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The Definition of Refugee in International Law: Proposals for the Future

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THE DEFINITION OF REFUGEE IN INTERNATIONAL LAW: PROPOSALS FOR THE FUTURE

I.	INTRODUCTION	183
II.	CUSTOMARY INTERNATIONAL LAW	185
III.	CONVENTIONAL INTERNATIONAL LAW	186
	A. <i>Historical Development</i>	186
	B. <i>The 1951 Convention</i>	187
	C. <i>The Draft Convention on Territorial Asylum</i>	190
	D. <i>Regional Developments</i>	194
IV.	THE PROBLEM OF DOMESTIC IMPLEMENTATION OF THE 1951 CONVENTION .	194
V.	PROPOSED SOLUTIONS	196
	A. <i>UNHCR Supervisory Powers</i>	196
	B. <i>Individual Right to Petition</i>	197
VI.	CONCLUSION	198

I. INTRODUCTION

The last decade has been marked by a seemingly unending number of mass flights of people fleeing their native lands, seeking a new life in foreign countries. For example, since 1970, 800,000 Haitians have left Haiti, principally bound for the Dominican Republic, the United States, and the Bahamas.¹ In 1978, the invasion of Cambodia by Vietnam forced several hundred thousand Cambodians to flee into Thailand.² Since 1979, it is estimated that over 500,000 Salvadorans have left El Salvador for the United States and the Latin American countries.³ Over 40,000 Sudanese fled to Ethiopia during the first six months of 1984 to escape a civil war and accompanying food shortages.⁴

While these groups have received a great deal of international attention, they constitute only a small part of the total number of nationals throughout the world who have fled their homelands and are without the protection of another country.⁵ In 1983, the total

¹ U.S. COMMITTEE FOR REFUGEES, AMERICAN COUNCIL FOR NATIONALITIES SERVICE, WORLD REFUGEE SURVEY 69 (1983) [hereinafter cited as WORLD REFUGEE SURVEY].

² *Id.* at 66.

³ *Id.* at 42.

⁴ N.Y. Times, May 6, 1984, at 1, col. 5.

⁵ The protection which a state provides its nationals is based on the State's territorial sovereignty. Therefore, under international law, a State is not obligated, or may be unable, to provide its protection to a national who has left its territory. See J. SWEENEY, C. OLIVER AND N. LEECH, CASE AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 488-89 (1981) [hereinafter cited as THE INTERNATIONAL LEGAL SYSTEM]. With regard to the duty a State owes aliens within its borders, international law is unsettled. The United States and other Western countries have generally promoted the concept of a minimum international standard of treatment for all aliens consisting of adherence to the "ordinary standards of civilization." See *Roberts v. United Mexican States (U.S. v. Mex.)*, 4 R. Int'l Arb. Awards 77 (1926). The position of Latin America and the Third World generally is that aliens are entitled to treatment equal to that of the nationals of the State in which the alien finds him or herself. See generally THE INTERNATIONAL LEGAL SYSTEM, *supra* at 547-73.

number of persons in such a position worldwide was estimated at nearly eight million.⁶ That number is now larger than at any other time in modern history, except for the period immediately following World War II, and is expected to continue to grow.⁷

An estimated fifty percent of these refugees are ineligible for asylum⁸ because they fail to satisfy the definition of refugee established by the 1951 United Nations Convention on the Status of Refugees⁹ ("1951 Convention"). It is argued by many writers that, because of this, the definition of refugee in the 1951 Convention, which requires that the individual be in danger of persecution in his or her native land, should be broadened to include victims of economic and political instability or natural disasters.¹⁰ In support of their argument to broaden the definition it is pointed out that the definition of refugee used today was developed in the immediate post-World War II period, when millions of people, mainly Europeans, were homeless or unwilling to return to their native countries after Nazi occupation. Approximately ninety-eight percent of all refugees today, however, are from developing countries.¹¹ Two-thirds are from Africa and Asia alone.¹² It is argued that in addition to political persecution and the ravages of war, the modern refugee flees the whole range of problems which accompany underdevelopment in the post-colonial period, including civil strife, political instability, and harsh economic conditions.¹³ Though the post-World War II refugee and the modern refugee are thus treated differently under international law, the actual position of both groups is the same.¹⁴ Hence, the argument continues, both groups should be accorded the same rights under international law.

A refugee group which could benefit from such a change is that group which has fled the civil war in El Salvador. As of 1983, the United States Department of State had categorized Salvadorans into three groups. The first, and smallest, includes those who qualify as political refugees. The second group includes those considered poor peasants who have simply been displaced by the fighting accompanying the civil war. This group consists of approximately 60,000 Salvadorans residing in refugee camps in Honduras, Guatemala, Costa Rica, and other surrounding countries. The third group, numbering approximately 600,000, contains those Salvadorans classified as "economic migrants," of which some 250,000-400,000 are in this country in search of a better way of life. Under this classification scheme, members of the second and third group are not eligible for asylum.¹⁵

This note examines whether a basis currently exists in international law for broadening the definition of refugee. Even though there is some indication of a broadening of the

⁶ WORLD REFUGEE SURVEY, *supra* note 1, at 61. At least one other commentator places the figure at 15 million. Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449, 449 (1981).

⁷ Nanda, *supra* note 6, at 449.

⁸ For a definition of asylum *see infra* text accompanying note 24.

⁹ *See infra* notes 41-59 and accompanying text.

¹⁰ Chamberlain, *The Mass Migration of Refugees and International Law*, 7 FLETCHER FORUM 93, 103-04 (1983); Fragoman, *The Refugee: A Problem of Definition*, 3 CASE W. RES. J. INT'L L. 45, 58 (1970); Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 SAN DIEGO L. REV. 45, 54-55 (1977); Woods, *The Term 'Refugee' in International and Municipal Law: An Inadequate Definition in Light of the Cuban Boatlift*, 5 ASILS INT'L L. J. 39, 64 (1981).

¹¹ Chamberlain, *supra* note 10, at 104.

¹² Nanda, *supra* note 6, at 449 n.l.

¹³ Fragoman, *supra* note 10, at 58.

¹⁴ Plender, *supra* note 10, at 54-55.

¹⁵ WORLD REFUGEE SURVEY, *supra* note 1, at 43.

definition on a regional level,¹⁶ recent deliberations on the Draft Convention on Territorial Asylum indicate that there is little possibility of such a change being accepted on an international scale in the near future.¹⁷ Moreover, given the current structure of the 1951 Convention, simply broadening the definition will not ensure that the definition is interpreted and applied in the manner intended. Implementation of the 1951 Convention through the domestic laws of each of the States party to the convention permits national and foreign policy interests to shape the interpretation and application of the definition of refugee.¹⁸ A more effective course of action for those concerned with the protection of refugees would be to first insure the consistent application of existing norms. Ultimately, the development of enforcement mechanisms for the 1951 Convention,¹⁹ and the creation of a right for individuals or organizations to petition an international or regional appeals council, would provide impartial enforcement, ensure consistency, and bring the 1951 Convention in line with emerging practices under other human rights conventions.²⁰

II. CUSTOMARY INTERNATIONAL LAW

The practice of States granting asylum to non-nationals who have fled their native countries has ancient origins. It can be traced as far back as the ancient Mediterranean civilizations, when humanitarian concerns led to the provision of refuge for individuals fleeing from political or religious oppression or, in some cases, for common criminals.²¹ Other, more modern practices by States have included an Act of the British Parliament in 1708 offering naturalization to members of the "Protestant or Reformed Religion" and the 1685 Edict of Potsdam, whereby Friedrich Wilhelm authorized the Huguenots of France to settle in Brandenburg and Prussia.²² The French Constitution of June 24, 1793, included a right to asylum.²³

Asylum has been defined as "the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it."²⁴ The protection of persons within its borders by a State is based upon its territorial sovereignty,²⁵ so the granting of asylum under customary international law is regarded as an entirely discretionary State action.²⁶ As a requirement of State sovereignty, customary international law leaves the formulation of policies and criteria which determine who shall be granted asylum to each individual State.²⁷ It is, therefore, generally accepted customary international law that individuals do not have a right to asylum.²⁸ Instead, the State has the absolute discretion to decide whether or not to extend its protection to aliens

¹⁶ See *infra* notes 97-101 and accompanying text.

¹⁷ See *infra* notes 70-96 and accompanying text.

¹⁸ See *infra* notes 102-09 and accompanying text.

¹⁹ See *infra* notes 110-11 and accompanying text.

²⁰ See *infra* notes 112-16 and accompanying text.

²¹ Krenz, *The Refugee as a Subject of International Law*, 15 INT'L & COMP. L.Q. 90, 91 (1966).

²² I A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 10 (1966).

²³ *Id.*

²⁴ Krenz, *supra* note 21, at 91 (quoting Institute of International Law, 1 ANNUAIRE 167 (1950)).

²⁵ *Id.*

²⁶ *Id.*; Johnson, *Refugees, Departees and Illegal Migrants*, 9 SYDNEY L. REV. 11, 24 (1980). See also, OPPENHEIM'S INTERNATIONAL LAW 677-78 (H. Lauterpacht 8th ed. 1955); J. BRIERLY, *THE LAW OF NATIONS* 217 (1955).

²⁷ Nanda, *supra* note 6, at 456-57.

²⁸ *Id.*

within its borders. Consequently, the definition of "refugee" under customary international law is left to the law of each individual State, technically making it impossible to form a definition of refugee under customary international law. The concept of refugee exists only within specific international or domestic legal contexts.²⁹

III. CONVENTIONAL INTERNATIONAL LAW

A. Historical Development

Territorial sovereignty, which gives a State the absolute right to decide whether or not to allow an alien to enter its territory, also ensures that no State is under any obligation to return a non-national to his native country, even upon the request of the alien's government.³⁰ Because of the desire of States to prosecute criminals who have fled their territorial jurisdiction, the first international agreements dealing with the treatment of non-nationals by a State were extradition treaties. First used in the nineteenth century, these bilateral agreements, based on reciprocity, typically list a number of offenses which the contracting States agree constitute grounds for the return of a person. Extraditable offenses include most criminal acts.³¹ The consistent exception, however, are those acts which constitute political offenses.³²

In the early twentieth century, limited bilateral instruments which dealt with specific groups of displaced persons, such as those which fled the Russian Revolution,³³ were the first type of international instruments to address the problem of refugees specifically.³⁴ Definitional problems rarely arose in the context of these instruments, as they referred to specific groups of refugees.³⁵

The first multilateral instruments dealing with refugees were the result of the efforts of the League of Nations. Specifically, these were the 1933 Convention Relating to the International Status of Refugees³⁶ ("1933 Convention") and the 1938 Convention Concerning the Status of Refugees Coming from Germany³⁷ ("1938 Convention"). The 1933 Convention contained a more flexible definition³⁸ than those agreements dealing with specific groups of refugees, as it allowed modifications by each contracting party. France took advantage of this provision to extend the Convention's applicability, which already included Russians and Armenians, to Spanish refugees.³⁹

At the close of World War II, the existence of millions of displaced persons, mainly Europeans, who refused to be repatriated, forced the world community to broaden its approach to the problem of refugees.⁴⁰ One of several responses to the situation was the 1951 Convention.⁴¹

²⁹ A. GRAHL-MADSEN, *supra* note 22, at 73.

³⁰ Krenz, *supra* note 21 at 91.

³¹ See, THE INTERNATIONAL LEGAL SYSTEM, *supra* note 5, at 138-44 (1981) and cases cited therein.

³² *Id.*

³³ Krenz, *supra* note 21, at 99.

³⁴ *Id.*; Fragomen, *supra* note 10, at 47.

³⁵ Weis, *The Concept of the Refugee in International Law*, 87 J. DU DROIT INT'L 928, 930 (1960).

³⁶ 159 L.N.T.S. 199.

³⁷ 192 L.N.T.S. 59.

³⁸ Article 1 of the 1933 Convention applied its provisions to Russian, Armenian and assimilated refugees, subject to such modifications as each contracting party might introduce at the moment of signature or accession. Weis, *supra* note 35, at 930.

³⁹ *Id.*

⁴⁰ Fragomen, *supra* note 10, at 47.

⁴¹ 19 U.S.T. 6260; T.I.A.S. No. 6577; 189 U.N.T.S. 137.

B. *The 1951 Convention*

The 1951 Convention, drafted by the United Nations to meet the problem of the millions of refugees left homeless by World War II, was the first international agreement to set out the rights of refugees as well as the responsibilities of the world community to refugees. Intended to revise and consolidate all previous international agreements on refugees⁴² it is still the leading international agreement on refugees. Under the 1951 Convention, minimum standards for the treatment of refugees in certain areas are to be equivalent to each State's treatment of its own nationals.⁴³ In addition, refugees are assured specific rights to property,⁴⁴ association,⁴⁵ access to courts,⁴⁶ self-employment,⁴⁷ housing,⁴⁸ and movement⁴⁹ of a level generally accorded other aliens in residence in the

⁴² Nanda, *supra* note 6, at 452.

⁴³ For example:

Article 4: *Religion*: The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

Article 23: *Public Relief*: The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Other areas in which refugees are to be accorded treatment equal to that of the host country's nationals include public elementary education (art. 22), rationing (art. 20), and labor legislation and social security (art. 24).

⁴⁴ Article 13: *Movable and Immovable Property*: The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

⁴⁵ Article 15: *Right of Association*: As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

⁴⁶ Article 16: *Access to Courts*: (1) A refugee shall have free access to the courts of law on the territory of all Contracting States. (2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solui*. (3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has habitual residence the treatment granted to a national of the country of his habitual residence.

⁴⁷ Article 18: *Self-Employment*: The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

⁴⁸ Article 21: *Housing*: As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

⁴⁹ Article 26: *Movement*: Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

host country. In return, refugees must conform to the laws and regulations of the host country.⁵⁰

Other substantive provisions include requirements for issuing identity papers to refugees, prohibitions against expelling refugees to the borders of territories where their life or freedom may be threatened ("refoulement"), and clemency for refugees who unlawfully enter their host country.⁵¹

Execution of the Convention is left to the contracting States through their domestic laws.⁵² However, they are required to "communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of [the] Convention."⁵³ The Convention further grants the United Nations Office of the High Commissioner for Refugees⁵⁴ ("UNHCR") the duty of "supervising the application of the provisions of this Convention"⁵⁵ and requires the contracting States to provide UNHCR "with information and statistical data requested concerning: (a) the condition of refugees, (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees."⁵⁶

Article I of the 1951 Convention sets out the definition of the term "refugee." In addition to any person who has previously been termed a refugee under various international instruments,⁵⁷ a refugee is any person who:

[a]s a result of events occurring before 1 January 1951 and owing to a 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.⁵⁸

The words "events occurring before 1 January 1951" could mean either "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1 January 1951 (emphasis added)."⁵⁹ Article 1(B)(1) directed each contracting State to

⁵⁰ Article 2: *General Obligations*: Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

⁵¹ See arts. 27, 33, and 31.

⁵² This conclusion, though explicitly stated nowhere in the Convention, is clear from the overall structure of the Convention and the language of arts. 35(2)(b) and 36.

⁵³ Art. 36.

⁵⁴ UNHCR is the arm of the United Nations primarily responsible for providing aid to refugees. Funded on a voluntary basis by U.N. members and other governmental and non-governmental agencies, UNHCR provides refugees with a wide range of services, including material and legal assistance. See generally, Nanda, *supra* note 6, at 460-63.

⁵⁵ Art. 35(1).

⁵⁶ Art. 35(2).

⁵⁷ The instruments noted are the Arrangements of 12 May 1926, 89 L.N.T.S. 47, and 30 June 1928, 89 L.N.T.S. 63, the Conventions of 28 October 1933, 159 L.N.T.S. 199, and 10 February 1938, 192 L.N.T.S. 59, the Protocol of 14 September 1939, 198 L.N.T.S. 141, and the Constitution of the International Refugee Organization, T.I.A.S. 1846, 62 Stat. 3037. See art. 1(A)(1).

⁵⁸ Art. 1(A)(2).

⁵⁹ Art. 1(B)(1). This limitation was adopted in part because of the drafting committee's sense of political reality. The committee discussed the possibility of including all refugees irrespective of their origin and irrespective of the fact that the events which caused the breaking off of ties with their

declare at the time of signature, ratification, or accession which of the meanings it had adopted. Ambivalence toward the geographical limitation is indicated, however, by the adoption of the following recommendation into the official minutes of the conference which ratified the Convention:

The Conference . . . expresses the hope that the Convention Relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations would be guided by it in granting, so far as possible, to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.⁶⁰

The January 1, 1951 limitation of the 1951 Convention was removed by the Protocol Relating to the Status of Refugees of January 31, 1967⁶¹ ("Protocol"). The Protocol, adopted because "new refugee situations [had] arisen since the [1951] Convention was adopted and . . . the refugees concerned may therefore not fall within the scope of the [1951] Convention,"⁶² expressly adopted the substantive provisions of the 1951 Convention,⁶³ along with the entire definition of refugee contained in article 1 of the 1951 Convention, omitting the restrictive words "as a result of events occurring before 1 January 1951."⁶⁴ Article I(3) of the Protocol further extinguished the geographic limitation in article 1(B)(1) of the 1951 Convention, except for those States party to the 1951 Convention which had already adopted the restriction. While the Protocol did not expressly adopt the procedural sections of the 1951 Convention,⁶⁵ its procedural provisions are, in fact, the same as those in the 1951 Convention.⁶⁶

country of origin belonged to the past or to the future. This approach was rejected, however, because the committee decided it would be difficult for a government to sign a "blank cheque" and undertake obligations towards "future refugees, the origin and number of which would be unknown." Fragon, *supra* note 10, at 53 n.30 (quoting Report of the Ad Hoc Committee on Refugees and Stateless Persons, U.N. Doc. E/1618 at 38 (1951)).

⁶⁰ U.N. Doc. A/Conf. 2/108 at 9.

⁶¹ 19 U.S.T. 6224, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

⁶² *Id.* (Preamble).

⁶³ Art. 1(1):

The States Parties to the present Protocol undertake to apply articles 2 to 34(2) inclusive of the [1951] Convention to refugees as hereinafter defined.

⁶⁴ Art. 1(2).

⁶⁵ See *supra* notes 52-56 and accompanying text.

⁶⁶ Compare arts. II and III, *infra*, and text accompanying notes 52-56, *supra*.

Art. II: (1) The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

(2) In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested; in the appropriate form, concerning:

- (a) the condition of refugees;
- (b) the implementation of the present Protocol;
- (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Art. III: The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

The 1951 Convention and the Protocol have, as of 1983, been ratified by at least ninety countries.⁶⁷ A handful of countries have acceded to one instrument but not the other. For example, three states which are party to the Convention have not ratified the Protocol.⁶⁸ The United States and Swaziland are the only two States which have ratified the Protocol but not the Convention.⁶⁹ Given that the Protocol is virtually identical to the Convention in its substantive and procedural requirements, ratification of only the Protocol, and not the 1951 Convention as well, does not change the overall substantive and procedural responsibilities of the contracting States. Ratification of only the 1951 Convention, however, results in a very restricted commitment to refugee assistance. Under the 1951 Convention alone, the definition of refugee is limited to persons affected by events occurring before January 1, 1951. If the signatory State adopted the optional limitation of article 1(B)(1), the definition is further limited to events occurring only in Europe.

C. *The Draft Convention on Territorial Asylum*

The most recent effort of the United Nations in the area of conventional international law affecting refugees was abandoned in 1977, when action on the Draft Convention on Territorial Asylum ("Draft Convention") was indefinitely postponed after representatives failed to reach agreement on the text.⁷⁰ This abandonment marked the end of nearly thirty years of work by the United Nations on the status of refugees under international law.⁷¹

In 1948, the United Nations General Assembly adopted the Universal Declaration on Human Rights,⁷² a non-binding resolution which included the statement "everyone has the right to seek and to enjoy in other countries asylum from persecution."⁷³ The Commission on Human Rights, which drafted the Declaration, suggested at about that time that "the question of the inclusion of the right of asylum from persecution in the International Bill of Human Rights or in a special convention for that purpose"⁷⁴ should be examined at the earliest opportunity. A lack of agreement among States, however, as to

⁶⁷ According to the WORLD REFUGEE SURVEY, *supra* note 1, at 4, the signatories include: Algeria, Angola, Argentina, Australia, Austria, Belgium, Benin, Bolivia, Botswana, Brazil, Burundi, Canada, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cyprus, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Germany (Federal Republic of), Ghana, Greece, Guinea, Guinea-Bissau, Guatemala, Holy See, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Luxembourg, Mali, Malta, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peoples Republic of China, Philippines, Portugal, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Spain, Sudan, Surinam, Sweden, Switzerland, Togo, Tunisia, Turkey, Uganda, United Kingdom, United Republic of Cameroon, United Republic of Tanzania, Upper Volta, Uruguay, Yemen, Yugoslavia, Zaire, Zambia, and Zimbabwe.

⁶⁸ Madagascar, Monaco, and Peru. *Id.*

⁶⁹ WORLD REFUGEE SURVEY, *supra* note 1, at 4.

⁷⁰ Plender, *supra* note 10, at 48.

⁷¹ Most of the discussion in this section is taken from two excellent, very detailed articles which chronicle this period: Weis, *The United Nations Declaration on Territorial Asylum*, 7 CAN. Y.B. INT'L L. 92 (1969) [hereinafter cited as Weis, *Declaration on Territorial Asylum*] and Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 BRIT. Y.B. INT'L L. 151 (1979) [hereinafter cited as Weis, *Draft Convention on Territorial Asylum*].

⁷² U.N.Y.B. 535 (1948-49).

⁷³ Art. 14(1). The original version of the article, before adoption, read: "everyone has a right to seek and to be granted . . . asylum." Weis, *Draft Convention on Territorial Asylum*, *supra* note 71, at 151. Dr. Weis quotes the late Sir Hersch Lauterpacht as describing the article as adopted as "artificial to the point of flippancy." *Id.*

⁷⁴ Weis, *Declaration on Territorial Asylum*, *supra* note 71, at 94-95.

a series of central issues, led to the failure to include any clause pertaining to asylum in the International Covenant on Civil and Political Rights.⁷⁵ The issues dividing the members were the same central issues discussed during negotiations on the Draft Convention: the personal scope of such a clause, the definition of the person to whom asylum should be granted, and whether a right to asylum should be created.⁷⁶

After an impasse on these issues which lasted several years, a Draft Declaration on the Right of Asylum was submitted to the Commission on Human Rights in 1957 by the French representative.⁷⁷ On December 14, 1967, after ten years of discussion by the Commission and the consideration of the draft declaration by two committees of the General Assembly, General Assembly Resolution No. 2312, entitled "Declaration on Territorial Asylum", was unanimously adopted by the General Assembly.⁷⁸

Soon after adoption of the Declaration, efforts began to establish a Convention on Territorial Asylum. In 1971, the European Office of the Carnegie Endowment for International Peace at Geneva, in conjunction with the UNHCR convened a "Colloquium on Territorial Asylum and the Protection of Refugees in International Law." At this meeting and a series of subsequent meetings over the next two years, a group of eminent international lawyers, members of the International Law Commission, and representatives of various United Nations member States and international and regional commissions, prepared a draft which was submitted in 1973 to the General Assembly. In 1974, the General Assembly directed the President of the General Assembly to establish a Group of Experts on the Draft Convention, composed of representatives of not more than twenty-seven States which were to be selected on the basis of geographical distribution after consultation with different regional groups. The Group's mandate was to meet

⁷⁵ Weis, *Draft Convention on Territorial Asylum*, *supra* note 71, at 151.

⁷⁶ Compare Weis, *Draft Convention on Territorial Asylum*, *supra* note 71, at 151 and notes 84-92 *infra* and accompanying text.

⁷⁷ Weis, *Declaration on Territorial Asylum*, *supra* note 71, at 97. The draft read as follows:

1. Responsibility for granting asylum to persons requesting it shall lie with the international community as represented by the United Nations.

2. Every person whose life, physical integrity or liberty is threatened, in violation of the principles of the Universal Declaration of Human Rights, shall be regarded as entitled to seek asylum.

3. By granting asylum in accordance with articles 1 and 2, a State shall incur no international responsibility. Asylum granted by such a State shall be respected by all other States.

4. (a) Irrespective of any action taken by particular States, the United Nations shall, in a spirit of international solidarity, consult with States as to the most effective means of providing help and assistance for the persons referred to in article 2.

(b) Other States shall examine, in a like spirit of solidarity, appropriate measures to lighten the burden of countries of first asylum including admission to their territory of a certain number of persons first granted asylum in another State.

5. No one shall be subjected to measures, such as expulsion, return or rejection at the frontier, which would result in compelling him to return to or remain in a territory where his life, physical integrity or liberty would be threatened, in violation of the principles of the Universal Declaration of Human Rights. This principle shall not apply in the case of persons whom there are reasonable grounds for regarding as a danger to the security of the receiving country or who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country.

⁷⁸ G.A. Res. 2312, U.N. GAOR Supp. (No. 16) at 81. For an excellent summary and analysis of the text of the Declaration as finally adopted, see Weis, *Draft Convention on Territorial Asylum*, *supra* note 71, at 135-45.

no later than May 1975 for a maximum of ten working days to review the text of the Draft Convention.⁷⁹

The Draft Convention as reported out by the Group of Experts did not significantly change the definition of refugee established by the 1951 Convention. Article 2 of the Draft Convention, concerning the scope of application of the document, read:

1. A person shall be eligible for the benefits of this Convention if he, owing to a well-founded fear of:

(a) Persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, including the struggle against colonialism and apartheid, or

(b) Prosecution or punishment for acts directly related to the persecution as set forth in (a),

is unable or unwilling to return to the country of his nationality, or, if he has no nationality, the country of his former habitual residence.⁸⁰

In this form the draft article represented little change from the 1951 Convention, except for the inclusion of two additional clauses. The first clause added "the struggle against colonialism and apartheid" as a permissible basis for persecution. This clause could have broadened the basis for claiming asylum, although the determination of when persecution has occurred in the struggle against colonialism would have been difficult to define. The second clause created an additional basis for asylum for "prosecution or punishment for acts related to the persecution as set forth in clause (a)." This clause would seem to broaden the grounds upon which asylum could be granted.

Other sections of the draft at this stage also represented a relaxation of the international posture toward granting asylum. Article 1 stated that each contracting State shall use its "best endeavours in a humanitarian spirit"⁸¹ to grant asylum to any person eligible for the benefits of the Draft Convention. Article 3 provided in absolute terms that no person who fits within the Draft Convention's scope and is within the territory of a contracting State can be compelled to return to his country of origin if his life or freedom will be threatened therein.⁸² Article 8 stated that "the grant of territorial asylum ... is a peaceful and humanitarian act. It shall not be regarded as an act unfriendly to any other State and shall be respected by all States."⁸³

After the work of the Group of Experts was completed, a conference of plenipotentiaries was convened from January 10 to February 4, 1977, at the request of the General Assembly. On January 13, consideration of the Draft Convention began.⁸⁴ With regard to

⁷⁹ Weis, *Convention on Territorial Asylum*, *supra* note 71, at 152-54.

⁸⁰ *Id.* at 155.

⁸¹ *Id.* There is no comparable article in the 1951 Convention or Protocol.

⁸² *Id.* at 156. This is an expression of the principle of non-refoulement, also contained in art. 33 of the 1951 Convention:

1. 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.

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

⁸³ *Id.* at 157. There is no comparable article in the 1951 Convention or Protocol.

⁸⁴ *Id.* at 159-60.

article 2, concerning application of the Draft Convention, there was no discussion of expanding the definition of refugee to include persons other than political refugees. To the contrary, according to one participant's account of the proceedings, discussion revolved around three issues: (a) amendments seeking to amend the introductory phrase of the paragraph so as to emphasize even more strongly the sovereign right of the State to grant or refuse asylum; (b) amendments seeking to add to the grounds of persecution; and (c) amendments relating to paragraph 2 seeking to widen the exclusion clauses.⁸⁵

As a result of these discussions, and after a fairly close vote (38 to 34, with 15 abstentions), an amendment was adopted replacing the words "if he, owing to a well-founded fear of persecution," taken from the 1951 Convention, with "if he, being faced with a definite possibility of persecution...."⁸⁶ The requirement of a "definite possibility" of persecution, rather than a "well-founded fear," created a much more restrictive definition than that contained in the 1951 Convention.⁸⁷

In other action on article 2, a sub-paragraph was added which read: "(3) The provisions of paragraph 1 of this article shall also not apply to any person requesting territorial asylum for purely economic reasons."⁸⁸ Also, the grounds of persecution were expanded to include reasons of "kinship, foreign occupation, alien domination, and all forms of racism."⁸⁹ The new version of article 2 was adopted 47 votes to 14 with 21 abstentions.⁹⁰

Under article 3, an additional exception to the principle of non-refoulement at a State's border was created in the case of "a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State."⁹¹ Additional articles on the duties of those seeking asylum and the facilitation of family reunification were also adopted.⁹²

The Conference did not complete action on the entire Draft Convention before the end of the time allocated to it. In its final message to the General Assembly, the conference recommended that the General Assembly "consider the question of convening at an appropriate time a further session of the Conference."⁹³ At that time most Western delegations were not in favor of an early resumption.⁹⁴

Given the length of time spent working on the Draft Convention and its predecessor agreements, the lack of effective action is disappointing.⁹⁵ Such an international effort is not likely to be undertaken again soon. In addition, given the direction the Draft Convention was taking, it can be surmised that no international consensus exists to support a broadening of the definition of refugee as it currently exists in the 1951

⁸⁵ *Id.* at 162.

⁸⁶ This amendment was proposed orally by Argentina, Indonesia, Malaysia, Pakistan, and the Philippines. *Id.*

⁸⁷ The definition in the 1951 Convention implies both an objective ("well-founded") and a subjective ("fear of persecution") test for granting asylum. The amendment was interpreted as intending to do away with the subjective element altogether. *Id.*

⁸⁸ *Id.* at 163.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 168. Compare with art. 33 of the 1951 Convention, *supra* note 82.

⁹² *Id.* at 164-66.

⁹³ *Id.* at 168.

⁹⁴ *Id.*

⁹⁵ For the reactions of some of those present, see *id.* at 169-71; A. GRAHL-MADSEN, *infra* note 112, at 61-101.

Convention to include economic refugees. As one participant in the proceedings concluded:

In this situation it seems unlikely that a Convention on Territorial Asylum which constitutes progress from the legal and humanitarian angles could be concluded in the near future on a universal level within the framework of the United Nations, and still less likely that it would be widely ratified.⁹⁶

D. Regional Developments

In contrast to the trend toward narrowing the definition of refugee on an international level, actions by many regional organizations have broadened it. This trend is especially significant because in some cases these actions represent the legal posture of States which have not acceded to either the 1951 Convention or the 1967 Protocol.

The work of the Organization of African Unity is one example of the trend toward broadening the definition on the regional level. The African States, reportedly generous in granting asylum to great numbers of refugees and credited with a progressive attitude at the Conference on the Draft Convention on Territorial Asylum,⁹⁷ met in 1969 and adopted the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. It contained the following quite broad definition of refugee:

[A refugee is] . . . 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.⁹⁸

In other regional actions, article 22(7) of the Organization of American States Convention on Human Rights, adopted on November 22, 1969, established a right to asylum: "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 offenses or related common crimes."⁹⁹ In 1977, after the Conference on the Draft Convention on Territorial Asylum, and in reaction to article 2 of that Draft Convention,¹⁰⁰ the Committee of Ministers of the Council of Europe, another regional organization, adopted a Declaration on Territorial Asylum. It stated in part: "In fulfilling their humanitarian duties, the Member States of the Council of Europe reaffirm their intention to maintain their liberal attitude with regard to persons seeking asylum in their territory."¹⁰¹

IV. THE PROBLEM OF DOMESTIC IMPLEMENTATION OF THE 1951 CONVENTION

The 1951 Convention and Protocol are implemented through the domestic laws of each of their contracting States.¹⁰² The 1951 Convention's definition of refugee is, there-

⁹⁶ Weis, *Draft Convention on Territorial Asylum*, *supra* note 71, at 169. *But see* Plender, *supra* note 10, at 61: ". . . the failure of [the 1977] Conference to reach agreement constitutes no objection to a renewed effort to redefine [refugee]."

⁹⁷ Weis, *Draft Convention on Territorial Asylum*, *supra* note 71, at 170.

⁹⁸ *Id.*

⁹⁹ 9 INT'L LEGAL MAT. 673, 682 (1970).

¹⁰⁰ Weis, *Draft Convention on Territorial Asylum*, *supra* note 71, at 170.

¹⁰¹ *Id.* An interesting argument using the Convention Relating to Stateless Persons to expand the definition of refugees is set out in Woods, *supra* note 10, at 418-49.

¹⁰² *See supra* notes 52 & 66 and accompanying text.

fore, frequently used as the basis for an individual State's policies for granting asylum. For example, the definition of refugee in the 1951 Convention and Protocol has been incorporated into the domestic laws of Denmark, France, Germany, Norway, and Sweden.¹⁰³ The United States and the United Kingdom have based parts of their immigration laws on these instruments.¹⁰⁴

Even adoption of the current definition by all of the parties to the 1951 Convention, however, does not ensure its consistent interpretation and application. As long as the definition of refugee evolves solely on a nation by nation basis, national interests will continue to be involved in its interpretation and application.¹⁰⁵ An example of this is the current influx of refugees from El Salvador into the United States, discussed above.¹⁰⁶ In its 1983 Country Reports on the World Refugee Situation, the United States Department of State estimated that the majority of Salvadorans in the United States are economic migrants. The Department claims that these Salvadorans are in search of a way to earn a living, rather than fleeing political persecution. In 1981, however, the United Nations High Commissioner for Refugees declared that all Salvadorans who had left their country since the beginning of 1980 should be considered bona fide refugees, on the grounds that the Salvadorans fled from the consequences of political events in which they did not necessarily play an active role, and that they and their families are likely to suffer if returned to El Salvador.¹⁰⁷ Similarly, Haitians and Kampuchians are often categorized as "economic" refugees while people fleeing similar circumstances in Vietnam, Poland, the Soviet Union, or other communist regimes are considered "political refugees."¹⁰⁸ The United States is by no means the only country to take its foreign policy interests into consideration when formulating immigration policy.¹⁰⁹ However, such examples illustrate that the definition is not the problem. Rather, domestic implementation allows States to unilaterally manipulate the definition to suit their perceived national and foreign policy interests. Given this form of implementation, one could surmise that the same fate would befall an expanded definition of refugee.

It would be naive, and perhaps even foolish, to think that a country implementing its own laws in its domestic setting will not take its own national and foreign policy interests into consideration at least to some degree. This is especially true when considering sensitive decisions such as a grant of asylum, which foreign nations may perceive as an

¹⁰³ Plender, *supra* note 10, at 47 n.7.

¹⁰⁴ *Id.* at 47. The United States incorporated the definition of refugee from the 1967 Protocol into United States law through the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103.

¹⁰⁵ See Chamberlain, *supra* note 10, at 103.

¹⁰⁶ See *supra* note 15 and accompanying text.

¹⁰⁷ WORLD REFUGEE SURVEY, *supra* note 1, at 43-44. The Canadian government has adopted a policy with regard to Salvadoran refugees which is very similar to that of the UNHCR. As a result, an "underground railroad" has developed to transport Salvadorans threatened with deportation by the United States to Canada. See, Bierman, *Salvador Immigrants Fleeing to Canada*, Boston Globe, March 12, 1985, at 11, cols. 2-6. This illustrates another problem with the domestic implementation of the 1951 Convention: the burden will fall disproportionately on those countries which adopt broader definitions.

¹⁰⁸ Chamberlain, *supra* note 10, at 103-04. It is perhaps significant that prior to the enactment of the Refugee Act of 1980, which incorporated into United States law the definition of refugee contained in the 1951 Convention and Protocol, the definition of refugee in United States law applied only to persons who came from Communist-dominated and Middle-Eastern countries. See, LeMaster and Zall, *Compassion Fatigue: The Expansion of Refugee Admissions to the United States*, 6 B.C. INT'L & COMP. L. REV. 447, 456 (1983).

¹⁰⁹ *Id.* at 104.

unfriendly action. Therefore, a long-term approach to the problem of ensuring consistent and impartial application of the existing definition of refugee should involve enforcement or decision-making by a regional or international organization. Only in this way can the effect of the national and foreign policy interests of both the host country and the homeland of the refugee be lessened.

V. PROPOSED SOLUTIONS

A. UNHCR Supervisory Powers

One method of ensuring consistent application of the standards for admission of refugees is for the UNHCR to exercise its right under the 1951 Convention to receive information from the parties to the Convention with regard to their implementation of the Convention. It could then utilize this information in conjunction with its power to supervise the Convention.

Article 35(2) of the 1951 Convention and article II(2) of the 1967 Protocol state that the contracting States must provide the UNHCR with any information or statistical data requested "concerning: (a) the condition of refugees, (b) the implementation of this Convention, and (c) laws regulations and decrees which are, or may hereafter be, in force relating to refugees." The UNHCR is entitled to this information in order that it may "make reports to the competent organs of the United Nations."

It is unclear for what purpose other organs of the United Nations would utilize such information. Nevertheless, the creation of specific, rigorous reporting requirements by the UNHCR pursuant to articles 35(2) and II(2), along with the subsequent dissemination of these reports to the members of the General Assembly might encourage fair, consistent, and impartial actions under the Convention by having the actual extent of each State's implementation of the Convention and their actions under the Convention publicized. This approach is not without precedent. The International Labor Organization has utilized similar procedures with some success.¹¹⁰ It is also similar to the publicity method used by Amnesty International to pressure governments into respecting the human rights of their citizens.

Paragraph 8(a) of Chapter II of the Statute of the UNHCR charges the High Commissioner with, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application*, and proposing amendments thereto . . ." (emphasis added).¹¹¹ While not specifically charging the High Commissioner with the supervision of the 1951 Convention, article 35(1) of the Convention expressly states that contracting States shall "undertake to cooperate with the Office of the United Nations High Commissioner, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and [they] shall in particular facilitate its duty of supervising the application of the provisions of this Convention." For those states party to the Protocol only, the same language is contained in article II(l) of the 1967 Protocol.

¹¹⁰ See generally, F. KIRGIS, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTINGS 443-61 (1977) for a discussion of how the publication of information concerning a State's actions under a treaty can create a "mobilization of shame" sufficient to change the actions of a State.

¹¹¹ See Article 1 of the Statute of the Office of the United Nations High Commissioner for Refugees, adopted 14 December 1950, G.A. Res. 428, 5 U.N. GAOR, Supp. 20, at 46, U.N. Doc. A/1775 (1950).

These provisions read together indicate that the parties to the 1951 Convention and 1967 Protocol have agreed to grant some type of supervisory status to the UNHCR. No specific provisions of either the 1951 Convention, the 1967 Protocol or the High Commissioner's Statute, however, elaborate on this function or provide the Office of the High Commissioner with any specific enforcement or supervisory powers. Hence, its effectiveness as an enforcement mechanism remains unclear.

B. *Individual Right to Petition*

At the Consultation on European Refugees, held in Geneva in 1976, it was suggested that a European Refugee Commission be created to hear appeals by individuals against negative eligibility decisions in the participating countries.¹¹² It was felt that such an approach would help move toward a more uniform interpretation and application of the 1951 Convention and other relevant instruments.

An important issue this proposal raises by implication is the creation of an individual right to petition. Under customary international law, individuals do not have standing to bring suit in a court of international law or any other court established by international convention (unless, of course, the convention specifically grants that right).¹¹³ Unlike other human rights conventions, the 1951 Convention and 1967 Protocol do not create a right of petition for individuals. Therefore, the only parties with standing to bring suit are the refugee's country of origin, or the country in which the refugee is attempting to obtain asylum. When an individual has been denied asylum by a receiving State, it is hard to conceive under what circumstances the latter would be motivated to enforce the Convention's provisions. Similarly, because a refugee is by definition without the protection of his or her country of origin, the former is in a very questionable position to press for enforcement of the Convention on behalf of its national. The only party in whose direct interest it would be to actually enforce the terms of the Convention is the individual refugee or other concerned individuals or groups.¹¹⁴

The individual's right to petition is not unknown in international law. In the area of human rights it is emerging with increasing frequency. On a regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that any person, nongovernmental organization, or group of individuals claiming to be the victim of a violation by a party of the rights set forth in the Convention may petition the European Commission on Human Rights.¹¹⁵ In addition, the Convention established

¹¹² A. GRAHL-MADSEN, *TERRITORIAL ASYLUM* 100 (1980).

¹¹³ 2 H. LAUTERPACHT, *INTERNATIONAL LAW* 489-93 (E. Lauterpacht ed. 1975).

¹¹⁴ See generally, Sinha, *An Anthropocentric View of Asylum in International Law*, 10 COL. J. TRANS-NAT'L L. 78, 101-02 (1971):

How is [the refugee's] protection under the Convention to be enforced for his benefit? In the international legal system he suffers from disabilities and needs the state to espouse his claim against the offending state. He obviously cannot rely in this matter upon the diplomatic protection of the state from whose government he is fleeing. The state of refuge might give him its diplomatic protection against other states, but he still has no means of enforcing his rights against the state of refuge In any event, the espousal of his claim is not a matter of right: rather, it is a matter of the state's will.

It should be pointed out that many countries, including the United States, allow refugees petitioning for asylum to appeal decisions through the domestic judicial system. This right is also assured by art. 16 of the 1951 Convention. See *supra* note 46. For an argument that recent proposals to reform United States immigration law threaten this right, see Note, *U.S. Immigration and Refugee Reform: A Critical Evaluation*, 22 VA. J. INT'L L. 805, 830-32 (1982).

¹¹⁵ See Convention for the Protection of Human Rights and Fundamental Freedoms, 213

the European Court of Human Rights in order to ensure the enforcement of the Convention's provisions.¹¹⁶

Construction of such a system to supplement and enforce the 1951 Convention is probably not very likely to occur in the near future, especially given the apparent lack of international consensus on the entire subject of the status of refugees in international law. The safeguards afforded by this type of system, however, would go far to ensure the consistent application of existing norms.

VI. CONCLUSION

Despite arguments by many writers to expand the definition of refugee contained in the 1951 Convention to include victims of economic unrest or natural disasters,¹¹⁷ and a movement toward expanding the definition on a regional level,¹¹⁸ the international consensus, based upon the deliberations on the Draft Convention on Territorial Asylum, appears to be against such a change.¹¹⁹ Even if such a change was achieved, it is unlikely that much would be accomplished by it. This is because the 1951 Convention is implemented solely through the domestic laws of each of its contracting States and hence the interpretation and application of its provisions are subject to each State's sense of national interest.¹²⁰ A better course of action would be to attempt to ensure the consistent application of existing norms. This could be attempted by the UNHCR through its power under the 1951 Convention to receive information from States with regard to their implementation of the Convention.¹²¹ Publication of such reports have, in the past, achieved some success in motivating States to alter their behavior.¹²² Another method would be to create an individual right to petition under the Convention.¹²³ Though many States, including the United States, do allow aliens to appeal asylum decisions through the domestic judicial system, an international or regional tribunal would be necessary to ensure that humanitarian, rather than political, concerns predominate.

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U.N.T.S. 222 (effective September 3, 1953) art. 25(1); The Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 262 (effective May 18, 1954).

¹¹⁶ *Id.* at Section IV. The right to petition, however, is predicated on the requirement that the party against whom the complaint is made has formally recognized the competence of the Commission to receive such petitions (art. 25) and only after all domestic remedies have been exhausted (art. 26).

¹¹⁷ See *supra* notes 9-15 & 40-60 and accompanying text.

¹¹⁸ See *supra* notes 70-95 and accompanying text.

¹¹⁹ See *supra* notes 102-09 and accompanying text.

¹²⁰ See *supra* notes 110-11 and accompanying text.

¹²¹ *Id.*

¹²² See *supra* notes 112-16 and accompanying text.

¹²³ See *supra* notes 102-09 and accompanying text.