TOWARD A BROADER DEFINITION OF REFUGEE: 20TH CENTURY DEVELOPMENT TRENDS

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INTRODUCTION

The word "refugee" is a term of art in international law.[1] Modern territorial states have limited its use to those instances under which individuals or groups deserve assistance and protection in their escape to freedom or safety.[2] The reason for the individual's flight to freedom or safety is important under the principles of international law in relation to the definition of "refugee."[3] Because refugees are afforded special status under international law, the modern territorial state may want to deter an influx of certain individuals or groups for social, economic or foreign policy reasons. To accomplish this goal, states can define them as stowaways, boat people, economic migrants, displaced persons, illegal aliens, or people who have been firmly resettled elsewhere.[4] Further, the protec-

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1. This article will not focus on the concepts of asylum and withholding of deportation (nonrefoulement). Asylum is a discretionary relief given to persons who meet the definition of refugee. Asylum status usually leads to permanent residency. Nonrefoulement is another form of immigration relief which prohibits a state from returning an individual to a country where the life or liberty of the individual is clearly endangered. This is usually a temporary relief. *See generally* ALEINIKOFF & MARTIN, IMMIGRATION PROCESS AND POLICY 638-726 (1985); *see also* Immigration and Naturalization Service v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987) (leading Supreme Court case which discusses and distinguishes United States law on the two types of protection; according to the Court, asylum is to be considered using the refugee definition contained in the international conventions to be discussed later in this article, while United States law covering nonrefoulement (withholding of deportation) has its own history outside of the Refugee Act of 1980; nonetheless, the nonrefoulement provisions of United States law are consistent with obligations under the 1967 Protocol).

2. For a more detailed discussion of the semantics covering the definition and description of the word refugee, *see* GOODWIN-GILL, 1-2 THE REFUGEE IN INTERNATIONAL LAW (1985)

3. *Id.* at 1.

4. Two recent examples include the United States' treatment of Central Americans fleeing armed conflict in that region, and the United Kingdom's effort to stem the flow of Vietnamese asylum seekers in Hong Kong. *See* Miller, *Demystifying "Safe Haven": The Case of Salvadoran and Guatemalan Refugees*, 3 GEO. IMM. L.J. 45 (1989) (discusses the administrative misinterpretation of the concept of firm resettlement by the United States under a "safe haven" policy used to deny asylum claims made by Salvadorans and

tion and assistance offered by modern territorial states to the different types of refugees comes under the aegis of international human rights due to the very nature of the problem associated with refugees. For example, people flee not only because they have been persecuted or have a well-founded fear of persecution,[5] but also to escape the intolerable human conditions associated with foreign oppression, slavery, armed conflict, or the consequences of natural disasters such as earthquakes, floods, drought, and famine.[6] Human rights is a broad field compared to the narrow definition of refugee which has developed during the last three decades.[7] Placing refugees under the protection of international human rights may make it difficult for states to avoid their responsibilities under international law to assist people in distress by avoiding the terminology of refugee.[8] In fact, certain territorial states responsible for creating the current international legal instruments defining refugees have become more restrictive in receiving refugees as part of their overall immigration policy.[9]

This Article discusses the legal and normative definitional development of the word "refugee" as it is found in various domestic, regional, and international instruments which have defined the word "refugee" in the twentieth century. More specifically, the Article focuses on the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, the 1980 Refugee Act, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, and the 1984 Cartagena Declaration on Refugees. In discussing these modern international instruments, all of which have legal capacity except for the Cartagena Declaration,[10] the definition of refugee is given, followed by a discussion of the definition's scope. The objective of this discussion is to use the definitional development of "refugee" to anticipate where international law might turn as human

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Guatemalans who arrive via Mexico seeking asylum); *see also* 12 REFUGEE REPORTS 1-2 (Dec. 29, 1989) ("Hong Kong officials removed 51 Vietnamese asylum seekers from . . . detention center, forced them to board a chartered Cathay Pacific jet and flew them back to Hanoi").

5. *See infra* note 19.

6. GOODWIN-GILL, *supra* note 2, at 1-5.

7. Bari, *A Mutual Concern,* 26 UNHCR REFUGEES (Aug. 1989) (author suggests that refugee and human rights groups need to work closer since they are both concerned about the plight of refugees).

8. GOODWIN-GILL, *supra* note 2, at 18, 19.

9. Editorial, *1989: What Hope for Refugees*, 5 UNHCR REFUGEES (Aug. 1989).

10. For a discussion of international declarations, *see generally* W. BISHOP, INTERNATIONAL LAW 46-51 (1962).

civilization enters the twenty-first century.

I. 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

The Convention relating the Status of Refugees[11] defines refugees in two ways. First, a person is considered a refugee if he or she is defined as such under the Arrangements of 12 May 1926[12] and 30 June 1928,[13] or under the Conventions of 28 October 1933[14] and 10 February 1938,[15] the Protocol of 14 September 1939,[16] or the Constitution of the International Refugee Organization.[17]

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11. Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, *entered into force* April 22, 1954, 189 U.N.T.S. 137 *reprinted in* INT'L HUMAN RIGHTS INSTRUMENTS 280.1 (R. Lillich ed. 1986) [hereinafter 1951 Convention].

12. Category 1. "*Russian* pre-war or Nansen refugees, defined as [a]ny person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the USSR and who has not acquired another nationality."
Category 2. "*Armenian* pre-war or Nansen refugees defined as [a]ny person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality."
COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 45 (UNHCR 1979) [hereinafter UNHCR COLLECTION].

13. Category 3. "*Assyrian or Assyrian-Chaldean and assimilated refugees* defined as . . . a person of Assyrian or Assyrian-Chaldean origin, and also by assimilation any person of Syrian or Kurdish origin, who does not enjoy or who no longer enjoys the protection of the State to which he previously belonged and who has not acquired or does not possess another nationality."
Category 4. "*Turkish* refugees defined as . . . [a]ny person of Turkish origin, previously a subject of the Ottoman Empire, who under the terms of the Protocol of Laussanne of 24 July 1923, does not enjoy or no longer enjoys the protection of the Turkish Republic and who has not acquired another nationality."
UNHCR COLLECTION, *supra* note 12, at 45.

14. Category 5. "*Spanish refugees* defined as . . . [p]ersons possessing or having possessed Spanish nationality, not possessing any other nationality and with regard to whom it has been established that, in law or in fact, they do not enjoy the protection of the Spanish government." UNHCR COLLECTION, *supra* note 12, at 45.

15. Category 6. "*Refugees coming from Germany* defined as . . . (a) [p]ersons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German government. (b) Stateless persons not covered by the previous conventions or agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German government . . . [p]ersons who leave Germany for reasons of purely personal convenience are not included in this definition." UNHCR COLLECTION, *supra* note 12, at 46.

16. Category 7. "*Austrian Refugees* (victims of Nazi persecution), defined as: (a) [p]ersons having possessed Austrian nationality not possessing any nationality other than German nationality, who are proved not to enjoy, in law or in fact, the protection of the German government; and (b) Stateless persons, not covered by any previous Convention or arrangement and having left the territory which formerly constituted Austria after being established therein, who are proved not to enjoy, in law or in fact, the protection of the German government . . . [p]ersons who leave territories which formerly constituted Austria for reasons of purely personal convenience are not included in this definition." UNHCR COLLECTION, *supra* note 12, at 46.

17. Category 8. Any person who has been considered a refugee under the Constitution

Generally, post World War I refugees in this first category of the 1951 Convention have the following characteristics: (1) they are nationals of a particular territory; (2) they have lost the protection, in law or in fact, of the particular government controlling said territory; and (3) they are stateless or possess no other nationality. Examples of nationalities covered under the above agreements include Armenians, Austrians, Czechs, Germans, Kurds, Russians, Slovaks, Spaniards and Syrians. In addition, refugees under the Constitution of the International Refugee Organization include persons of Jewish origin from Germany and Austria, and unaccompanied children who are war orphans. Finally, excluded from the definition are those people who leave a particular territory (especially Germany) for purely personal reasons.[18]

The second category of refugee under the 1951 Convention covers events prior to January 1, 1951 and includes an individual who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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

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of IRO is automatically within the terms of the Statute and the Convention, unless he falls under one of the "cessation" or "exclusion" clauses.

Category 9. *"Victims of Nazi or Fascist regimes*, or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not.

Category 10. "*Saar refugees*, defined as "all persons who, having previously had the status of inhabitants of the Saar, have left the territory on the occasion of the plebiscite and are not in possession of national passports."

Category 11. *"Refugees from Sudetenland* as defined in the Resolution of the 104th Section of the Council of the League of Nations dated 19 January 1939: "These are refugees who, having Czecho-Slovak nationality and not now possessing any nationality other than German, have been obliged to leave the territory which was formerly part of the Czecho-Slovak State—that is, the territory known as the Sudetenland—where they were settled and which is now incorporated in Germany. They consist of persons who do not enjoy the protection of either the German or the Czecho-Slovak government."

Category 12. "*Any other refugee*—whether *de jure* or *de facto* stateless who were refugees before the War although they did not belong to a recognized category of refugees and who have continued to be refugees in spite of the changed circumstances."

Category 13, "Subject to the provisions of section D and of Part II of this Annex, the term "refugee" also applies to *persons who*, having resided in *Germany or Austria*, and being of Jewish origin or foreigners or stateless persons, were victims of Nazi persecution and were detained in, or were obligated to flee from and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein."

Category 14. "The term "refugee" also applies to *unaccompanied children* who are war orphans or whose parents have disappeared, and who are outside their countries of origin. Such children, 16 years of age or under, shall be given all possible priority assistance, including, normally, assistance in repatriation in the case of those whose nationality can be determined." UNHCR COLLECTION, *supra* note 12, at 46-47.

18. *Id.* Categories 13 & 14.

> 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.[19]

Under this second definition, temporal limitations (any event prior to January 1, 1951) and geographic restrictions are eliminated. In this sense it has universal application, although state signatories had the option of applying the provisions of the 1951 Convention to events happening only in Europe.[20] Refugees in the second category under the 1951 Convention have the following characteristics: (1) they are outside their home country; (2) they are unable or unwilling to return to their home country in order to be protected by the government; (3) they are unable or unwilling to return to their home country because of a well-founded fear of persecution; and (4) the well-founded fear of persecution is on account of race, religion, nationality, membership in a particular social group or political opinion. This has become the classic refugee definition under international law.[21]

II. 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

Since the 1951 Convention only applied to events occurring before 1951, the international community felt it was necessary to address refugee situations arising subsequent to that time. Accordingly, the 1967 Protocol relating to the Status of Refugees[22] stipulated that "equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951."[23]

The United States never signed the 1951 Convention, but it did become a party to the 1967 Protocol which incorporated by reference the definition of refugee found in the 1951 Convention.[24] The

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19. 1951 Convention, *supra* note 11, art. I(A), at 280.1.

20. *Id.* Art. I(B) which provides: "For the purposes of this Convention, the words 'events occurring before 1 January 1951' in article 1, section A, shall be understood to mean either (a) events occurring in Europe before January 1951; or (b) events occurring in Europe or elsewhere before 1 January 1951 and such Contracting State shall make a declaration at the time of signature . . . specifying which of these meanings it applies. . . ."

21. *See* HANDBOOK ON PROCEDURE AND CRITERIA FOR DETERMINING REFUGEE STATUS 3-7 (1979) (international instruments defining the term "refugee").

22. Protocol relating to the Status of Refugees, *signed* January 21, 1967, *entered into force* October 4, 1967, 19 U.S.T. 6223, U.N.T.S. No. 6577, 606 U.N.T.S. 267 (*entered into force* for U.S. November 1, 1968) *reprinted in* INT'L HUMAN RIGHTS INSTRUMENTS 110.1 (R. Lillich ed. 1986) [hereinafter 1967 Protocol].

23. *Id.*, preamble 1(2).

24. *Id.* art. 1(2).

1967 Protocol further permitted cooperation between the signatories and the United Nations High Commissioner for Refugees ("UNHCR").[25] The 1951 Convention and 1967 Protocol are the principal international instruments which address the definition of refugee under international law.[26]

III. 1980 REFUGEE ACT

In 1980 the United States Congress enacted the Refugee Act,[27] which repealed the refugee provisions of the Immigration and Nationality Act ("INA") which were added by 1965 amendments to the INA.[28] Under the old version of the INA, a refugee could qualify under the seventh preference, a conditional entry not considered an immigrant category.[29] This conditional entry defined a refugee as any person who, because of persecution or fear of persecution on account of race, religion, or political opinion, who fled from a Communist or Communist-controlled country or any country within the general area of the Middle East.[30] The section further included the admission of "persons uprooted by catastrophic natural calamity," however, this category has never been utilized.[31]

With the Refugee Act of 1980 the United States brought its domestic law into conformity with the definition of refugee found in the 1951 Convention and 1967 Protocol.[32] INA Section 101(a)(42)

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25. *Id.* art. 2 (cooperation of the National Authorities with the United Nations).

26. The United Nations has placed the responsibility for refugees and stateless persons under the United Nations High Commissioner for Refugees whose office was established pursuant the STATUTE OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, General Assembly Resolution 428(v) of 14 December 1950 *reprinted in* UNHCR COLLECTION, *supra* note 12, at 309. The Commissioner's work is considered non-political and entirely social and humanitarian.

27. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

28. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913, amending § 203(a)(7) of the INA.

29. For a detailed discussion of the immigrant categories under United States law *see* 2 GORDON & MAILMAN, IMMIGRATION LAW AND PROCEDURE § 2.17 - 2.18 (rev. ed. 1989).

30. *Id.* Prior to World War II, United States immigration policy was very restrictive concerning the admission of refugees. Commentators have often cited the refusal of the United States to admit hundreds of thousands of people who fled the fascist European regimes before World War II. United States involvement in World War II, and subsequently military actions in Southeast Asia brought about changes in refugee immigration policy. Legislative enactments providing for the admission of refugees occurred in 1948, 1953, 1957, 1960 and 1965. The earlier acts were usually temporary in nature. In addition, the United States used its parole power to admit refugees on what were usually emergency situations (e.g., Cubans fleeing the government of Fidel Castro). The 1965 amendments were intended to provide for a permanent statutory mechanism for dealing with refugee problems. *See generally* 2 GORDON & MAILMAN, *supra* note 29, at 2.42Aa - 2.24.Ab (comprehensive discussion on the development of refugee policies for the United States).

31. ALEINIKOFF & MARTIN, *supra* note 1, at 622.

32. *See supra* notes 11 & 22.

contains the statutory definition of refugee:

> (A) Any person who is outside any country of such person's nationality or, in the case of a person having no nationality is outside any country in which such person habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstance as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion.[33]

Two additional sections were added to the INA. Section 207 covers overseas refugees and emergency refugee admissions,[34] while Section 208 provides asylum procedures for refugees who are physically present in the United States, or at a port of entry or land border.[35] To qualify under either provision a person must meet the definition of refugee found under Section 101(a)(42).[36] In addition, the Refugee Act of 1980 includes provisions for persons not covered by the 1951 Convention and 1967 Protocol, but who are of special

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33. 8 U.S.C. § 1101(a)(42) (1982). The United States has an administrative mechanism for granting temporary refuge to people who are already in the United States and come from places where there is some form of armed conflict or for foreign policy reasons. This is known as extended voluntary departure (or E.V.D.). Although E.V.D. has provided temporary refuge for various groups in the past (e.g., Poles, Ethiopians, Nicaraguans, Ugandans, Cubans, Cambodians, Vietnamese, Chileans, Laotians, Iranians, Afganis, and Dominican Republicans), it is not defined in statute or regulation. It has been used fifteen times since 1960. *See* ALEINIKOFF & MARTIN, *supra* note 1, at 728, 729. There has been much controversy and discussion as to whether E.V.D. should be granted to Salvadorans and Nicaraguans presently in the United States, and there have been attempts to enact legislation establishing E.V.D. status for Salvadorans and Nicaraguans; *see* HARTMAN, IN DEFENSE OF THE ALIEN 172, 173 (1987) (author discusses temporary refuge within the Central American context). H.R. 45 which provides safe haven for these two nationalities passed the House of Representatives, and a Senate version, S. 458, is pending, *see* 66 INTERPRETER RELEASES 1233-35 (Nov. 6, 1989).

34. 8 U.S.C. § 1157 (1982).

35. 8 U.S.C. § 1158 (1982).

36. *See supra* note 33.

humanitarian concern or in the national interest to the United States.[37] According to the Senate Report accompanying the bill, the additional coverage includes "displaced persons" who are not technically covered by the U.N. Convention.[38] Examples given to justify the expansion of protection beyond treaty refugees included Vietnamese evacuated from Saigon in 1975.[39] Also mentioned in the Senate Report was the definition of a "displaced person" as someone "uprooted because of arbitrary detention" and "unable to return to his usual place of abode."[40] This accommodates political prisoners and other detainees inside countries who needed resettlement opportunities outside of their home country.[41]

Although the INA does not contain a definition of "refugees of special humanitarian concern," legislative history indicates that these include group admission, or classes of refugees from countries where the United States has strong cultural ties, historic relations, or treaty obligations.[42] Examples of these group admissions are people from Cuba, the Soviet Union, Eastern Europe, Indochina, and to a lesser degree the Middle East, Uganda, Lebanon, and Latin America.[43]

IV. ORGANIZATION OF AFRICAN UNITY CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

Article I of the OAU Convention[44] contains two definitions of refugee. The first definition is the classic or traditional treaty definition based on the well-founded fear standard discussed previ-

37. *See supra* note 34.

38. S. REP. No. 96-256, 96th Cong., 2d Sess. (1980) *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 141, 144 (1980).

39. *Id.*

40. *Id.* at 145.

41. *Id.*

42. *Id.* The President must consult with Congress to discuss, among other matters, the reasons that would justify humanitarian concerns (or national interest), and must provide Congress with the following information: (1) a description of the refugee situation; (2) an analysis of the conditions of the countries from which the refugees come including their numbers; (3) proposed plans, including costs, for the transportation and resettlement; (4) the social, economic, and demographic impact on the United States; (5) whether other countries will admit and assist in the resettlement of the refugees; and (6) the foreign policy interests of the United States regarding the refugees. *See* 8 U.S.C. § 1157(e).

43. *Id.* at 146.

44. OAU 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 U.N.T.S. 45 *reprinted in* UNHCR COLLECTION *supra* note 12, at 193. (1979) [hereinafter OAU Convention].

ously.[45] The second definition states: "The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality."[46]

Under the second definition, the OAU Convention expands the traditional treaty refugee definition. The OAU Convention definition clearly covers situations involving external or internal armed conflict, as well as situations where heavy fighting occurs. It also applies where there has been widespread disease and famine, or where there has been a breakdown in the public order which forces people to flee.[47] However, the OAU Convention only permits those refugees under the well-founded fear standard to qualify for asylum and resettlement.[48] With regard to the expanded definition of refugee, the OAU Convention forbids its member states from deporting (nonrefoulement) or compelling both types of refugees to remain in a place where life, physical integrity or liberty would be threatened.

The OAU Convention sets up a system which recognizes both the treaty refugee and a "displaced person" refugee. Only treaty refugees are afforded full asylum protection, whereas all refugees are afforded temporary protection. In addition, the OAU Convention allows for the UNHCR to concern itself with both types of refugees[49] and considers that the provisions contained therein are a "regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees."[50]

V. CARTAGENA DECLARATION ON REFUGEES

In 1984 the Republic of Colombia sponsored, in cooperation with the University of Cartagena de Indias, the Regional Center for Third World Studies, and the United Nations High Commissioner for Refugees, a colloquium on the international protection of refu-

45. *Id.* art. I(1).

46. *Id.* art. I(2).

47. COLES, IN DEFENSE OF THE ALIEN 78-120 (1984) (author discusses the protection of refugees from armed conflict situations and includes an in-depth analysis of the displaced person refugee definition contained in the OAU Convention).

48. OAU Convention, *supra* note 44, art II(1).

49. *Id.* art. VIII(1).

50. *Id.* art. VIII(2).

gees in Central America, Mexico, and Panama.[51] As part of the colloquium's conclusions and recommendations, also known as the "Cartagena Declaration on Refugees,"[52] it was recommended that the classic definition of refugee be expanded along the lines of the OAU Convention discussed above.[53] In addition to the 1951 Convention and 1967 Protocol definition, the Cartagena Declaration calls for the definition of refugee to include "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order."[54]

The expanded refugee definition is not binding on any government; it is aspirational in character. In other words, it is not considered as part of international law.[55] Nonetheless it recognizes that within the Central American context, there is a need to expand the classic treaty refugee definition. The expanded definition would include persons affected by generalized violence, where massive violations of human rights take place, and where there have been certain social upheavals.[56]

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51. *See* Cartagena Declaration on Refugees (Cartagena de Indias, 22 November 1984) OAS/Ser.L/V/II.66, doc. 10, rev. 1, pp. 190-93; *see also* REPORT ON THE INTERNATIONAL CONFERENCE ON CENTRAL AMERICAN REFUGEES (Guatemala City May 29-31, 1989) prepared by Rev. Msgr. DiMarzio, Executive Director, Migration and Refugee Services, United States Catholic Conference (a draft declaration was passed unanimously by the participating countries which, among other matters, recognized that a ten-year period of armed conflict in the region resulted in more than 2 million refugees and displaced persons of whom at least 150,000 are refugees under the 1951 Convention; in addition, there was an effort on the part of non-government organizations participating in the meeting to elevate the Cartagena Declaration to an Inter-American Convention which would apply to Mexico, the United States and Canada; this proposal was rejected); *see* Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons, *reprinted in* 4 INT'L J. REFUGEE L. 583-96 (1989).

52. *Id.*

53. Cartagena Declaration, *supra* note 51, Conclusions and Recommendations III (3).

> To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (art. 1 ¶ 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances which have seriously disturbed public order.

54. *Id.*

55. *See supra* note 10.

56. Another noteworthy international document is the Principles Concerning Treatment of Refugees, as adopted by the Asian-African Legal Consultative Committee at its

CONCLUSION

Before the 1951 Convention, the definition of refugee tended to apply to nationalities or religious groups who had lost the protection of governments controlling specific territories. Various international agreements covered particular nationalities according to circumstances. The 1951 Convention altered this approach by eliminating temporal and geographic restrictions. Moreover, the 1951 Convention applied only to those refugees who had a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion based on events occurring prior to January 1, 1951. The 1967 Protocol eliminated the January 1, 1951 dateline and incorporated the well-founded fear of persecution refugee definition, giving it universal application.

Although the United States was not a party to the 1951 Convention, it did sign and ratify the 1967 Protocol. In 1980, the United States amended its immigration laws to conform to the treaty obligations assumed by becoming a signatory to the 1967 Protocol. The United States further amended its refugee laws to go beyond the classic refugee definition by allowing the admission of refugees who are of "special humanitarian concern." This phrase, however, is not defined in the INA. The only definition of refugee under United States law is the classic refugee definition.

There are two specific instances in which regional instruments have gone beyond the classic refugee definition. In 1969, the OAU Convention expanded the definition in a qualitative manner. The expanded definition has been interpreted as having both subjective and objective components. The subjective aspect lies in the purposeful violation of human rights, and the objective aspect involves conditions related to general aggression, or a breakdown of public order.[57] The new refugee definition is binding on those African countries which are signatories to the OAU Convention.[58] In 1984,

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Eighth Session (Bangkok 1966). This document does not expand the refugee definition along the lines of the OAU Convention and the Cartagena Declaration, rather, it substitutes the word "colour" for the word "nationality" contained in the classic treaty definition. *See* UNHCR COLLECTION, *supra* note 12, at 201.

57. *See* COLES, *supra* note 47, at 79.

58. Algeria, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Kinshasa), Dahomey, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, United Arab Republic of Tanzania, Upper Volta, Zambia; *see* OAU Convention, *supra* note 44, at 200.

the Cartagena Declaration called for the expansion of the classic refugee definition to Central America along the lines of the OAU Convention. Unlike the OAU Convention, however, the Cartagena Declaration is not legally binding on any country in the Americas.

While immigration policy in wealthy states like Australia,[59] Canada,[60] the United States,[61] and Western European countries[62] has become more restrictive in the reception of refugees, the number of refugees has increased in the less wealthy parts of the world. Africa, Asia, and Central America account for ninety percent of the world's approximately thirteen million refugees.[63] In the face of such large numbers of refugees, and given the reality that the 1951 Convention and 1967 Protocol are being interpreted restrictively by certain countries that have traditionally accepted refugees,[64] various countries in Africa and Central America have created regional agreements that afford protection beyond what has become the definitional application of state protection under international refugee law. Both the OAU Convention and the Cartagena Declaration can been seen as developmental international customary norms which reflect state practice in temporary refugee law, as well as international human rights law.[65]

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59. Crawford & Hyndman, *Three Heresies in the Application of the Refugee Convention*, 1 INT'L J. OF REFUGEE L. 155 (1989) (authors set forth three misinterpretations of the 1951 Convention used by Australia to limit admission of refugees, especially applications for refugee status made by Sri Lanka Tamils).

60. Note, *The East Asian Threat: Canada's Attempt to Create a Restrictive Refugee Policy*, 2 GEO. IMM. L.J. 605 (1988) (discussion of Bill L-84 authorizing new refugee processing procedures intended to control the entry of illegal aliens who seek refugee status, increased penalties for the harboring and transportation of illegal aliens).

61. Miller, *supra* note 4; *see also* HARTMAN, *supra* note 33. In addition to its deterrence through detention policy toward Central Americans, the United States has an interdiction program with Haiti, and over 20,000 Haitians have been interdicted at sea with only 6 Haitian boat people allowed to enter the United States to pursue asylum claims, 10 REFUGEE REPORTS 11 (Oct. 20, 1989); *see also* 8 HAITI INSIGHT 1-3, 7 (Jan. 1990) (article discussing United States interdiction program and forced return of Haitian boat people). For more information on the U.S. deterrence through detention policy, *see The U.S. is Renewing Border Detentions*, N.Y. Times, Feb. 8, 1990, at A22, col. 1.

62. *See supra* note 9.

63. *Id.*

64. Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee on the UNHCR Programme*, 1 INT'L J. OF REFUGEE L. 286 (1989) (among other observations the author explicitly mentions the general deterioration of attitudes towards "refugees" occurring since the mid-1970s).

65. *But see* Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Thinking?* 26 VA. J. INT'L L. 857 (1986) (author argues that only persons who might be exposed to torture are included in the development of customary international refugee law, but that neither state practice nor jurisprudence support the broader application to humanitarian refugees); *contra* Perluss & Hartman, *Temporary Refugee: Emergence of a Customary Norm*, 26 VA. J. INT'L L 551 (1986) (authors discuss emergence of principle of Non-Refoulement at the border within the context of basic human

The offering of temporary protection to the beneficiaries of the expanded refugee definition under the OAU Convention and the Cartegena Declaration, coupled with the fact that the United Nations High Commissioner for Refugees has been given competence to provide assistance to the beneficiaries,[66] signifies an important attitude change on the part of many territorial states toward humanitarian refugees, including the international treatment of refugees. As the twentieth century enters its last decade, it is clear that notwithstanding the compassion fatigue experienced by certain Western States,[67] the classic definition of refugee under the existing international legal order is giving ground to state practice of expanded refugee protection which merges international human rights with refugee law.[68]

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rights as a binding principle of customary international law).

66. OAU Convention, *supra* note 44 preamble ("[c]onvinced that the efficiency of the measure recommended by the present Convention to solve the problem of refugees in Africa necessitates *close and continuous collaboration between the United Nations High Commissioner for Refugees*") (emphasis added); Cartagena Declaration, *supra* note 51 CONCLUSIONS AND RECOMMENDATIONS II (K) ("[t]o request immediate assistance from the international community for Central American refugees, to be provided either directly, through bilateral or multilateral agreements, or *through UNHCR* and other organizations and agencies") (emphasis added).

67. *See* HARTMAN, *supra* note 33, at 178.

68. Editorial, *Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa*, 4 INT'L J. REFUGEE L. 557, 558 (1989) (editorial postulates that the expanded definition of refugee in the OAU Convention contributed "to the development of a more humane international refugee regime").