil war or invasion by foreign forces.⁵⁷ In a civil war or during a foreign invasion certain measures, such as curfews, military censorship and restrained searches, may be enforced as part of a military response. Measures not related to military objectives but designed primarily to terrorize the population should be classified as persecution. In any particular situation it may be difficult to draw a clear line between actions with a valid military objective and those essentially designed to persecute.

The Requirement to be Outside Your Country of Nationality

Another requirement of the *Convention* definition is that a refugee claimant be outside his or her country of nationality. This is a requirement that those being persecuted must satisfy to gain the protection of the international community, but which is essentially unrelated to their need for protection.⁵⁸ The problem is not insignificant, as Fragomen points out; such people may constitute a majority of those refugees excluded by the *Convention* definition of a refugee.⁵⁹ The High Commissioner for Refugees has also complained of this problem:

[I]t is felt by some that persons who do not cross an internationally recognized border should be treated as displaced persons. Here again, there is need for clarification.⁶⁰

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It is clearly inconsistent with the aim of refugee law to exclude potential refugees merely because they have failed to leave their country of residence. Often failure to leave is a direct result of the persecution they are suffering from in the first place.

This requirement also raises questions about the underlying premise of modern refugee assistance. Many of those applying for refugee status do so because they are involved with secessionist movements contesting the borders of their countries. This is especially true in post-colonial countries where the borders rarely conform to ethnic divisions. To deny refugee status merely because the claimant is unable to escape the contested borders is to deny responsibility for a problem often created by Western colonial powers in the first place. Groups fighting for independence should represent the quintessential aim of modern refugee law; providing an escape for political activists is an indirect way of supporting such movements. To require those involved in secessionist movements to leave undermines this support both by reinforcing, at an international level, the validity of the contested state borders and by posing additional obstacles in the way of refugee protection.

Exclusions

Article 1, Sections C to F, of the *Convention* contain a number of exceptions to the granting of refugee status under the Section A definition. Sections C and E refer to people who, for one reason or another, come within the protection of an acceptable state. Section D disqualifies those receiving aid from organs or agencies of the United Nations other than the UNHCR. This considerably lessens the scope of the definition.⁶¹ Subsection F(b) excludes those who have committed serious non-political crimes. In these cases, the underlying rationale for refugee protection is ignored. 'Criminals' may not be highly desirable as new citizens but they are surely no less deserving of protection from an oppressive state than anyone else. Finally, Subsection F(c) excludes those who have "been guilty of acts contrary to the purposes and principles of the United Nations."⁶² The scope of the "purposes and principles" of the United Nations is undefined. Even if it were restricted to the principles outlined in the United Nations Charter (the most restrictive practical interpretation possible), the ambit of this phrase is very wide and could easily be abused. These exclusions derogate from the principle behind providing refugee protection and should be curtailed accordingly.

The Discretionary Nature of Granting Asylum

Neither the *Convention* nor the *Protocol* place any obligation on signatories to grant asylum to those coming within the definition of a refugee; individual states retain absolute discretion to admit or reject refugees.⁶³ Subarticle 33(1) of the *Convention* prohibits expulsion of refugees to territories where their life or freedom would be threatened

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but this only applies to persons already within the Contracting State's borders. The discretionary nature of the grant of asylum is a fundamental weakness in the scheme of protection afforded refugees.⁶⁴ During the Cold War, the West made use of refugees as a propaganda weapon in its international ideological battles. As a result, accepting refugees has come to be seen as a negative comment upon the internal affairs of the state of origin. Many states are thus reluctant to grant refugee status to those fleeing friendly regimes and use their discretion to avoid political embarrassment at the expense of the claimants.⁶⁵ Even more alarming is the possibility that governments will use their discretion to warp the aim of refugee law not only to avoid offending friendly states but also to enhance their municipal standing. The effects of this may range from only 'importing' educated refugees to introducing a colour bias when accepting refugees because of domestic racism.⁶⁶

No procedure for determining or admitting refugees is prescribed by the *Convention*. Thus, states often design their procedures in a way that allows them to adapt international obligations to their own needs.⁶⁷ Such procedures often vary widely.⁶⁸ Many countries have simply elected not to set up any procedures at all.⁶⁹ This glaring lacunae in the *Convention* enables Contracting States to exclude any unwanted refugees without acknowledging the real reasons for doing so; thereby avoiding international scrutiny.

The Need For Individual Assessment

The *Convention* requires an individual determination of refugee status. Mass exoduses of people from a state now generate a large proportion of all refugees and these migrations pose the greatest challenges to international refugee law.⁷⁰ The assessment procedure required to determine refugees under the *Convention* presents a major barrier to efficient processing in the case of a mass migration.⁷¹ The *Convention* and *Protocol*, designed to deal with manageable numbers of refugees, are difficult to comply with when huge numbers are involved.

States initially receiving large refugee flows, generally less developed countries with few resources, are often completely unable to deal with entrants on an individual basis. Even in states of final refuge, despite their generally superior resources, there is a tendency for determination systems to generate backlogs.⁷² The *Convention* definition places the additional burden of individual determination on states already reluctant to admit large numbers of refugees. Difficulties in applying the *Convention* definition tends to dilute its acceptance, support, and uniform application in the international refugee determination process.

Displaced Persons

Perhaps the greatest weakness of the *Convention* refugee definition is that it fails to provide any relief for persons dislocated by war, civil strife, natural disasters, or serious economic disruptions.⁷³ The precise

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problems of displaced persons, referred to by the UNHCR as *de facto* refugees, may differ from the problems of persons who are actively being persecuted by their governments, but their need for assistance, especially immediate aid, is no less imperative.⁷⁴ Furthermore, the main cause of forced migration is not persecution but a combination of natural disaster, war and economic turmoil.⁷⁵ It is contrary to the basic notion of a refugee, as reflected in common parlance, to exclude those fleeing from causes other than persecution from international protection under the *Convention*.

The history of refugee law, starting with the League of Nations,⁷⁶ is basically a response to the problem of persons displaced by diverse factors including war and civil strife. It is inconsistent with this history to limit refugee status to those suffering from persecution. As Fragomen points out, the distinction between political and economic refugees is frequently artificial.⁷⁷ Most political and racial oppression is based on a struggle for economic control. To try and divorce politics and economics is, at a practical level, verging on the ridiculous. The real point, however, is that those deprived of basic human needs require international protection whether that deprivation is based on direct government oppression or factors tangential to it. To deprive displaced persons from relief under international refugee law is both inhumane and incompatible with the overall aims of refugee law.

SOLUTIONS

Having established that there are problems with the international definition of a refugee, it is now necessary to propose solutions. There are really only three viable alternatives in the treatment of refugees: voluntary repatriation; temporary absorption into the country of first refuge; or final resettlement in a third country.⁷⁸ The first generally requires a change in the circumstances that brought about flight in the first place. Chamberlain suggests that the root causes should be studied to improve the international community's response to the problem through careful development aid.⁷⁹ While this is certainly a useful suggestion, development aid is unlikely to remove all sources of refugees, especially in the short run.⁸⁰

The second and third possibilities require an expansion of the *Convention* definition of a refugee. J. I. Gunning has suggested that resistance to widening the definition is based on two arguments: concern about the availability of resources and fear that state sovereignty in the area of foreign policy would be compromised.⁸¹ To these considerations I would add the desire to deter an influx of culturally, racially and politically dissimilar people, both for political reasons and general xenophobia.

Moves Towards Expanding the Definition of a Refugee

The first efforts to expand the definition of a refugee came, predictably, from the UNHCR. By 1957, the General Assembly had

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authorized the UNHCR to use its 'good offices' to aid refugees who fell outside their direct mandate.⁸² In 1965 the General Assembly eliminated the distinction between *Convention* and non-*Convention* refugees with respect to the UNHCR seeking international assistance for refugees.⁸³ Finally, in 1975, the General Assembly authorized the UNHCR to act for victims of man-made events who were in a situation 'analogous' to that of *Convention* refugees.⁸⁴

In 1969, the Organization of African Unity adopted a convention to deal with the problem of refugees regionally. In addition to covering *Convention* refugees Article 1, Subsection (2) extends the traditional coverage:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁸⁵

This coverage is similar in its ambit to the 1975 extension of the powers of the UNHCR discussed above.

In 1984, a colloquium on international protection for refugees in Central America, Mexico and Panama was held in the Republic of Columbia. The Conclusions and Recommendations (known as the "Cartegena Declaration on Refugees") calls for the definition of refugee to include:

[P]ersons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.⁸⁶

This definition extends coverage in approximately the same way as the *OAU Convention* and the 1975 amendment to the UNHCR's powers.

The Problems of Resources and Foreign Policy

The fear of refugee-receiving countries that resources would be strained by an expansion of the definition of a refugee is probably unfounded. The UNHCR already provides assistance to *de facto* refugees, so to that extent, no additional resources would be required. More importantly, the decision to leave one's country of origin is determined primarily by practical considerations, not those set out in the *Convention* definition of a refugee. Further, factors such as cost and the personal destabilization likely to ensue prevent the vast majority of those entertaining thoughts of leaving their homelands from translating their thoughts into action. In any case, one must balance the moral imperative

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of aiding those who need international protection with the issue of a lack of resources. The massive charitable efforts launched each time a new crisis occurs suggest that the means to provide assistance are available.

Presently, production of refugees is often viewed by the international community as a negative comment on the internal affairs of the state of origin. Governments are concerned that an expansion of the definition of a refugee will limit state discretion to control admission and inhibit their ability to freely determine foreign policy. A significant broadening of the scope of the definition of a refugee, however, would tend to reduce the ideological content now attached to refugee acceptance. By shifting the focus from persecution of individuals, which is seen as unacceptable, to inability to protect groups, the determination of a refugee would be based on economic, as opposed to moral, considerations. The negative foreign policy implications of accepting refugees from friendly states would be largely neutralized by the lessened stigma of refugee production.

The Problem of Displaced Persons

Many of the defects in the *Convention* definition, discussed above, affect only a small number of refugees in particular circumstances and could be solved by minor adjustments, without significantly altering the scope or the object of the definition. The problem of displaced persons, whether uprooted by war, civil unrest, serious economic disruption or natural disaster, differs in nature from other weaknesses in the definition in two main respects: first, displaced persons are suffering from a qualitatively different problem than persecuted persons and, second, the number of displaced persons is extremely large, hence inclusion in the definition would require major changes to the operation of any scheme designed to deal with refugees.

It is widely recognized that displaced persons suffer in a qualitatively different way than those who are actively persecuted by their governments.⁸⁷ Perhaps the best way to describe this difference is that the former require the assistance of the international community while the latter require its protection. I propose that the problem of displaced persons be dealt with primarily by granting refuge on a temporary basis with a view to voluntary repatriation after the conditions giving rise to the need for refuge have dissipated. Temporary refuge should be organized on a regional basis. This organization would accord with present realities, be acceptable to the international community at large, minimize disruption to the individuals involved, and reduce costs. To prevent the burden of granting temporary refuge from falling predominantly on those states accommodating refugee influxes, those who can generally least afford it, the financial obligations incurred should be distributed according to ability to pay, primarily among the developed nations.⁸⁸

The idea of temporary refuge has been gaining support in the international community, partly because it is practical.⁸⁹ The *OAU Convention* only extends asylum rights to *Convention* refugees while

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displaced persons merely have the right not to be deported (*nonrefoulement*).⁹⁰ While the principle of *nonrefoulement* in Article 33 of the *Convention* only extends to refugees, it represents the only obligation incurred by State Parties that is beyond their control. Presumably, individuals entitled to *nonrefoulement*, but not granted permanent residence, would obtain temporary refuge. Hyndman suggests that temporary refuge accords both with state practice and is found in many international instruments.⁹¹ Hartman has argued convincingly that temporary refuge has become a norm of international customary law, at least in relation to civilians fleeing internal armed conflict.⁹²

An advantage of temporary refuge is that it envisages eventual voluntary repatriation of the displaced persons once conditions return to normal in the state of origin. There are several advantages to this relative to the other durable solutions, permanent asylum or resettlement: the individuals involved are not subjected to cultural and political disruptions and other traumas attendant upon relocation in a foreign environment, costs are minimized, and foreign policy implications are reduced.⁹³

The key to the success or failure of any system proposed for the international arena is its acceptability to the actors involved.⁹⁴ The system being proposed would impose obligations on two sets of states: those providing temporary refuge, and those who are being asked to sustain the financial burden. Those providing temporary refuge will be amenable to this system in part because they are culturally and ethnically similar to the refugees and have a better understanding of their plight. The same forces that gave rise to the initial international refugee protection in Europe generate sympathy and tolerance with respect to refugees from within relatively homogeneous regions.⁹⁵ These states have great difficulty controlling the flow of refugees in any case and tend to absorb them under the current system despite the lack of any obligation to do so.⁹⁶ The main concern of states of first asylum is generally the tremendous cost associated with large influxes.⁹⁷

The developed nations would also be willing to participate in such a system. They are primarily concerned with preventing a mass influx of "foreigners" which is seen as a threat to domestic harmony and politically dangerous.⁹⁸ These nations would see the obligation to pay the costs of maintaining refugees abroad as an acceptable trade-off. In addition, developed nations already foot a large part of the bill for looking after displaced persons through the UNHCR⁹⁹: a direct obligation would not make a big difference to them. Finally, the humanitarian and human rights pressures that exist within developed states would exert a certain amount of political pressure in favour of such a scheme.

Temporary dislocation, with a view to eventual repatriation, would reduce the disruption in the lives of the refugees, themselves. Instead of being transferred into a totally different environment, they would remain in the same part of the world and expect to return to their homes at some point. This factor would weaken as the length of the refugee period increases but the sad fact is that many displaced persons spend years in refugee camps as it is.¹⁰⁰ Another destabilizing element

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for displaced persons is their precarious status in the state of first refuge. Presumably, once international obligations were entered into, and funding put into place, the level of security afforded would increase. Instead of being dependent on the whims of a single, host state and the 'good offices' of the UNHCR, they would be protected by an international agreement, possibly under a separate governing agency.

Finally, the cost of maintaining displaced persons in the state of first refuge would be much less than that associated with permanent relocation. Various plans for reducing costs, discussed above,¹⁰¹ could be implemented. A uniform system for dealing with such people would be administratively much more efficient and thereby cut costs. Most importantly, the cost of maintenance in states of first refuge would tend to be much less than in receiving states due to the nature of their economies.

CONCLUSION

The *Convention* definition of a refugee is no longer viable. It was originally designed to deal with the limited refugee situation that existed forty years ago. Both the passage of time and the internationalization of refugee problems have weakened the effect of the definition to the point where a majority of *de facto* refugees do not even come within its ambit. Many of those who should be covered by the definition are not afforded protection under the national schemes designed in accordance with the *Convention's* provisions. The UNHCR tries to deal with refugee situations as they arise but without guaranteed, long-term funding, the response is woefully inadequate. It is clear that a new regime governing refugees needs to be promulgated.

An international proposal for dealing with refugees must be acceptable to state governments to gain acceptance. It should also take into account current practices with regard to refugees. I suggest that a proposal based on the idea of temporary refuge and envisaging eventual voluntary repatriation would be most acceptable to all involved. In practice, most refugees already remain in the country of first refuge. Western states, through the UNHCR, already foot a large part of the bill for these refugees and would be amenable to increased funding if they could also renounce the obligation to accept large numbers of refugees as citizens. A treaty, codifying a scheme along these lines, would regularize current practices and provide enhanced protection for refugees.

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1. See: *Refugees Magazine*, (Office of the United Nations High Commissioner for Refugees [hereinafter UNHCR], March 1986), at 13; Report of the United Nations High Commissioner for Refugees, 40 U.N. GAOR Supp. (No. 12) at 3, U.N. Doc. A/40/12 (1985); and the United States Committee for Refugees, *1980 World Refugee Survey* (New York: United States Committee for Refugees, 1980), at 33:

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1980 Refugees and Displaced Persons

Africa	4,045,200
Asia	7,292,500
Europe	229,750
Latin America	1,085,300
Middle East	<u>3,312,500</u>
Worldwide Total	15,965,250

The difficulty in accurately assessing the number of refugees worldwide is accentuated by conflicts such as the recent conflagration in the Persian Gulf. In that case, in just two months, a substantial number of new refugees were generated, dating previous estimates.

2. *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137. In force 22 April 1954 in accordance with Article 43 [hereinafter Convention].
3. *Protocol Relating to the Status of Refugees*, 31 January 1967, G.A. Res. 2198 (XXI), 21 U.N. GAOR, Supp (No. 16) at 48, U.N. Doc. A/6316 (1966). In force 4 October 1967 in accordance with Article VIII [hereinafter Protocol].
4. See the Convention, *supra*, note 2, at Subarticle 1(A)(2).
5. See F. Krenz, "The Definition of a Refugee", text of a statement at the National Symposium on the Protection of Refugees, Toronto, February 19-21, 1982. By 1982, 92 states had ratified the Convention and/or the Protocol. Since then there have been several more ratifications. In addition, many states have indirectly accepted the Convention definition through regional agreements such as the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, *infra*, note 85.
6. See: Canada: *The Immigration Act*, R.S.C. 1985, c. I-2, ss. 2(1); Denmark: Act No. 224 of 7th June, 1952, Regarding the Admission of Foreigners, s. 2; France: Law No. 52-893 of 25th July, 1952, and Presidential Decree No. 54-1055 of 14th October, 1954, 1954 D.432; Germany: Asylum Ordinance, 1953 BGBl 3; Norway: Alien's Act of 27th June, 1956, 2; Sweden: Foreigners Law of 30th April, 1954, art. 2; and the United States: 8 U.S.C. ss. 1101(a)(42)(A).
7. See: M.D. Chamberlain, "The Mass Migration of Refugees and International Law" (1983) 7 *Fletcher Forum* 93 at 98; I.R. Gunning, "Expanding the International definition of Refugee: A Multicultural View" (1989-90) 13 *Fordham Int'l L. J.* 35 at 37; J.C. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 *Harvard Int'l L. J.* 129 at 132; D. Hull, "Displaced Persons: 'The New Refugees'" (1983) 13 *Georgia J. Int'l Comp. L.* 755 at 756-7; and R. Plender, "Admission of Refugees: Draft Convention of Territorial Asylum" (1977) 15 *San Diego L. Rev.* 45 at 47.
8. See the Convention, *supra*, note 2 at Subarticle 33(1).
9. 7 League of Nations O.J. 755-58 (1921).
10. Arrangement of 30 June 1928, in *Collection of International Instruments Concerning Refugees* (UNHCR 1979), at 45 [hereinafter the UNHCR Collection].
11. See: Convention of 28 October 1933, UNHCR Collection, *supra*, note 10, at 45; Convention of 10 February 1938, UNHCR Collection, *supra*, note 10, at 46; Protocol of 14 September 1939, UNHCR Collection, *supra*, note 10, at 46; and the *Constitution of the International Refugee Organization*, UNHCR Collection, *supra*, note 10 at 46-7.
12. C.O. Miranda, "Toward a Broader Definition of Refugee: 20th Century Development Trends" (1990) 20 *Cal. West. Int'l L. J.* 315 at 318.
13. Arrangement of 12 May, 1926, UNHCR Collection, *supra*, note 10 at 45.
14. *The Universal Declaration Of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), at 71, Subarticle 14(1).
15. G.A. Res. 428 Annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950) [hereinafter Statute of the UNHCR].
16. *Supra*, note 2 Subarticle 1(A).
17. See *supra*, notes 10, 11 and 13.
18. *Supra*, note 2 Subarticle 1(A)(2).
19. *Supra*, note 2 Subarticle 1(B)(1) reads:

For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either

- a. "events occurring in Europe before 1 January 1951"; or

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b. "events occurring in Europe or elsewhere before 1 January 1951";

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

20. *Supra*, note 3. Article I, section 3 reads:

The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol.

21. A.T. Fragomen, Jr., "The Refugee: A Problem of Definition" (1970) 3 *Case Western Reserve Journal of International Law* 45 at 60-1.

22. See *supra*, note 8.

23. For a discussion of this problem see: Chamberlain, *supra*, note 7 at 101; J.I. Garvey, "Toward a Reformulation of International Refugee Law" (1985) 26 *Harvard Int'l L. J.* 483 at 487 [hereinafter Garvey (1)]; and Gunning, *supra*, note 7 at 39.

24. See Hathaway, *supra*, note 7 specifically at 130-2.

25. Consider, for example, the crisis precipitated in the Malawian economy by refugees flowing over the border from Mozambique between 1985 and 1990. Malawi required massive assistance from the UNHCR. This influx of capital has had far reaching effects on the Malawian economy.

26. See Hathaway, *supra*, note 7 at 179.

27. Examples of this are outflows from Cuba, Vietnam and Uganda. Particularly revealing is a statement made by Jimmy Carter about the effect the Cuban influx had had on his unsuccessful presidential bid:

The refugee question has hurt us badly. It wasn't just in Florida, it was throughout the country. It was a burning issue. It made us look impotent when we received these refugees from Cuba.

J. Carter, "Carter's Own Post-Mortem: Successes, Mistakes - And His Future" *U.S. News & World Report* (17 November 1980) 92.

28. See Garvey (1), *supra*, note 23 at 483.

29. See Chamberlain, *supra*, note 7 at 104.

30. *INS v. Cardoza-Fonseca*, 480 U. S. 421 (1987).

31. See K. Hailbronner, "Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" (1986) 26 *Virginia J. Int'l L.* 857 at 880-887.

32. See Fragomen, *supra*, note 21 at 58.

33. See: Fragomen, *ibid.*, at 54; P. Hyndman, "Refugees Under International Law with a Reference to the Concept of Asylum" (1986) 60 *The Australian L. J.* 148 at 149 [hereinafter Hyndman (1)]; P. Hyndman, "The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants" (1987) 9 *Human Rights Quarterly* 49 at 59 [hereinafter Hyndman (2)]; and B.M. Tsamenyi, "The 'Boat People': Are They Refugees?" (1983) 5 *Human Rights Quarterly* 348 at 362.

34. See Fragomen, *supra*, note 21 at 64.

35. P. Weis, "The Concept of the Refugee in International Law" (1960), U.N. Doc. HCR/INF/49 at 22.

36. G. Melander, *Eligibility Procedure in Western European States* (1976), at p. 22.

37. A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1, (Leyden: A. W. Sijthoff, 1966) at 216.

38. See Tsamenyi, *supra*, note 33 at 363, citing G. Melander, *Eligibility Procedure in Western European States* (1976), 22, at 193.

39. *Supra*, note 7 at 168-71. See also Chamberlain, *supra*, note 7 at 103.

40. V.P. Nanda, "World Refugee Assistance: The Role of International Law and Institutions" (1980-81) 9 *Hofstra L. Rev.* 449 at 468.

41. See R.C. Silberstein, "United States, Canadian, and International Refugee Law: A Critical Comparison" (1988) 12 *Hastings Int'l Comp. L. Rev.* 261 at 281-2.

42. *Re Iyar*, No. 79-1237 (IAB 1/15/80).

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43. Plender, *supra*, note 7 at 54. Cited as TH/5911/75. Identification withheld. Researchers refer to Clerk of the Tribunal Immigration Appeals, Thanet House, Strand, London W.C. 2.
44. D.P. Gagliardi, "The Inadequacy of Cognizable Grounds of Persecution as a Criterion for Awarding Refugee Status" (1987-88) 24 *Stanford J. Int'l L.* 259 at 272.
45. See Plender, *supra*, note 7 at 57-8. For example, is persecution based on membership in a religious group, despite lack of manifestation of that belief, enough to engage the definition, in which case all members of the group would potentially be covered, or must the discriminatory measures relate to religious acts, thereby excluding non-practising members. An historical example of the relevancy of this is the Spanish Inquisition when Jews who renounced their faith were not persecuted but those who insisted on continuing devotion were: would all Jews merit protection or just those unwilling to sacrifice their religion?
46. See: Hathaway, *supra*, note 7 at 168-71; and C.J. Wydrzynski, "Refugees and the Immigration Act" (1979) 25 *McGill L. J.* 154 at 175 (note 100).
47. See Hyndman (2), *supra*, note 33 at 71.
48. See, for example: Canada: *Re Inzunza and Minister of Employment & Immigration* (1979), 103 D.L.R. (3d) 105 (Fed. C.A.); United States: *Orellana v. M.E.I.*, F.C.A., July 25, 1979 (unreported).
49. *Matter of Acosta*, Interim Dec. No. 2986.
50. *Sévère* (1975) 9 I.A.C. 42.
51. *Ibid.*, at 55.
52. *Belfond* (1975) 10 I.A.C. 208.
53. *Ibid.*, at 222.
54. Examples include: El Salvador (see Gagliardi, *supra*, note 44, at 277-279); Guatemala; Uganda under Idi Amin; and Mozambique. In the case of Mozambique it is the guerillas, the Mozambiquan National Resistance, who are primarily responsible for this kind of activity.
55. *Coriolan v. I.N.S.*, 559 F.2d 993 (5th Cir. 1977).
56. *Ibid.*, at 1001.
57. Gagliardi, *supra*, note 44 at 277.
58. See: Fragomen, *supra*, note 21 at 55 and 57; Hyndman (1), *supra*, note 33 at 149.
59. Fragomen, *supra*, note 21 at 57.
60. *Addendum to the Report of the United Nations High Commissioner for Refugees*, 32 U.N. GAOR, Supp. (No. 12A) at 33-34, U.N. Doc. A/32/12/Add. 1 (1977).
61. For example, in 1949 the United Nations Relief and Works Agency for Palestinians in the Near East (hereinafter UNRWAPNE) was established to deal with Palestinian refugees, G.A. Res. 302 (IV), 5 U.N. GAOR Supp. (No. 1) (1949). Since a large proportion of the Palestinian refugees come within the scope of the UNRWAPNE's mandate they are excluded from the refugee definition. However, they are often not afforded adequate protection from persecution, especially if they are active in the Palestine Liberation Organization or other grassroots organizations which oppose the Israeli occupation of the West Bank and Gaza Strip.
62. Convention, Subarticle 1F(c).
63. See: Hull, *supra*, note 7 at 761; and Plender, *supra*, note 7 at 49.
64. See Nanda, *supra*, note 40 at 456-7. Chamberlain points out that the right of the individual to leave is firmly entrenched in both treaty and customary international law while the logically correlative right, asylum, is absent, *supra*, note 7 at 93-4.
65. See: J.F. Hartman, "The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict" in D.A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinus Nijhoff Publishers, 1988) 87 at 96; Hyndman (1), *supra*, note 33, at 149; and G. Melander, "The Protection of Refugees" (1974) 18 *Scandinavian Studies of Law* 151 at 159.
66. See: Carter, *supra*, note 27; Fragomen, *supra*, note 21 at 46; and Hathaway, *supra*, note 7 at 133 and 175.
67. Canada, for example, excludes everyone who a) is suffering from a disease that may endanger public health or cause excessive demands on social services (F.N. Marrocco, Q.C. and H.M. Goslett, *The Annotated 1991 Immigration Act of Canada* (Agincourt, Ontario: Carswell, 1990), ss. 19(1)(a); b) may be unable to support themselves (ss. 19(1)(b)); c) is or may be convicted of a serious offence (ss. 19(1)(c) and (d)); d) is or may be a spy or subversive (ss. 19(1)(e)-(f)); and e) is or may be a terrorist (ss. 19(1)(g)). These wide-ranging powers of exclusion, especially those related to security, which require no explanation, enable the Canadian authorities to exclude any "undesirable elements".

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68. For example, in the United States, in *Pierre v. United States* (1977), 547 F.2d 1281 (5th Cir.), vacated and remanded to consider question of mootness, (1977), 434 U.S. 962, the court held, at 1288, that “[t]he entire immigration scheme would be nullified if any alien desiring entry could demand the full process of the courts to adjudicate his refugee status, merely by appearing at our shores and proffering assertions of [refugee] status...” Physical presence inside the United States, therefore, affords no greater protection, procedurally or otherwise, than is generally available. Contrast this with *Singh v. Minister of Employment & Immigration* (1985), 58 N.R. 1 (SCC), a Canadian case, at 49 and 60-1, where Wilson J. differentiated Canadian procedure from that of the United States and held that s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, and the wide range of procedural and substantive justice that it engenders, applies to refugee claimants as soon as they are physically within Canada.
69. See: Hyndman (1), *supra*, note 33 at 151; and Nanda, *supra*, note 40 at 467.
70. See Garvey (1), *supra*, note 23 at 485.
71. See: Chamberlain, *supra*, note 7 at 94; Gunning, *supra*, note 7 at 46; Hailbronner, *supra*, note 31 at 859; Hull, *supra*, note 7 at 763; and Hyndman (1), *supra*, note 33, at 151.
72. A case in point is Canada which has created a “special” process for those who filed claims before January 1, 1989. It is hoped that the backlog will be dealt with by the end of 1991, by which time there will be a new backlog, dating from January 1, 1989.
73. See: Gunning, *supra*, note 7 at 37; Hall, *supra*, note 7 at 756; Hyndman (1), *supra*, note 33 at 149; Miranda, *supra*, note 12 at 316; and Nanda *supra*, note 40 at 468.
74. See Plender, *supra*, note 7 at 54.
75. See: Fragomen, *supra*, note 21 at 56 quoting from the United States Committee for Refugees, *World Refugee Report 2* (1970), who suggests that in 1970 only 3,490,000 of 17,318,320 [about 20%] of refugees worldwide qualified under the Convention definition; Gunning, *supra*, note 7 at 38; Lentini, “The Definition of Refugee in International Law: Proposals for the Future” (1985) 5 *British Columbia Third World Law Journal* 183 at 184; and Plender, *supra*, note 7 at 47.
76. See *supra*, notes 9 - 13.
77. *Supra*, note 21 at 58.
78. See: Hathaway, *supra*, note 7 at 131; and Hyndman (1), *supra*, note 7 at 152.
79. *Supra*, note 7 at 106, 107. See also J.I. Garvey, “The New Asylum Seekers: Addressing Their Origin” in D.A. Martin ed., *The New Asylum Seekers: Refugee Law in the 1980s*, (Dordrecht: Martinus Nijhoff Publishers, 1988) 181 at 186. [hereinafter Garvey (2)]
80. It is beyond the scope of this paper to discuss the likely impact of development aid on refugee production. Suffice it to say that international development aid has long focused on refugee protection without accomplishing a significant reduction in the problem. I suggest that the factors underlying refugee production are very deep rooted and the effect of international development aid will remain superficial unless funding levels are increased dramatically.
81. *Supra*, note 7 at 76.
82. Chinese Refugees in Hong Kong, G.A. Res. 1167, 12 U.N. GAOR Supp. (No. 18) at 20, U.N. Doc. A/3805 (1957), authorizing the UNHCR to use its “good offices” to help Chinese refugees in Hong Kong.
83. Report of the UNHCR, G.A. Res. 2039, 20 U.N. GAOR Supp. (No. 14) at 41, U.N. Doc. A/6014 (1965).
84. Report of the UNHCR, G.A. Res. 3454, 30 U.N. GAOR Supp. (No. 34) at 92, U.N. Doc. A/10034 (1975).
85. *The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45, Article 1, Subsection (2) [hereinafter the OAU Convention].
86. *Cartagena Declaration on Refugees (Cartagena de Indias)*, 22 November 1984, OAS/Ser.L/V/II.66, doc. 10, rev. 1, Conclusions and Recommendations III(3).
87. See: Chamberlain, *supra*, note 7 at 104; Gagliardi, *supra*, note 44 at 277; G.S. Goodwin-Gill, “Non-Refoulement and the New Asylum Seekers” (1986) 26 *Virginia J. Int'l L.* 895 at 913; Gunning, *supra*, note 7 at 54; Hartman, *supra*, note 65, at 90 and 94; and Plender, *supra*, note 7 at 61.
88. See: Chamberlain, *supra*, note 7 at 106; and Gunning, *supra*, note 7 at 81-82. Goodwin-Gill (*supra*, note 87 at 916-8) proposes a set of principles for resolving problems associated with displaced persons. He suggests that burden-sharing and co-operation in promoting solutions are necessary.

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89. See Hull, *supra*, note 7 at 791. Gunning (*supra*, note 7) argues that a restricted right of temporary refuge, granted to displaced persons, could be accompanied by other limitations. As examples she suggests that the right to work could be refused or only granted on a temporary basis and that full access to public relief and assistance could be withheld from temporary refugees. As a last resort, temporary refugees could be held in camps where costs are significantly reduced. As she points out, this is an extreme solution with serious drawbacks. Where funding was adequate, however, many of the worst problems associated with camps (mainly due to poor conditions) would be alleviated. Fragomen (*supra*, note 21) suggests that the practice of states of first refuge (those now accommodating displaced persons) of defining refugees broadly but according them fewer rights is legitimate. This implies that a smaller package of rights for temporary refugees might be acceptable.

90. See Miranda, *supra*, note 12 at 323.

91. See Hyndman (2), *supra*, note 33 at 154.

92. See *supra*, note 65.

93. See: Garvey (2), *supra*, note 79 at 183; and Hartman, *supra*, note 65 at 91.

94. Garvey (1), *supra*, note 23 at 484, 494 and 499 and (2), *supra*, note 79 at 182) suggests that traditional reliance by those seeking to expand refugee law on human rights or humanitarian considerations actually thwarts the objective sought. Since international law is, at the moment at least, premised almost exclusively on state sovereignty, it is within the confines of sovereigntist politics that we must look for a solution to refugee problems. He does not reject humanitarian and human rights principles as guiding lights in seeking solutions; he maintains the need to find a legal basis for proposed solutions. This must be generated by the principles of state sovereignty.

95. See Hathaway, *supra*, note 7 at 134 and 181-3.

96. Even the United States, with massive available resources, has difficulty controlling the illegal entry of non-citizens over its border with Mexico and along its coastline.

97. See Hathaway, *supra*, note 7 at 182. Hyndman (1) (*supra*, note 33 at 154) posits that states of first asylum are prepared to grant temporary refuge to a mass influx of refugees if they are assured of assistance from other states.

98. With regard to the United States, K.D. Brill states:

[T]he problem of asylum and refugee status is overshadowed by our intense political struggle over immigration policy, particularly the growing perception that illegal immigration of Hispanics and other minority groups will erode the political and economic stability of the nation.

In "The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act" (1983) 32 *Cleveland State Law Review* 117 at 174.

99. In 1987, fifteen developed nations were responsible for more than ninety-nine per cent of the voluntary contributions obtained by the UNHCR (\$372,483,950 of a total of \$375,749,253). *Executive Committee of the High Commissioner's Programme, Voluntary Funds Administered by the United Nations High Commissioner for Refugees: Accounts for the Year 1987 and Report of the Board of Auditors Thereon*, U.N. Doc. A/AC.96/707 (1988).

100. Take, for example, the Palestinians. Generations have grown up in camps created in 1948.

101. *Supra*, note 89.