

# The ANNALS of the American Academy of Political and Social Science

<http://ann.sagepub.com>

---

## Identifying the World's Refugees

ATLE GRAHL-MADSEN

*The ANNALS of the American Academy of Political and Social Science* 1983; 467; 11

DOI: 10.1177/0002716283467001002

The online version of this article can be found at:

<http://ann.sagepub.com/cgi/content/abstract/467/1/11>

---

Published by:

 SAGE Publications

<http://www.sagepublications.com>

On behalf of:



[American Academy of Political and Social Science](#)

Additional services and information for *The ANNALS of the American Academy of Political and Social Science* can be found at:

Email Alerts: <http://ann.sagepub.com/cgi/alerts>

Subscriptions: <http://ann.sagepub.com/subscriptions>

Reprints: <http://www.sagepub.com/journalsReprints.nav>

Permissions: <http://www.sagepub.com/journalsPermissions.nav>

## Identifying the World's Refugees

By ATLE GRAHL-MADSEN

**ABSTRACT:** In a world in deep crisis, tendencies toward protectionism and xenophobia, as well as fear of new mass flows of asylum seekers, have brought the development of international instruments for the benefit of refugees to a virtual halt. The legal framework was formed during the 1950s and 1960s. There are several definitions of "refugee," serving different purposes, and there is a trend to interpret and apply them more narrowly. The term "economic refugee" is a misnomer. There are many categories of de facto refugees, the common denominator being that they should not be forcibly returned to their homeland. States employ different, often very crude methods to stem the tide of would-be refugees. More humane and equitable practices could be developed at negligible financial and political cost; so too could a low-keyed protocol on territorial asylum, making us aware of our responsibility as fellow human beings.

---

*Atle Grahl-Madsen earned his law degree and his doctorate in law at the University of Oslo, as well as a diploma at The Hague Academy of International Law. After years of law practice, international service, and law teaching, including five years as professor of international law at Uppsala University, he is now professor of law at the University of Bergen, his home town. His extensive writings include several books and many articles on international refugee law, and he is considered an authority on the subject.*

IN a public lecture I once described the period before World War II as an age of innocence, and I was duly scolded. Was not that the period of a Hitler, a Mussolini, a Stalin; a period of civil wars, unemployment, and general unrest; and did it not ultimately lead to the most terrible war in the history of humankind so far?

And yet I believe I had a point. We truly believed that we could sort good from evil, the decent chaps from the bad ones, and that eventually we should be able to work ourselves out of the mess. The same kind of optimism prevailed during the early postwar period, until the reconstruction and rehabilitation of Europe was completed 15 years after the war, and even a good part into the sixties, when we faced the challenge resulting from Uhuru: the development of the third world. The sky was the limit!

On the threshold of the seventies we sensed that things had turned sour. The great shock came with the oil crisis in 1973, and since then shock wave has followed shock wave. We have come to realize that everything has its price—we can get nothing for free. The globe has its limits. All that we do must be paid for, by someone, one way or the other. In the industrialized countries, tendencies toward protectionism and xenophobia are among the predictable reactions, as they all too often go hand in hand with feelings of helplessness and frustration. Also, many developing countries have seen their high hopes dwindle and disappear.

There is still a good amount of good sense and goodwill throughout the world. Many governments have proved admirably levelheaded, even though the problems before them may seem formidable and on the upsurge. But there are also more than enough disturbing events,

fueled not least by the ongoing struggle for power.

Poverty and power politics are the two main reasons that people by the millions have felt compelled to leave their homes and their countries to seek a semblance of security on foreign soil. Southeast Asia, Western Asia, and the Horn of Africa are areas with major refugee problems, with the Caribbean and Central America as leading runners-up. Smaller—but hardly small—refugee problems are found in many other areas in all parts of the world, excepting only Oceania, and new eruptions, new mass exoduses, can happen in any continent.

This is, in broad outline, the background against which we shall try to draw up a sustainable policy toward refugees for our time and age.

Let one thing be clear: humanism may be struggling, but compassion is not dead.

#### THE LEGAL FRAMEWORK

The international legal framework for assistance to refugees was formed in the 1950s and 1960s, the Refugee Convention of 1951 and the Refugee Protocol of 1967<sup>1</sup> being the major instruments, along with the 1950 Statute of the Office of the U.N. High Commissioner for Refugees (UNHCR) and some important resolutions of the General Assembly of the United Nations.<sup>2</sup> To this we may add some other instru-

1. Convention Relating to the Status of Refugees (28 July 1951), *United Nations Treaty Series (UNTS)*, 189:137; Protocol Relating to the Status of Refugees (31 Jan. 1967), *UNTS*, 606:267.

2. See United Nations High Commissioner for Refugees (UNHCR), *United Nations Resolutions and Decisions Relating to the Office of the United Nations High Commissioner for Refugees*, 3rd ed., loose-leaf, U.N. Doc. HCR/Inf/48/Rev.2, with addenda (1975).

ments, perhaps the most interesting being the Organization of African Unity (OAU) Convention governing the Specific Aspects of Refugee Problems in Africa (1969).<sup>3</sup>

But, of course, these instruments should not be seen in isolation. The different human rights instruments<sup>4</sup> are particularly important parts of the general scene.

This is not the place to give a detailed account of the refugee definitions in the UNHCR Statute and the Refugee Convention and Protocol.<sup>5</sup> Let us just make clear that the crucial criterion of a refugee according to those instruments is having well-founded fear of persecution for what we broadly may describe as ethnic, religious, or political reasons. The definition encompasses those who are threatened with sanctions for struggling to protect their human rights, but not everyone who may be labeled a political offender. However, the latter may be protected by other rules of international law.<sup>6</sup> The OAU Convention embraces also a second category of refu-

gees: those fleeing their country in order to escape warfare and other man-made disasters.<sup>7</sup>

These definitions of refugees are important for many purposes, but not for all. First and foremost, the definition in the Refugee Convention and Protocol is decisive for the conventional—contractual—obligations of states parties to those instruments.<sup>8</sup> A person who satisfies the criteria is entitled to the benefits of the Convention, including the rule of *non-refoulement* as there spelled out, that is to say the prohibition of forcible return of a refugee to a country where he or she will risk persecution.<sup>9</sup> All contracting states have, under the law of treaties, a right to demand that refugees receive their due according to the Convention: this amounts to what we may call “contractual protection.”<sup>10</sup>

The Convention also gives the high commissioner a right to supervise the application of the provisions of the Convention,<sup>11</sup> and with respect to persons satisfying the criteria, his function of international protection has thus a firm conventional base. The same goes for those covered by the terms of the OAU Convention.<sup>12</sup>

7. OAU Convention, art. I(2).

8. There are also a number of other international instruments referring to that definition, such as the 1957 Hague Agreement Relating to Refugee Seamen (with a 1973 Protocol); and the 1959 European Agreement on the Abolition of Visas for Refugees; in UNHCR, *Collection of International Instruments*, pp. 48, 54, 301.

9. On this rule, see Atle Grahl-Madsen, *Territorial Asylum* (Stockholm: Almqvist & Wiksell, and Dobbs Ferry, NY: Oceana, 1980), pp. 40 ff.

10. On this notion, see Atle Grahl-Madsen, “Protection for the Unprotected,” *Yearbook of the AAA* (Association of the Attenders and Alumni of The Hague Academy of International Law), 37/38:176-85 (1967/68).

11. Refugee Convention, art. 35.

12. OAU Convention, art. VIII; see also art. VII.

3. OAU Convention, in UNHCR, *Collection of International Instruments Concerning Refugees*, 2nd ed. (Geneva: UNHCR, 1979), p. 193.

4. Universal Declaration of Human Rights, 1948; European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; and American Convention on Human Rights (Pact of San José, Costa Rica), 1969; in UNHCR, *Collection of International Instruments*, pp. 99, 274, 104, 128, 207.

5. See Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. 1, *Refugee Character* (Leyden: Sijthoff, 1966), pp. 142 ff. and references given there.

6. See Grahl-Madsen, *Status of Refugees*, vol. 2, *Asylum, Entry and Sojourn* (Leyden: Sijthoff, 1972), pp. 81 ff.

Moreover, the definition in the Refugee Convention and Protocol has found its way into the legislation of many countries and has thus become important for the acquisition of formal refugee status and asylum under municipal law and for sundry other rights and benefits.<sup>13</sup>

Vis-à-vis states not parties to the Refugee Convention and Protocol or some other convention of similar scope, one will have to fall back on the UNHCR Statute and other resolutions of the U.N. General Assembly or other international organs.<sup>14</sup> The same applies, to some extent, with respect to states having ratified the Refugee Convention with a geographical limitation—refugees as a result of “events occurring in Europe”<sup>15</sup>—states not parties to the 1967 Refugee Protocol,<sup>16</sup> and matters not covered by the operative provisions of the Convention.

In either case, we may also seek a basis in rules of general international law.

Thus, we may find a basis for the rule of *non-refoulement* in some time-honored notions, ably expounded already by the fathers of international law, men such as Hugo Grotius<sup>17</sup> and Emmerich de Vattel,<sup>18</sup> from which we may deduce that

this very rule reflects a basic principle of civilized government—and thus one of the cornerstones of international law—and as such exceeds its contractual expression and is tempered only by the equally august principle of burden-sharing among nations.<sup>19</sup>

“Asylum”—this word of many facets—was used during the nineteenth century largely to denote one particular aspect, namely nonextradition for political offences.<sup>20</sup> For this purpose the criteria of the Refugee Convention and Protocol are of scant importance; here Article 14 of the 1948 Universal Declaration of Human Rights<sup>21</sup> may serve as an indicator, while the provisions of extradition treaties occupy the forefront.<sup>22</sup>

When it comes to the outspoken positive aspects of asylum—admission and permission to remain in a given country—refugee character according to Convention and Protocol or according to the mandate of the high commissioner is neither a sufficient nor an exclusive yardstick.

Most states whose law provides for the granting of asylum<sup>23</sup> will weigh the need of the supplicant against the interests of the community, and in some instances only temporary refuge will be

13. See sec. 2 of the 1956 Norwegian Aliens Act (*Fremmedloven*); sec. 28 of the 1965 German Aliens Act (*Ausländergesetz*); and sec. 3 of the 1980 Swedish Aliens Act (*Utlänningslagen*).

14. See note 2, and resolutions of the Council of Europe in Grahl-Madsen, *Territorial Asylum*, pp. 160, 211, 212.

15. Refugee Convention, art. 1B.

16. The Protocol removed the dateline, “events occurring before 1 January 1951.”

17. Hugo Grotius, *De jure belli ac pacis* (1625), bk. 2, ch. 2, sec. xvi.

18. Emmerich de Vattel, *Le droit des gens ou principes de la loi naturelle; appliqués à la con-*

*duite et aux affaires des Nations et des Souverains* (1758) (Washington, DC: Carnegie Institution, 1916), 3:92, sec. 231.

19. See Atle Grahl-Madsen, “International Refugee Law Today and Tomorrow,” *Archiv des Völkerrechts* (1982, in press).

20. See Grahl-Madsen, *Status of Refugees*, vol. 2, pp. 9 ff.

21. Text in Grahl-Madsen, *Territorial Asylum*, p. 131; see also the documents cited in note 4.

22. See extradition treaties listed in Grahl-Madsen, *Status of Refugees*, vol. 2, pp. 9 ff.

23. See Grahl-Madsen, *Territorial Asylum*, pp. 24 ff.

offered. On the other hand, states may afford admission and residence to many needy comers who do not in strict law satisfy the conventional requirements. The Swedish provision for B-refugees<sup>24</sup> is a case in point, and so is the granting of residence permits on humanitarian grounds in Norway and many other countries. It is well known that the Intergovernmental Committee for Migration (ICM) does not apply the strict criteria of the Refugee Convention or the UNHCR Statute to the persons benefiting from its services. The acceptance of the boat people and other contingents of refugees for resettlement has been a humanitarian response to an emergency situation; frequently no individual eligibility tests are carried out.<sup>25</sup> This is even clearer when fleeing persons are rescued at sea and the flag state of the rescuing vessel assumes responsibility for them.<sup>26</sup>

#### PROBLEMS OF INTERPRETATION AND APPLICATION

During the 10 years since the explosion in oil prices rocked the world, the international legal instruments defining refugee character have remained the same. More states have acceded to them, thus adding to their stature, but for most

of the world's refugees this has not affected their position. Quite to the contrary, we can sense in country after country a tendency toward a more restrictive interpretation and application of important provisions, sometimes even a disregard for rules of international law.

The term "persecution," used in the Refugee Convention and Protocol as well as in the UNHCR Statute, has never been officially defined, but the drafters of the Convention clearly conceived it in a liberal way. Moreover, state practice—including court decisions—during the fifties and sixties was characterized by largesse.<sup>27</sup> Not so today. Section 3(3) of the new 1980 Swedish Aliens Act (*Utlänningslagen*) may be considered indicative of a trend: "Persecution means such persecution as is directed against the foreigner's life or freedom or which otherwise is of a serious nature."<sup>28</sup> This tends to limit the number of successful petitioners.

I shall not here go into the various ways in which the application of the Convention and Protocol is restricted by narrow interpretation of the different elements of the refugee definition. That is a subject surely warranting a separate serious study.<sup>29</sup>

#### ECONOMIC REFUGEES

There is, however, one phenomenon that cannot be ignored: the dismissal of large groups on the ground that they are merely economic refugees. In my opinion, the term "economic refugee" is a

24. 1980 Swedish Aliens Act, sec. 6; see also sec. 5.

25. See note 54.

26. In most countries, it is a criminal offense not to rescue persons in distress at sea, if this can be done without serious risk to the rescuing vessel. Refugees thus rescued may often be landed only on the condition that the flag state consent to admit the refugees to its territory, if they have no other place to go. The alternative would be to let them stay on board. If they are enlisted as crew members, they may be entitled to admission to the territory of the flag state after 600 days, according to the 1957 Hague Agreement on Refugee Seamen.

27. See Grahl-Madsen, *Status of Refugees*, vol. 1, pp. 188 ff.

28. My translation.

29. For some comments, see Grahl-Madsen, "International Refugee Law."

misnomer. Strictly speaking, if a person leaves or stays away from his home country for well-founded fear of persecution, that fact overrides all other considerations, and that person is a refugee, full stop.<sup>30</sup>

However, wealth in this world is unevenly distributed; some countries are rich, others are poor. And to a great extent, wealth is concentrated in countries that are also democracies, while some of the poorest countries are afflicted by more or less oppressive regimes of the kind that produces refugees. There is a perennial stream of persons from poor countries into more affluent ones. Many of these persons make no claim to be anything but migrants in search of a livelihood. Others claim to be refugees. A few are able to prove that they are already victims of persecution. Others may make a convincing case to the effect that upon their return to their home country, they will almost certainly be subjected to severe measures of a persecutory nature.

In the case of a mass exodus, however, the rank and file will demonstrate fear and anguish, but to the cool spectator it would nevertheless seem that to any particular one of them, the risk of personally becoming a victim of persecution would be minuscule. It would take a very ruthless and very efficient regime to inflict serious harm on hundreds of thousands of persons. Unfortunately, such regimes do exist. But there are countries where persecution, even of

returned would-be refugees, is a statistical probability rather than a direct threat.

In such a situation, the term "economic refugee" has a tendency to pop up. If 100,000 persons are returned, nothing is likely to happen to 90,000 of them, except that they will be back in the same miserable conditions and perhaps even a little worse off than before.

But if there is no way of determining who the unlucky thousand or ten thousand will be—if indeed we are faced with some kind of lottery, where an unknown number of returnees will be selected at random in order to make an example—we are confronted with a rather awkward question. How big should the probability be in order that we may speak of "well-founded fear of persecution"? One in ten? One in a hundred? One in a thousand? One in ten thousand? Or what?<sup>31</sup>

This question is utterly cynical, and I believe that we should not even endeavor to answer it in the context of the refugee definition. Indeed, should a situation arise involving the return of a mass of people, even though an unknown number of them would in all likelihood be victimized,<sup>32</sup> then we no longer can play with words in a definition; we must squarely face the realities of the world as responsible human beings.

Apart from excluding from return those individuals who appear to be more exposed to sanctions than the mass of people, the stage would appear to be set

30. See Government of Canada, Office of the Minister of Employment and Immigration, *The Refugee Status Determination Process: A Report of the Task Force on Immigration Practices and Procedures*, cat. no. MP 15-11/1981E (Ottawa: Minister of Supply and Services Canada, 1981), pp. 14-15.

31. The average chance of being murdered in the United States in any one year is one in 10,000. Could this be relevant?

32. On the possibility of derogating from the rule of *non-refoulement* in the case of a mass influx of refugees, see Grahl-Madsen, "International Refugee Law."

for some kind of negotiation, some kind of accommodation with the government of the home country—in the form of emergency aid or development assistance, or in some other form appropriate to the circumstances—in order to minimize the risk to those who would actually be returned. If one could indeed negotiate some degree of liberalization of the regime, so much the better.

This would take quite some negotiating skill. Sometimes the creation of a consortium of states—perhaps with adequate executive and administrative arrangements—might be a useful vehicle for actions of this nature. Could a satisfactory scheme be worked out, the situation might be turned into one of voluntary repatriation, and in the end the solution could perhaps indeed be considered better than only half-successful integration of strangers in a land that for them would remain a foreign country. But if no satisfactory solution could be worked out, we would have blood on our hands. No scrap of paper could be an excuse.

#### DIFFERENT CATEGORIES OF REFUGEES

Refugee character has a different meaning in different contexts. "Convention refugee"<sup>33</sup> is not the same as "mandate refugee,"<sup>34</sup> and "refugee" according to the extended definition in the OAU Convention<sup>35</sup> is again something else. Additionally we have such often ob-

scure categories as "B-refugees,"<sup>36</sup> "de facto refugees,"<sup>37</sup> and "refugees in orbit."<sup>38</sup>

Moreover, the term "Convention refugee" has various meanings, depending on the conventional undertakings of each contracting state. Thus, there is a difference between states that have restricted their application of the Convention to persons being refugees because of "events occurring in Europe" and those that have undertaken to apply the Convention without geographical limitation. There is also a difference between those states that maintain the dateline, "events occurring before 1 January 1951," and those that have dispensed with the dateline by acceding to the 1967 Refugee Protocol.<sup>39</sup> It follows that one and the same person could be considered a Convention refugee in, say, Norway, but not in Italy, or vice versa, because the two governments may interpret and apply the same criteria in different ways.

The differences owing to variations in the contractual undertakings of different states may be bridged, to some extent, by the high commissioner's certifying eligibility under his mandate. This is, for instance, the case in Italy: those non-European refugees who cannot be recognized as Convention refugees in that country nevertheless may enjoy a measure of protection, and other rights and benefits, in their certified capacity as mandate refugees.<sup>40</sup>

Another type of two-tiered system is found in Sweden, where persons—not

33. The term "Convention refugee" is used here to denote a person who is a refugee according to the 1951 Refugee Convention and/or the 1967 Refugee Protocol.

34. A mandate refugee is a refugee under the mandate of the UNHCR, according to the 1950 UNHCR Statute and subsequent resolutions of the U.N. General Assembly; see note 2.

35. See OAU Convention, art. I(2).

36. 1980 Swedish Aliens Act.

37. See the following section.

38. See Grahl-Madsen, *Territorial Asylum*, pp. 95 ff., and further sources cited there.

39. See notes 15 and 16.

40. See Enrico Lapenna, ed., *I Rifugiati in Italia* (Rome: UNHCR Branch Office, and Italian Order of Malta Sections of the Association for the Study of the World Refugee Problems [AWR], 1980), pp. 6-7, 217.

qualifying as Convention refugees—who for political reasons are unable to return to their homeland may be given the status of B-refugees, under Section 6 of the 1980 Aliens Act. Similar categories exist in other countries, perhaps only in the form that persons in need of refuge may be given residence permits “on humanitarian grounds.”<sup>41</sup>

#### DE FACTO REFUGEES

“De facto refugees” is a term that has come more and more to the fore. I believe that the best definition of this term is “a person not recognized as a Convention refugee but who is in a similar predicament.” However, once this has been said, it is clear that the term “de facto refugees” covers a multitude of different categories of persons.<sup>42</sup>

It is relatively easy to distinguish those who are certified refugees under the high commissioner’s mandate, and the same goes for the persons recognized as B-refugees or the equivalent in different countries. But when we come to persons given residence permits “on humanitarian grounds” it is no longer so easy. They may or may not be de facto refugees, depending on why they were granted their permits. If it was on purely compassionate grounds, that is one thing; if for reasons that would qualify them as B-refugees in a country knowing this category, that is another thing.

Another important category is the one comprising persons in the process of being recognized—or rejected—as refugees, but here we are really in deep water,

as we shall have to distinguish between at least three different possibilities:

- those who eventually will be successful and win recognition as Convention refugees;
- those who will not be recognized as Convention refugees, but who may be “in a similar predicament” and who might have qualified as B-refugees or its equivalent, had they been in some other country; and
- those who clearly have no political or similar reason for not returning to their homeland.

The first two categories may be classified as de facto refugees, but the determination will as a rule be uncertain and tentative.

Then there are those whose claim to refugee status under the Convention has been rejected on purely formal grounds, in spite of the fact that they may have truly “well-founded fear of persecution” in their home country.<sup>43</sup> In addition we have yet another elusive category: those who for some reason or other—often to protect persons in the home country or because they do not want to break all bridges—have not applied for refugee status. Nevertheless they may be true refugees, perhaps more than anybody else.

Some de facto refugees will have papers proving their character as such; this goes for B-refugees in Sweden and, in particular, for mandate refugees in Italy,<sup>44</sup> to mention some. But others are truly paperless. Those having some sort of certificate may be said to enjoy a certain status, even though this status may be

41. See Grahl-Madsen, *Status of Refugees*, 1:317 ff.

42. See Enrico Lapenna, “Les réfugiés de facto: un nouveau problème pour l’Europe,” *AWR Bulletin*, 19:61-68 (1981); and Grahl-Madsen, “International Refugee Law.”

43. See Grahl-Madsen, “International Refugee Law.”

44. See Lapenna, *I Rifugiati in Italia*.

much inferior to that of recognized Convention refugees,<sup>45</sup> whereas the paperless ones cannot, as a rule, lay claim to any particular status.<sup>46</sup> They may even be discriminated against; for example, persons applying for asylum in certain countries are subjected to restrictions concerning employment, residence, and movements.<sup>47</sup>

However, *de facto* refugees should, on the whole, be protected by the rule of *non-refoulement*. This follows partly from the declaratory, not constitutive, nature of recognition as a Convention refugee,<sup>48</sup> and partly from the provisions of municipal legislation, which does not restrict the applicability of the rule of *non-refoulement* to recognized refugees.<sup>49</sup> It may therefore be said that, in the final analysis, it is the applicability of the rule of *non-refoulement* that distinguishes refugees—including *de facto* refugees—from all other aliens in the territory of a given state.

But the question whether a person should—and could—be returned to his home country will occur only once in a while. It follows that the test of *non-refoulement* is not a very practical one, and it has therefore from time to time been suggested that one ought to formalize the concept and give *de facto* refugees a certain status. It has been countered, however, that some of the categories of *de facto* refugees are indeed elusive, and that there always will be a gray zone somewhere. I am afraid that the objection is sound. But the situation

may probably be improved by a less restrictive and less formalistic granting of Convention refugee status to persons who will, after all, be allowed to stay “on humanitarian grounds”; by the high commissioner’s issuing eligibility certificates, particularly in hardship cases; and by other means.

But for those who remain paperless, the remedy seems to lie in the improvement of the status of alien residents generally, by application of human rights covenants, social charters, conventions for the improvement of the conditions of labor,<sup>50</sup> and by further advances, which may cost minimally in financial and political terms, such as the creation of a new residents passport,<sup>51</sup> definition of personal status, and so forth.

#### ELIGIBILITY DETERMINATION

Refugee character—“eligibility” in the parlance of refugee law—may be determined both individually and collectively. Convention eligibility is determined by each contracting state, and a decision by one state is not necessarily binding on other states.<sup>52</sup>

States determine eligibility mostly on an individual basis,<sup>53</sup> but there are also instances of collective eligibility determination. Thus the Federal Republic of Germany recently adopted a special law providing for the collective eligibility of so-called contingent or quota refugees:<sup>54</sup>

50. See conventions adopted under the auspices of the Council of Europe and the International Labour Organisation

51. See Grahl-Madsen, “International Refugee Law.”

52. *Ibid.*; see also further sources cited there.

53. See Grahl-Madsen, *Status of Refugees*, vol. 1, pp. 341 ff.

54. *Gesetz über Massnahmen für im Rahmen humanitärer Hilfsaktionen aufgenommene Flüchtlinge*, 22 July 1980.

45. For example, Convention travel documents are available only to Convention refugees.

46. See, however, notes 4 and 50.

47. See the new 1982 German Asylum Procedural Act (*Gesetz über das Asylverfahren*).

48. See Grahl-Madsen, *Status of Refugees*, vol. 1, p. 340.

49. See the laws mentioned in note 13.

refugees accepted *en bloc* as part of an international humanitarian action, such as the boat people from Southeast Asia.<sup>55</sup> In this way the normal, elaborate eligibility procedure for individual asylum seekers is bypassed.

Such collective conferment of eligibility is fully consonant with the Convention, provided allowance is made for the exclusion of certain individuals deemed unworthy of status of refugees, such as war criminals and persons guilty of "acts contrary to the purposes and principles of the United Nations."<sup>56</sup> Mandate eligibility may also be conferred on a collective basis. Indeed the Statute of the UNHCR (paragraph 2) stipulates that the work of the high commissioner "shall relate, as a rule, to groups and categories of refugees."

The high commissioner therefore may—and often does—determine that members of a given group or category are *prima facie* refugees under his mandate.<sup>57</sup> This does not prevent the exclusion of individuals who for some reason are considered disqualified. But the cited provision was included for financial reasons: it has never prevented the high commissioner from interesting himself in the case of an individual refugee and to certify eligibility of an individual.<sup>58</sup>

By successive resolutions of the General Assembly, the mandate of the high commissioner extends far beyond the eligibility provisions of the 1950 UNHCR

Statute, so that it now encompasses not only refugees but also displaced persons<sup>59</sup> and—for some purposes—even stateless persons.<sup>60</sup> In given circumstances, the high commissioner may indeed come to the aid of persons displaced within their home country.<sup>61</sup>

As matters stand today, it is a matter of discretion for the high commissioner how far he should go in certifying a person as a refugee under his mandate. Such a certificate is hardly available to internally displaced persons.<sup>62</sup> This special category apart,<sup>63</sup> it would seem that the decisive criterion is whether the person in question—or the group to which that person belongs—is deemed able to return to a peaceful existence in the home country, without fear of being persecuted or subjected to other measures of a similar nature. Thus the limits for the exercise of discretion are rather wide, and the high commissioner's practice may perhaps differ somewhat from country to country, depending on the circumstances.

#### STEMMING THE TIDE

It is part of the tragedy of our times that several states by various methods are seeking to prevent or at least to discourage refugees from reaching their shores to seek sanctuary. Military security zones may be established along frontiers and coastlines, making penetration hazardous, to say the least; or vessels

55. See Grahl-Madsen, *Territorial Asylum*, pp. 102 ff.

56. On the meaning of this phrase, see Grahl-Madsen, *Status of Refugees*, vol. 1, pp. 282 ff.

57. See Michel Moussalli, "Who Is a Refugee?" *Refugees Magazine*, 1:41-43 (Sept. 1982).

58. See Poul Hartling, "Concept and Definition of 'Refugee': Legal and Humanitarian Aspects," *Nordisk Tidsskrift for International Ret*, 48:125-38, 129-30 (1979).

59. See Moussalli, "Who Is a Refugee?" p. 42.

60. See General Assembly Res. 3274(XXIX) (10 Dec. 1974), 31/36 (30 Nov. 1979).

61. See Hartling, "Concept and Definition of 'Refugee,'" p. 134.

62. Such persons may, of course, receive a certificate entitling them to certain benefits, such as care and maintenance.

63. See Grahl-Madsen, "Protection for the Unprotected."

carrying would-be refugees may be intercepted at sea and ordered to return with their human cargo. Visa exemption agreements between certain states may be abrogated, simply in order to prevent an uncontrollable inflow of asylum seekers by air, sea, or land.

Just as there may be collective decisions of eligibility, some governments have of late adopted policies that virtually amount to collective noneligibility for members of certain ethnic and other groups, which means that members of these groups may be returned to their homeland without ado, immediately upon arrival. Others may be returned to a country through which they have passed en route, on the pretext that that country is their country of first asylum, very likely adding to the number of refugees in orbit.

In order to reduce further the pull factor,<sup>64</sup> or in other words to make refugee life as unattractive as possible, asylum seekers may be denied the right to work and may be restricted in their movements, even confined to a camp. There has also emerged the concept of humane deterrent, the idea being to make living conditions in camps as miserable as possible so as to deter others from considering flight a viable alternative to their fear, anguish, and misery at home.

In May 1979 a Memorandum of Understanding was signed by the UNHCR and the government of the Socialist Republic of Vietnam concerning the "orderly departure" of persons from Vietnam, the purpose being to eliminate at least one push factor.

64. "Push factor" and "pull factor" are terms denoting circumstances that cause a person to leave his homeland and make it attractive to seek an abode abroad.

The United Nations has now initiated an attempt to find ways and means to avert future flows of refugees.<sup>65</sup> It is not intended to abridge the human right to leave any country, including one's own.<sup>66</sup> Instead, the General Assembly of the United Nations has turned its attention to the root causes of refugee problems, condemning "all policies and practices of oppressive regimes as well as aggression, alien domination and foreign occupation, which are primarily responsible for the massive flows of refugees throughout the world and which result in inhuman suffering."<sup>67</sup>

If anything results from this initiative, action will be necessary on many frontiers, ranging from penetrating studies of the limits to international law to practical and economic measures that can help states to solve their internal problems without recourse to oppressive policies of the kind that may cause mass flows of refugees.

Do we glimpse the contours of a brave new world?

#### REMEDIES?

We shall probably have to live with refugee problems for quite some time to come. It will still be a priority to try to help refugees in the regions where they belong, and—in order to forestall eruptions of jealousy and ethnic strife—this task may involve helping the population at large by improving the infrastructure and the living conditions throughout the

65. See Grahl-Madsen, "International Refugee Law," and further sources cited there.

66. See art. 13(2) of the 1948 Universal Declaration of Human Rights; and art. 12(2) of the 1966 International Covenant on Civil and Political Rights.

67. Quoted from General Assembly Res. 35/124 (11 Dec. 1980).

region. Nevertheless, there may yet be situations that can be remedied only by intercontinental resettlement. Furthermore no country will be immune to the inflow of at least a trickle of refugees, seeking asylum from persecution. We must remain prepared for all these contingencies, mentally and otherwise.

In order to counter the protectionist and xenophobic tendencies of our time, we should, perhaps, consider new mechanisms, which may help bring about more justice for the refugees and at the same time a popular feeling that no nation is shouldering the burden alone; to the contrary, each nation is merely taking its allotted share, so that the world can remain a place where decency and human dignity are important and respected values.

One possibility may be the establishment of regional eligibility commissions, which could determine both refugee character, in particular when it comes to matters of principle, and which country should assume responsibility for a given refugee or refugee group.<sup>68</sup> For this purpose a system of quotas or distribution keys might perhaps prove useful.<sup>69</sup>

Another, alternative or supplementary, possibility could be a slight amendment of the high commissioner's mandate, so that he could create an eligibility machinery in order to establish the individual's character as a "United Nations-protected person" or as an "internationally assisted person," thus playing down the political overtones of refugee status and at the same time assisting governments in their task—without infringing

on their prerogative—of determining Convention eligibility.

Moreover, perhaps the high commissioner, as a subsidiary organ of the General Assembly, could be authorized to request advisory opinions of the International Court of Justice on legal questions arising within the scope of his activities.<sup>70</sup> Such authorization alone would lend increased authority to the work of the high commissioner.

Finally, we should not give up hope for a low-keyed instrument on territorial asylum,<sup>71</sup> perhaps along the lines suggested in my book on the subject. The eligibility provisions of such an instrument would be very simple and could be based upon the wording of Article 14 of the 1948 Universal Declaration of Human Rights, somewhat as follows: "This protocol applies to persons seeking asylum from persecution. It may not be invoked in the case of prosecutions genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations."<sup>72</sup>

The operative provisions could also be very simple: a reiteration of the rule of *non-refoulement* and the principle of burden-sharing between nations, and in addition an undertaking to the effect that "a contracting state will do its best to give a refugee in its territory, being in need of it, the right to stay and to find a livelihood in the country."

The detailed undertakings in the Refugee Convention will, of course, remain valid and must be honored. But the new instrument might, in its soft language,

68. See Grahl-Madsen, "International Refugee Law."

69. See Grahl-Madsen, *Territorial Asylum*, pp. 102 ff.

70. See art. 96(2) of the U.N. Charter (26 June 1945).

71. See Grahl-Madsen, *Territorial Asylum*, pp. 69 ff.

72. *Ibid.*, pp. 72-73.

alert governments and peoples to the basic challenge: We live in an imperfect world. There are persons who have to leave their homes and countries in order to save life, limb, and freedom, and sometimes there may be many such persons. In each situation we should make an honest and honorable assessment of

our ability to give those human beings an abode, somewhere on earth, where they can live in peace and freedom.

A short, if imperfect, rule of this nature will keep us from hiding behind phrases and technicalities; it will bring the realities of the world and our own responsibility home to us.