

OPENING STATEMENT BY THE HIGH COMMISSIONER

21 April 1981

It gives me great pleasure to welcome you to this meeting of the Group of Experts. As you are no doubt aware the Executive Committee, during its last session in October 1980, requested me to convene a representative group of experts to examine temporary refuge in all its aspects within the framework of the problems raised by large-scale influx. I am happy to have been able to gather such a group of distinguished personalities with extensive knowledge experience in connection with refugee problems. May I begin by thanking you most sincerely for having accepted my invitation to attend this meeting.

The international protection of refugees, as one of the main functions of UNHCR, is described in paragraph 8 of the Statute of my Office. Moreover, under article 35 of the 1951 Convention, the Contracting States undertake to co-operate with the Office of UNHCR in the exercise of its functions. As regards international protection a distinction can be made between direct or immediate protection activities and promotional activities. Direct or immediate protection activities consist essentially of intervening on behalf of specific individuals or groups in such matters as granting of asylum, prevention of refoulement or expulsion and determination of refugee status. Promotional activities are related to the enforcement of existing laws and regulations, the development of national laws and regulations, the accession of States to existing international legal instruments and the development of new international legal instruments. Through its promotional aspect, international protection thus plays a part, directly or indirectly, in the creation and formulation of refugee law, at both the national and international levels.

I should like to emphasize here that the first requirement for the protection of refugees is to ensure that they are admitted to a country of refuge and that they receive durable, or at least temporary, asylum and that the principle of non-refoulement is scrupulously observed. No refugee must be forced back to a country where he fears persecution.

The problem which you will be dealing with as from today is a complex one. In recent years, large-scale influx of people fleeing from their own country has acquired unprecedented proportions and gravity, as well as characteristics previously unknown in this field. The problem no longer concerns individuals living in but involves entire populations which have become displaced. Such population movements create serious social and economic problems in receiving States and have a harmful effect on inter-State relations.

I drew the attention of the Executive Committee at its thirtieth session in 1979 to the serious problems existing in one area as a result of refusal of even temporary asylum to asylum seekers in boats, and to the forcible return of such asylum seekers to the high seas. The Executive Committee, conscious of the gravity of the situation involving a large-scale influx of asylum-seekers, adopted a conclusion in 1979 stating that persons seeking asylum in such situations should always receive at least temporary refuge. The Committee also stressed "the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum".

However, as I reported to the last session of the Executive Committee, the granting of asylum merely on a temporary basis, a practice which some States in different parts of the world still feel compelled to follow, continues to give rise to considerable problems. Efforts to find a country of resettlement for refugees who have temporary asylum may not always meet with success. The fact that their presence in the country is regarded as purely temporary may also result in a number of disadvantages of a more tangible nature.

I also referred to another problem which concerns the practice followed by a number of States of generally regarding asylum-seekers as illegal immigrants. This practice frequently results in asylum-seekers being exposed to a number of difficulties including serious measures such as detention and expulsion.

The debate in the last meeting of the Sub-Committee of the Whole on International Protection as well as the last session of the Executive Committee gave ample proof of the complexity of the problem. Indeed, some representatives expressed concern that acceptance of the notion of temporary refuge might lead to a weakening of recognized principles relating to asylum and non-refoulement and might sanction a practice by Governments generally to grant temporary refuge rather than durable asylum to refugees. Others stressed that the question of temporary-refuge should not be considered in isolation but rather in connection with the various problems which arose in regard to large-scale influx.

Thus, you realize the magnitude and complexity of the task which is facing you.

I am confident that you will have a fruitful debate and that your conclusions will constitute a solid basis for discussions during the next meeting of the Sub-Committee on International Protection. What we have, constantly to bear in mind is that our common goal is to serve the cause of refugees all over the world and to ensure that the basic principles established for their protection are maintained and further strengthened.

I have asked the Director of Protection to preside over your deliberations and both he and our colleagues in the Protection Division will be happy to do everything possible to facilitate your task.

Paper submitted by G.J.L. Coles TEMPORARY REFUGE AND THE LARGE-SCALE INFLUX OF REFUGEES

A. Introduction

There is concern in the international community over the increasing flows of refugees - and the scale of some of these flows - and there is a widespread conviction that principles and mechanisms must be developed to deal with the flows.^[1]

It is in the context of this concern, and of the problems that can be encountered in large-scale influx situations, that Australia has proposed that the concept and practice of temporary refuge, should be studied by the international community .

Australia believes that the concept of temporary refuge can be relevant and helpful in certain large-scale influx situations and that the examination and development of this concept will facilitate and improve the protection of persons requiring protection.

A summary of the reasons why Australia proposed that temporary refuge should be examined is given in the Background Note prepared by the Office of the High Commissioner. This Note records the discussion of temporary refuge last year. in the Sub-Committee of the whole on International Protection of the Executive Committee of the High Commissioner's Programme.

Against the background of that discussion this paper offers some comments on the nature of temporary refuge, its function in an international system for the protection of refugees, its relevance to the principle of non-refoulement (including the aspect of admission), its relationship to the concept of asylum, the status of persons granted temporary refuge, its significance for the obtaining of satisfactory durable solutions and its implications for international solidarity.

Hitherto, there has been a tendency to see temporary refuge as an unfortunate, if sometimes unavoidable, derogation from the ideal of the State of first admission providing the durable solution. As a consequence, perhaps, there has been a reluctance to discuss temporary refuge. To a certain extent this attitude may have been influenced by the belief that if the practice of temporary refuge were ignored it might cease to be a problem.

However, the practice of temporary refuge, which is now found on an extensive scale, reflects certain realities in the world which are unlikely to disappear, and temporary refuge presents positive as well as negative aspects. There is a need to examine it realistically; to see how it can be helpful and unhelpful; to determine what its proper function should be in an international system for the protection of refugees; and to regulate satisfactory its practice.

It may be that the failure to appreciate the proper function of temporary refuge in that system can create distortions in the conception of that system, and that the examination of temporary refuge may lead to a better understanding of the kind of system that is needed at the present time.

So far, temporary refuge (or temporary or provisional asylum) has barely been examined by jurists although it has been widely practised and provided for in an embryonic form in all the main international instruments on the status of refugees and asylum. Recent discussions in the Sub-Committee on International Protection have revealed considerable uncertainty about the nature and function of temporary refuge. In the submission of this paper, it is now urgent that the concept and practice of temporary refuge should be examined by international jurists in an objective and responsible way. The elucidation and elaboration of the concept of temporary refuge could be seen as a priority task in the development of international refugee law.

B. Legal nature of temporary refuge

The protection extended to a refugee by admission on a temporary basis is not a new form new form of protection in international refugee law. Admission on a temporary basis is the sovereign right of a State^[2] and express provisions for admission on such a basis are found in various international instruments on asylum and the status of refugees.^[3]

Admission on a temporary basis, therefore, is an aspect of sovereignty, and in so far as it is a distinct category of protection to which certain legal rights and duties belong it may also be called a legal concept.

If temporary refuge is understood as being the protection extended to a refugee by admission on a temporary basis, the proposal that temporary refuge should be studied and developed amounts to saying nothing more than that an existing and, accepted form of protection should be studied and developed.

The choice of the phrase "temporary refuge" instead of the phrases "first asylum", "temporary asylum" "provisional asylum" or "temporary residence" which have sometimes been used to denote temporary protection could contribute to a sense of novelty about the proposal, but the use of this particular phrase is not without precedent and the reasons for preferring it to the other phrases are advanced elsewhere in this paper.

C. Function of temporary refuge.

The proper function of temporary refuge is to facilitate admission and the obtaining of satisfactory durable solutions. In certain large-scale influx situations, the vast number of persons involved can make settlement in the country of refuge very difficult. Where a country receives in a short period of time many hundreds of thousands even millions of people, it may not be able to accommodate them and there may be an acute shortage of essentials such as food clothing and medicine. Where the large-scale influx creates serious problems endangering public order and national security and even international peace and security, the country of refuge may not have the will to settle them and may only be concerned to obtain their early return or resettlement elsewhere.

In such situations, the vast majority of the persons admitted are often maintained as destitute persons in large refugee agglomerations, their accommodation is often of a rudimentary or temporary nature and their presence is usually subject to restrictive conditions applying to such basic aspects as movement. They are not received into the local community in any meaningful sense. They are, as it were, held at the threshold of the community. While it would be possible to consider their presence in the country of refuge as a durable solution in a narrow, legal sense, the circumstances and conditions of their presence may make their situation, humanly speaking, unendurable in the longer term.

In some cases, the country of refuge can become increasingly concerned about their early return or resettlement, particularly where the influx continues; and in situations where neither of these solutions appears possible, the country of refuge may refuse to admit more people or may threaten to expel those already in its territory, pleading national security or the need to safeguard the local Population.

It is in such situations that the grant of temporary refuge facilitates admission and the continued presence of people in the country of refuge. It also acts as a signal to the international community that the country of refuge may need assistance in the obtaining of a satisfactory durable solution. Such assistance may take the form of aid to facilitate the absorption in the country of refuge, action in favour of early voluntary repatriation or resettlement offers.

The case for temporary refuge, therefore, is predicated on the basis that there are situations of large-scale influx where it would be neither reasonable nor desirable in regard to the refugees themselves or to the country of refuge to consider acceptance at the frontier as entailing automatically a durable solution in the country of refuge. In such situations, it may even be reasonable and desirable for the country of refuge to state at the time of admission that the solution granted by admission should be regarded as temporary.

The following are some examples of temporary refuge situations which have occurred:

1956: Influx of Hungarian refugees into Austria

As a result of events occurring in Hungary in late 1956, over 100,000 refugees entered Austria in November of that year. On 22 November, the Austrian State Secretary, Dr. Kreisky, emphasized that the refugee situation had become catastrophic", that refugees were continuing to pour into Austria, and that the Austrian Government was facing the gravest difficulties in accommodating them in transit camps and providing food, clothing and medicine. He appealed to the United Nations and the Western countries for rapid help and "quick action to provide a solution", stressing that Austria did not possess the facilities for coping with the flood of refugees.^[4]

Within a matter of days following the outset of the influx, a total of 25,000 refugees were resettled in the United States Canada, Switzerland, Argentina Australia, Western Germany, France, the United Kingdom, Italy, the Netherlands, Norway, Sweden and New Zealand. In the succeeding months, the large majority of the remaining refugees were also resettled.

In the Austrian case it was sufficient for Austria to appeal for "quick action to provide a solution" to convey the message that Austria could not provide a durable solution for all the refugees and that international assistance through resettlement was necessary. In the circumstances, it could-count on the immediate manifestation of Western European solidarity and the support of countries of traditional European immigration.

1971: Influx of refugees from East Pakistan into India

As a result of events occurring in 1971 in what was then Eastern Pakistan some ten million persons entered India within a few months seeking refuge.^[5] From the very beginning of the influx, the Indian Government insisted that the refugees could not stay as permanent residents in India. The Indian Government referred to them as "evacuees" in order to stress that they had sought temporary refuge in India and would be returned as soon as the conditions in their homeland would permit. They were housed in "Transit Relief Camps" and the Government directed that the accommodation should be of a short-term nature. An initial six months limitation on their stay became one of the major policy constraints in planning the assistance programmes.

At an ECOSOC meeting on 16 July 1971, the Indian representative stressed that plans for accelerated economic and social development in India had been severely jeopardized by the massive influx of refugees. He said that thirty percent of the taxes paid in his country were being channelled to meet needs arising from the influx. Relief efforts could, at best, be only a temporary matter. The real humanitarian solution lay in stopping the flow of refugees and in expediting their return to their homeland.

From the very inception of the influx, the only durable solution envisaged by the Indian Government and United Nations officials was voluntary repatriation at the earliest possible time. On 5 May 1971, the United Nations High Commissioner for Refugees said:

"We cannot afford to just set up huge feeding programmes and temporary housing which tends to be permanent. We have to find out quickly what the ultimate solutions will be, and no one has to be a prophet to see that the best solution would be to help the people to return to their homes, if and when the situation allows (this) to take place..."

In July 1971, when he saw the situation had taken on threatening proportions, the Secretary-General of the United Nations informed the President of the Security Council that he feared that the situation constituted a threat to international peace and security and that he believed that the United Nations should play a more forthright role to avoid further deterioration of the situation.

On 6 December 1971, the United Nations General Assembly passed a resolution which recognized that voluntary repatriation would be the only satisfactory solution to the refugee problem and urged all Member States to intensify their efforts to bring about

conditions necessary for the speedy and voluntary repatriation of the refugees to their homes.

Following eleven days of hostilities between India and Pakistan in the same month, which led to India's recognition of the independent State of Bangladesh the Security Council called for "international assistance in the relief of suffering and the rehabilitation of refugees and their return in safety and dignity to their homes".

The officially-assisted repatriation movement of ten million refugees began on 1 January 1972 and was completed two and a half months later.

In the Bangladesh case, the action of the Indian Government in making clear at the outset that the durable solution of settlement in India was out of the question and that the refuge granted could only be temporary served to place the international community on notice that a durable solution did not exist and one had to be found. The gravity of the situation and the urgency of finding a durable solution required that there should be no ambiguity about the condition of the admission: it had to be made clear that it was on a temporary basis only. In this case, India could not rely automatically on international assistance to provide quick durable solutions resettlement was out of the question and voluntary repatriation was not in the circumstances an easy solution. (In the event, it followed Indian military action.)

The temporary nature of the admission, explicitly asserted placed the international community under pressure to resolve the humanitarian and other problems created by the massive influx by assisting the obtaining of the conditions necessary for voluntary repatriation.

1975-1980: Indo-Chinese Refugees in South East Asia

More recent examples of temporary refuge are found in South East Asia.

During the period 1975-1980, nearly a million Indo-Chinese from Vietnam, Kampuchea and Laos sought refuge abroad. Their exodus, which reached its peak in 1979, created severe problems for most of the countries of first refuge. For various reasons, most of these countries were unwilling to provide a durable solution for even a limited number of these refugees; and they were deeply concerned that their admission on a temporary basis would leave most of the refugees on their hands with little effective international assistance in finding satisfactory durable solutions.^[6]

Among the factors which seem to have influenced the countries of refuge was a concern for national security and to avoid the difficulties and dangers that sheltering fleeing members of warring factions from neighbouring States could entail; a sensitivity over internal situations, such as that involving a delicate balance between ethnic communities; a reluctance to assume responsibility for refugees in such numbers as to affect the general economic and social development of the country; and a desire to remain uninvolved as far as possible in a situation which they felt to be the primary responsibility of other countries.

The admission into the countries of South East Asia of the vast majority of the Vietnamese "boat people" and other Indo-Chinese refugees and displaced persons has been on the explicit understanding that admission was on a temporary basis.

In the South East Asian context, temporary refuge has been an essential mechanism for facilitating admission. It has also been a link between the principle of non-refoulement and the principle of international solidarity and co-operation in burden-sharing.

At the Consultative Meeting on Refugees and Displaced Persons in South East Asia of December 1978, the Chairman, the Deputy High Commissioner, Mr. Dale de Haan observed in his summing up: "The consultations noted that there can be no humane or durable solutions unless Governments grant at least temporary asylum in accordance with internationally accepted humanitarian principles. The consultations also noted, as a corollary, that existing facilities in countries of first asylum in South East Asia were already overloaded and that for such countries temporary asylum depended on commitments for resettlement in third countries and the avoidance of residual problems in the area".

African practice

In the context of the refugee situation in Africa, temporary refuge was considered by the Arusha Conference of African States in May 1979. In the recommendation on Asylum in Africa, the Conference stressed "the particular importance of the concept of temporary asylum as provided for in Article II, paragraph 5, of the 1969 OAU Refugee Convention and of the need for this concept to be further strengthened and developed in Africa".^[7]

This particular recommendation was adopted in the context of other recommendations on Asylum in Africa which inter alia, "stresse(d) the importance of a scrupulous observance of the principle of non-refoulement" "stresse(d) the importance of voluntary repatriation as a solution to refugee problems" and "recognize(d) that the effective implementation in Africa of the principles relating to asylum will be further advanced by the strengthening and development of institutional arrangements for 'burden-sharing'."

D. Temporary refuge in relation to admission

It is abundantly clear that the great majority of States are unwilling to undertake in a general context and without qualification to grant a durable solution to all who might request it and who are deemed by the international community to be persons requiring protection.

Their reluctance has been increased by the uncertainty about the classes of persons who are, or may be, entitled to international protection and by the difficulty of making individual determinations of eligibility in large-scale influx situations.

In international instruments on asylum, the qualifications on the undertaking to grant a durable solution have been stated in such terms as "national security" or "in order to safeguard the population, as in the case of a mass influx of persons" [8] Undertakings to grant "asylum" - in the sense of a durable-solution have been qualified by such phrases as "best endeavours". [9]

On the other hand, States have been prepared to accept that the principle of non-refoulement should be scrupulously observed. In the numerous resolutions of international bodies in which this principle has appeared recent years, this principle has been stated without any qualification. [10]

In the light of this attitude of States, it becomes essential to avoid the automatic equation of admission under the principle of non-refoulement with the provision of a durable solution.

If admission is to be related to the principle of non-refoulement it must be regarded as providing either a temporary or a durable solution.

This view is supported by the approaches taken in various international instruments on asylum and the protection of refugees.

Although the 1951 United Nations Convention relating to the Status of Refugees has no substantive provision on admission a provision dealing with refugees unlawfully in the country of refuge provides that the contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. [11]

In the 1969 OAU Convention governing Special Aspects of Refugee Problems in Africa, it is provided that the Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees, and where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangements for his resettlement. [12]

In the 1967 United Nations General Assembly Declaration on Territorial Asylum, it is provided that should a State decide in any case that exception to the-principle of non-refoulement as stated in that Declaration would be justified, it shall consider the possibility of granting to the person concerned an opportunity of going to another State. [13]

A similar provision is found in Resolution 14 (1967) on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe. [14]

In the Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee in Bangkok in 1966, it is provided that where a State decides to take measures contrary to the principle of non-refoulement as stated in that article, it should enable the person thus endangered to seek asylum in another country. [15]

In the context of admission, it may be concluded from these instruments that in any universal system of protection based on the unqualified principle of non - refoulement applicable to large-scale influx situations, admission on a temporary basis facilitates the implementations of the principle of non-refoulement.

In view of this, it can be concluded further that in any general formulation of international protection policy or in any universal instrument on territorial asylum, the two alternatives of the admitting State granting either a durable or a temporary solution should be stated explicitly.

To omit altogether in such formulation or instrument any reference to a temporary solution or to down-play or obscure that solution would be to undermine the principle of non-refoulement.

This criticism could be directed -Particularly to the Carnegie draft Convention on Territorial Asylum.[16] Article 2 of that draft Convention stated. the principle of non-refoulement without any qualification but made no provision for temporary refuge along the lines of other international instruments, such as the 1969 OAU Convention. As a consequence the 1975 United Nations Group of Experts rejected this draft article but adopted a draft article which made no provision for temporary refuge and required States only to use their best endeavours not to reject at the frontier. [17]

The value of an express provision for temporary refuge was recognized by the Executive Committee of the High Commissioner's Programme, which in its Conclusion No. 15 (XX) on International Protection of 1979 stated:

"In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge."

A central theme in the case for the elaboration of the concept of temporary refuge is that in any developed universal system of international protection applicable to large-scale influx situations there must be flexibility in regard to the determination of durable solutions, and admission by itself must not prejudice the answer to the question of what would be the satisfactory durable solution in any given situation. The circumstances surrounding such situations can vary enormously, and the determination of the appropriate durable solution must depend upon the circumstances of each situation.

There is no one durable solution which can be said to be the most satisfactory solution in every situation. If there can be said to be an ideal solution, it is voluntary repatriation; but in some situations, it may be an unrealistic possibility.

The experience of the last fifty years has shown that in some situations durable residence in the country of first admission has been the best or only available solution; that in other situations resettlement in a third country has been the best or the necessary durable solution; and that in some cases relatively early voluntary repatriation has been possible.

At the present time, the order of the durable solutions mentioned in General Assembly resolutions on the report of the High Commissioner is "voluntary" repatriation, integration in countries of asylum or resettlement in third countries. [18]

Prior to 1966 and the emergence of refugee situations in Africa, notably in Angola, Algeria, Morocco and Tunisia, the traditional order of durable solutions included in the General Assembly resolutions on the report of the High Commissioner was "voluntary repatriation, resettlement and integration". [19] A resolution of the General Assembly in 1952 even referred the "voluntary repatriation or the resettlement in countries of immigration". [20]

Resolutions of the General Assembly in regard to particular situations contain formulations appropriate to the particular situations. For example in regard to refugees from what was then East Pakistan, the General Assembly in 1971 adopted a resolution "recognizing that voluntary repatriation is the only satisfactory solution to the refugee problem and that it is fully accepted by all concerned". [21] In relation to a situation which included events occurring in South East Asia, the General Assembly adopted a formulation in 1978 urging Governments to continue to co-operate closely with the High Commissioner "in efforts to achieve the self-sufficiency and, where possible, the integration of refugees in countries of asylum and to accept for resettlement, on the widest possible basis, refugees from countries of "first asylum". [22] In regard to assistance to refugees in Southern Africa the General Assembly adopted a resolution in 1977 which urged Government to provide the High Commissioner with the necessary facilities to assist the refugees by providing opportunities for local settlement.[23]

In the resolution establishing the High Commissioners Office of Refugees, the General Assembly in 1949 stated that the final solution to the problem of refugees can only be provided by the voluntary repatriation of the refugees or their assimilation within new national communities" and referred to the responsibility of the High Commissioner "to promote stimulate and facilitate the execution of the most suitable solution to the problem"[24] Similar phrases appear in the Statute of the Office of the High Commissioner.[25]

In a resolution expressing appreciation to the Government of Austria for the part it had played in receiving and assisting the refugees who had entered its territory, the United Nations General Assembly in 1957 requested the High Commission "to continue the efforts to effect solutions". [26] In 1958 the General Assembly referred to " solutions for non-settled refugees, and in particular for those living in camps".[27]

In the light of these variations in emphasis, it may be asked whether it is satisfactory in a universal instrument on territorial asylum applicable to large-scale influx situations to place the primary emphasis in the instrument on the obligation of the State initially approached to grant the durable solution.

This approach was adopted in the Carnegie draft Convention and was followed by the 1975 United Nations Group of Experts. Article I of the Carnegie draft Convention contains the obligation in relation to the grant of asylum - "asylum" in this context being understood as a durable solution.[28]

While such emphasis could be justified in relation to provisions applicable to individual asylum-seekers, it is debatable whether it is the correct emphasis in relation to situations of large-scale influx. In regard to such situations, it is arguable that the emphasis should be placed primarily on admission since the primary need is to secure admission and it may not be helpful or appropriate in such situations to emphasize a priori a particular durable solution especially where the large-scale influx was across the frontiers of cultures or racial, ethnic or religious groups. To place the primary emphasis on a particular durable solution may not only appear to prejudice the question of what the most satisfactory solution in any given situation should be but also may serve to make the issue of admission, more critical where, as a consequence of such emphasis, the admitting State is seen to be deprived: of the international support necessary to obtain another and more satisfactory durable solution. Furthermore, such an emphasis is inconsistent with the view that has always received a wide measure of agreement that in principle voluntary repatriation should be seen as the best durable solution, particularly in situations of large-scale influx.

E. Temporary refuge and the general principle of non-refoulement

Concern has been expressed that the concept of temporary refuge Could weaken the principle of non-refoulement.

As stated in this paper, however, temporary refuge is a means to facilitate the scrupulous observance of the principle of non-refoulement. It has been argued that it is an indispensable mechanism for securing the protection of persons requiring protection. It has also been argued that it is to undermine the principle of non-refoulement to down-play or obscure the solution of temporary refuge in any universal regime for the protection of refugees applicable to large-scale influx situations.

Since the principle of non-refoulement is applicable to expulsion or return ("refoulement") as well as to rejection at the frontier, temporary refuge should be seen as providing a form of protection characterized by the general principle. This interpretation is consistent with the treaty situation. [29]

Temporary refuge, therefore, should not be seen as an exception to the principle of non-refoulement in regard to expulsion or return. Where that principle is concerned, temporary refuge is durable. The temporary aspect is in regard only to the solution provided and not to the basic protection against refoulement.

The relevance of the principle of non-refoulement to temporary refuge was stressed in the first preambular paragraph of Conclusion No. 19(XXXI) on Temporary Refuge adopted by the Executive Committee.

F. Definition of temporary refuge

From the foregoing, temporary refuge can be defined as that protection characterized by the principle of non-refoulement which is accorded a person and which is temporary pending the obtaining of a durable solution.^[30]

In the various international instruments on asylum and the status of refugees the protection accorded by admission on a temporary basis has been seen exclusively in relation to the opportunity accorded to obtain admission into another country. ^[31]

This perception is inadequate in so far as it overlooks the other durable solutions of voluntary repatriation and settlement in the country of refuge.

As has been seen, in the case of the refugees from East Pakistan in 1971 temporary refuge was accorded pending the early voluntary repatriation of the refugees.

There may also be cases where persons admitted on a temporary basis may not subsequently return to their country of origin or resettle elsewhere but may settle in the country of refuge.

G. Temporary refuge in relation to the concept of asylum and the problem of terminology

The question of the legal nature of temporary refuge and its relationship to other legal principles has been complicated by the uncertainty over the meaning of the term "asylum" and by the different and conflicting meanings which have been attached to this term.

Traditionally the term "asylum" has been understood in a broad and general sense to mean the protection accorded a person seeking protection. In its well-known, definition of 1950 the Institute de Droit International stated:

"...le terme 'asile' designe la protection qu'un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes a un individu qui est venu de la rechercher."^[32]

In the broad and general sense, protection granted to a refugee in accordance with the principle of non-refoulement can be considered as asylum.

More recently, however, the term "asylum" has also been used in a more narrow and particular sense.

For example, in the 1972 Carnegie draft Convention on Territorial Asylum, which has had an important influence on the subsequent draft Conventions and international documents, there was an unqualified obligation not to reject at the frontier but only an obligation to use best endeavours to grant asylum. In this instrument, therefore, the protection granted to a person in accordance with the principle of non-refoulement is not necessarily the same as the protection accorded a person by the grant of "asylum" within the meaning of the term in the draft Convention. While both forms of protection may be characterized by the principle of non-refoulement, their substantive rights and duties may be different.

Although "asylum" in this more narrow and particular sense has never been defined, it can only be inferred from the context in which the term has appeared that it is a form of protection related or appropriate to a durable solution,

This interpretation would be consistent with the use of the terms "asylum" and "temporary refuge" in Conclusion 15 (XXX) on "Refugees without an Asylum Country" adopted in 1979 by the Executive Committee. In that Conclusion, the Executive Committee stated that "States should always use their best endeavours to grant asylum" and "asylum-seekers should always receive at least temporary refuge".

It may be asked whether the two different meanings which have been attached to the term "asylum" and the resulting possibility of confusion have not been the cause of serious misunderstanding over the obligations of States in relation to asylum-seekers, with adverse effects on national attitudes to international instruments on asylum and the status of refugees.

A recent example of the possibility of confusion is found in the resolution on the report of the High Commissioner adopted last year by the United Nations General Assembly. The resolution contained inter alia the following words:

"Urges Governments to intensify, their support for activities which the High Commissioner is carrying out in accordance with relevant resolutions of the General Assembly and the Economic and Social Council; especially by:

(A) facilitating his efforts in the field of international protection by observing the principle of asylum and non-refoulement relating to refugees..." ^[33]

In this resolution, what is meant by "observing the principle of asylum and non-refoulement"? Is it that no refugee should be rejected at the frontier or expelled or returned ("refoulement")? Or is it that every refugee should receive a durable solution from the admitting State? It is important to know what is meant by these words. A misunderstanding about the meaning intended could-affect significantly a State's attitude to the resolution. ^[34]

One of the useful results of a study of the concept of temporary refuge could be a helpful modern definition of the term "asylum". [35]

As has already been noted, protection provided by admission on a temporary basis has sometimes been called by different phrases, such as "temporary asylum", "provisional asylum", "first asylum" or "temporary residence".

None of these phrases is satisfactory.

Firstly, the use of the term "asylum" raises the question of the meaning intended - protection generally, whether temporary or durable, or protection accorded by a durable solution."

In regard to the more narrow and particular sense of the term "asylum", the qualification of "temporary" would be contradictory. does not make sense to talk of a temporary durable solution.

The qualification of "provisional" is doubly unsatisfactory, in that the term 'provisional' can mean not only "temporary" but "conditional" If it is desired to make clear that the principle of non-refoulement is an absolute obligation, any qualifications implying a conditional character to this principle should be avoided.

The qualification of "first" is also unsuitable. In addition to the ambiguity of the term "asylum" in this context, it implies that there will be a second country of asylum. Persons granted temporary refuge may either return voluntarily to their country of origin or may be granted a durable solution in their first country of refuge The use of the phrase "first asylum" in an anticipatory sense prejudices the answer to the question of what the durable solution should be. Also, there may be a second country of "asylum" which does not provide a durable solution e.g. in the case of a country providing a regional processing centre for refugees Such a country could be regarded as another country of temporary refuge. [36]

The phrase "temporary residence" is also unsatisfactory, as the term "residence" does not imply protection and is a term more appropriate to immigration law generally. Also "residence" may not be the correct term to apply to a refugee granted temporary refuge.

The advantage of the phrase "temporary refuge" is that the term "refuge" avoids the potential confusion arising from the double meaning of the term "asylum" and contains within itself the notion of protection. It also indicates that the rights in the country of refuge of a person granted temporary refuge may not be the same in all respects as the rights of a person granted the durable solution of lawful residence. [37]

The term "refuge" is found in the 1951 United Nations Convention relating to the Status of Refugees in a provision dealing with refugees who enter or remain unlawfully in a State (Article 31).

The phrase "temporary refuge" has been used increasingly in international deliberations and it has appeared in a number of recent conclusions of the Executive Committee of the High Commissioner's Programme. [38]

In view of the number of different phrases which have been used and of the desirability of avoiding ambiguous or inadequate phrases which may give rise to serious confusion, the Group of Experts may consider it timely to consider recommending the use of the phrase "temporary refuge" instead of the other phrases that have" occasionally been used.

H. The Status of Refugees Accorded Temporary Refuge

Existing international instruments on the status of refugees and asylum provide for admission on a temporary basis, but, from the point of view of the status and protection of persons granted temporary refuge, they do not deal with this aspect very satisfactorily.

The number of refugees Who have been accorded admission on a temporary basis in the last ten years amounts to many millions, and many of them have been in the, country of temporary refuge for Many months. Few of them have been granted the normal rights and status of alien visitors or residents. At the least, a large-scale influx poses major problems of accommodation, food and health; it can create problems endangering public order, national security and international peace and security. Refugees who enter a country of refuge in a large-scale influx without prior authorization are normally considered as a special category. They are generally treated differently from those refugees who enter as part of a planned or controlled refugee programme. The legal situation applying to a durable solution, therefore, is often significantly different from that applying to a temporary solution or to a solution as yet undetermined.

The 1951 United Nations Convention relating to the Status of Refugees is not well suited to deal with large-scale influx situations. The thrust of the Convention is mainly in the direction of establishing legal conditions applying to the durable solution. There are many problems of a protection nature which can arise in a large-scale influx situation which are not dealt with in the Convention. Also, the provisions of the Convention are related mainly to the question of status of the refugee in the internal law of a State and not to the form of solution provided by the admission or continued presence.

In the Convention, temporary refuge is dealt with explicitly connexion with refugees unlawfully in the country of refuge.

Article 31 stated that:

(A) The Contracting Status shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a country where their life or liberty was threatened, in the sense of Article I of the Convention, enter or are present in

their territory without authorization, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence;

(B) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country; and

(C) The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The possibility of the "regularization" of the internal status of such refugees is mentioned in this Article as implying an end to the phase of temporary refuge, but the meaning of this term and the implications of "regularization" for the status of the refugee have to be inferred from a reading of the other provisions of the Convention.

The process of inference is not an easy one.

In the Convention, three main kinds of provisions are found:

(A) those relating to "refugees lawfully staying in the territory"; [39]

(B) those relating to "refugees lawfully in the territory", [40] and

(C) those referring simply to refugees. [41]

The provisions of the (a) kind are clearly intended to apply to durable solution. This can be inferred from the subjects of these provisions (e.g. rights relating to employment and the practice of liberal professions, social welfare and travel documents).

The situation concerning the (b) kind is not so clear.

Under one interpretation, a "person lawfully in the territory" includes a person admitted temporarily as well as a person granted permanent residence. [42] If this is the correct interpretation, the provision in Article 32 of the Convention that a refugee lawfully in the territory shall not be expelled save on ground of national security or public order does not relate well to the situation of temporary refuge, since the self-evident purpose of this Article is to secure a durable solution on the basis of lawful presence.

If this is not the correct interpretation, what meaning should be attached to the phrase "lawfully in the territory"? Is it possible to be "lawfully in the territory" in a domestic legal sense without being "lawfully in the territory" within the meaning of Article 32 of the Convention? If it is not, must temporary refuge necessarily involve treating refugees granted temporary refuge as unlawfully in the country; or is there a possibility of an intermediate status between "unlawfully" and "lawfully"? [43]

Similar questions might also be raised in connection with Article 26 ("freedom of movement").

The provision of the (c) kind would seem to apply to the temporary as well as the durable solution. Of particular note in this regard is Article 33 which prohibits expulsion or return ("refoulement"). Some of these provisions, however, may not be without problems in the context of temporary refuge. [44]

It is unfortunate that so far little attention has been given by jurists to the question of the application of the Convention to large-scale influx situations. For States who are parties to the Convention and who wish to apply its provisions in good faith, there are important questions about its implementation in large-scale influx situations which have to be considered carefully. The answers to these questions may be especially relevant to States who are not parties to the Convention and who may be concerned particularly about the effect that ratification of the Convention could have, on their freedom to take reasonable and necessary action in relation to legitimate national concerns. A clearer understanding of the application of the Convention to large-scale influx situations may help to remove some of the obstacles to the wider ratification of the Convention.[45]

A guidance Note by the High Commissioner on the protection of refugees in large-scale influx situations could be very helpful. [46]

In this regard, it may not be sufficient to stress the fundamental importance of the provisions of the basic universal instruments, as does paragraph 4 of Conclusion 19 (XXXI) on Temporary Refuge of the Executive Committee of the High Commissioner's Programme, when it is not clear what these provisions mean in relation to large-scale influx situations and to temporary refuge in particular. As well as appreciating "the constant advice by UNHCR on the practical application of these provisions" States may also welcome a general exposition of these provisions in relation to large-scale influx situations. Such an exposition could help States prepare more satisfactorily than might otherwise be possible for an eventual large-scale influx situation.

The issues that can arise in such situations are too important for the, asylum-seekers and the States involved to justify the view that they are too sensitive to be examined by the international community. Such an attitude would seriously undermine the status of the international instruments concerned.

In the Declaration on Territorial Asylum adopted in 1967 by the United Nations General Assembly, it is stated that the opportunity granted to a person of going to another State, under Article 3(3), may be given under such conditions as the State concerned may deem appropriate.[47]

The phrase "under such conditions as the State may deem appropriate" is a very broad one indeed, and from a humanitarian point of view it is arguable that this phrase should be examined in relation to the basic minimum standards applicable to the treatment of

refugees and in relation to the 1951 United Nations Convention relating to the Status of Refugees and other international instruments.

It would not be adequate to state that persons in a temporary refuge situation should be regarded as being in a twilight zone between law and fact and as not enjoying any status as a refugee. Apart from the fact that such a position would be difficult to defend in relation to the 1951 United Nations Convention - to mention only one international instrument this view would condemn persons who might be in a country of refuge months or even years to a legal situation where they were without any legal protection. From a humanitarian point of view, the absence of any statement for the protection of such persons would be a seriously unsatisfactory situation.

It is essential, therefore, to have an adequate and authoritative statement of basic, minimum standards which are applicable to refugees admitted on a temporary basis.

These standards should be considered as applying irrespective of whether or not a State is party to any existing treaty on asylum or the protection of refugees. They should apply whether the country is one of first refuge or second refuge, e.g. in the case of a country providing an interim facility such as a regional processing centre. Basically, these standards would be fundamental human rights derived from the international instruments on human rights, including the 1966 International Covenant on Civil and Political Rights, Article 2 of which states that the rights recognized in the Covenant apply to all individuals within the territory of the State party, without distinction of any kind.

They would also reflect the pertinent provisions of the 1951 United Nations Convention relating to the Status of Refugees and of other relevant international instruments.

These standards should be minimum standards only and their statement should be without prejudice to any other rights such persons enjoyed under international law or the law of the country of refuge and should not prevent a State from granting all other rights which were possible and were conducive to the well-being of the refugees. [\[48\]](#)

A fundamental principle applying to persons granted temporary refuge is that they shall not be expelled or returned in any manner whatsoever to the frontiers or territories where their lives or liberty would be threatened.

The basic minimum standards should also include the following:

- (A) they should not be penalized solely on account of their illegal entry or presence;
- (B) they should be treated as persons whose tragic plight required special understanding and sympathy; they should receive all necessary assistance; and they should not be subject to cruel inhuman or degrading treatment;
- (C) there should be no discrimination on the grounds of race, religion, political opinion, nationality or country of origin;
- (D) they were persons before the law enjoying free access to courts of law for the protection of their rights;
- (E) they should be subjected only to such restrictions on movement as were necessary;
- (F) a primary consideration in their location in the country of refuge must be their safety and well-being;
- (G) they should be provided with basic sanitary and health facilities;
- (H) family unity should be respected;
- (I) all possible assistance should be given for the tracing of relatives;
- (J) women and children should receive special protection and assistance;
- (K) in the case of minor unaccompanied children the investigation whether a child has a family or other close relations should be conducted with all due haste. Where no close relative was found the child should, if possible, be placed in his own cultural and linguistic group. The best interests of the child should always be the paramount consideration;
- (L) they should be free to practise their religion and to provide religious education to their children;
- (M) the sending and receiving of mail should be allowed;
- (N) at least limited amounts of material assistance from friends or relatives should be permitted;
- (O) appropriate arrangements should be made, where possible, for the registration of births, deaths and marriages;
- (P) they should be granted all the necessary facilities to enable them to obtain a satisfactory durable solution; and
- (Q) they should be permitted to transfer assets which they have brought into the territory to the country where the durable solution was obtained.

For the effective protection of refugees admitted on a temporary basis, it should also be stated that a country granting temporary admission should consult with the Office of the High Commissioner as soon as possible in order that the High Commissioner can ensure that the persons involved are fully protected, given emergency assistance and that durable solutions are sought promptly.

Access should be granted in regard to all persons of concern to the High Commissioner, and his Office should be allowed to supervise the well-being of persons entering reception or other refugee centres.

For the countries of temporary refuge, particularly the developing countries the advantage of a statement of basic standards in regard to physical or material conditions would be that such a statement would help in the determination of the amount and kind of international assistance necessary to ensure that refugees were not left to live in the country of refuge as destitute persons. Most countries faced with a massive influx could be unable to cope alone with the burden, and a country affected would be entitled to invoke the fact that a refugee is a person of concern to the international community to obtain the necessary international assistants.

In determining the forms of assistance necessary the donor States should take into account the plight of the inhabitants of the country of refuge, who, as a consequence of the large-scale influx, may have been displaced or otherwise subjected to material hardship.

The development of the concept of temporary refuge in relation to the question of status in the country of refuge may help States avoid the situation where in cases of the large-scale and unauthorized influx of refugees they feel it necessary to designate such persons "illegal immigrants". Such designations usually: reflect the concern of States to place such persons for legal reasons in a special category distinct from that of aliens whose entry or presence has been "authorized" or "regularized".

I. Temporary Refuge in Relation to Durable Solutions

Concern has been expressed that a closer examination of temporary refuge may place refugees in a more precarious situation by generating a practice by governments generally of granting temporary refuge rather than asylum to refugees.

The concern is understandable; and it underlines the importance of considering temporary refuge in relation to the need to obtain durable solutions.

It would be wrong, however, to see temporary refuge in an entirely negative light; it has positive aspects as well, particularly in relation to admission and the obtaining of the most satisfactory durable solutions. Without admission, there can be no durable solutions; and more important than a solution which is durable in a legal sense is a satisfactory durable solution.

It has been argued *supra* that in general international system for the protection of refugees which applies to large-scale influx situations the primary objective should not be the securing of a durable solution by admission but the obtaining of a satisfactory durable solution as soon as possible. In view of the variety and complexity of the circumstances which can surround large-scale influx situations, there should be no general a priori assumption about the best solution in every situation.

The considerations that apply in cases of large-scale influx are significantly different from those that apply in cases of individual asylum-seekers. The problems created by a large-scale influx are of a special character, often calling for extraordinary solutions on the international plane. In the latter cases, a durable solution in the admitting State can usually be accorded without difficulty; and it would be reasonable to consider that in such cases temporary refuge should only be accorded in exceptional circumstances. In the latter cases however, the number of persons involved can sometimes make a durable solution in the admitting State more difficult to provide.

In regard to large-scale influx situations, therefore, it would be wrong to assume as a general rule that the best solution is for the admitting State to grant a durable solution. It would be to make an assumption which cannot be justified in the light of experience and which would lead in practice to seriously harmful results.

The only general principle that can be safely adopted in regard to large-scale influx situations is that the most satisfactory durable solution should be found as soon as possible.

Solutions which are durable in a legal sense should not be equated automatically with satisfactory solutions. Refugees can find themselves in situations which are durable in a legal sense but which are scarcely endurable in a human sense. Bad durable solutions can create vast agglomerations of human misery condemned to a future without hope and almost entirely dependent on international charity for survival at barely subsistence level. They can also endanger international peace and security as well as national security and public order. [\[49\]](#)

As has already been argued, the essentially temporary nature of a solution can often be inferred from the situation itself in the country of refuge. The circumstances of that situation may make the provision of a satisfactory durable solution very difficult. The sudden influx of hundreds of thousands of people can make heavy demands on resources which are inadequate. Employment, land and business opportunities may not be available. Even food, accommodation and basic health and social services may be inadequate. There may be little prospect in the foreseeable future of economic or social self-sufficiency it cannot be said that a durable solution exists. Despite a sympathetic and generous reception of the refugees by the country of refuge, the large number involved may create for that country internal and international problems which would make early voluntary repatriation or some other solution imperative for the well-being of the refugees and for the peace and security of the States concerned.

In certain large-scale influx situations, voluntary repatriation may be the only possible solution. For humanitarian and political reasons, it may become of the utmost importance that the situation existing at the time of the large-scale influx in the country of origin should change to such an extent that voluntary return will be possible.

In the case where no satisfactory durable solution in the admitting State can be foreseen for all of the refugees, the qualification of the grant of protection as temporary can be considered a responsible and constructive act by the admitting State. It places the international community on notice that the mere presence of the refugees in the country of refuge should not be construed by itself as a satisfactory durable solution.

Viewed in this light, temporary refuge, rather than making the situation of refugees more precarious, helps their situation by emphasizing the importance of the durable solution being a satisfactory one.

It is in the case where the most satisfactory durable solution would be settlement in the country of refuge that the obligation of the admitting State to use its best endeavours to grant a durable solution assumes its relevance and importance.

What is the most satisfactory solution should be determined not by regard to an ideal but unrealistic situation but by regard to what is possible.

For examples at the time of admission the most satisfactory durable solution. in any objective judgement could be voluntary repatriation or resettlement elsewhere for the large majority of the refugees. Both possibilities could be seen as real possibilities in the near future. Subsequent events however, could reveal that both these solutions were unobtainable for some or all of the refugees. In this changed situation, it could be determined that the best durable solution was local settlement. Against the difficulties of local settlement should be weighed the suffering and hardship of living in uncertainty about the future and in conditions which were confining and demoralizing.

Initially, therefore, temporary refuge should be seen as a provisional solution only. The possibility of local settlement for some of, the refugees at least should not be arbitrarily excluded at the outset.

The view has been expressed that if a country of resettlement cannot be found within a reasonable period of time, the country of refuge should be willing to "regularize" the status of the refugees and grant them all the rights of normal lawful residence.

The difficulty with such an unqualified view is that it could undermine the equally important consideration that other States must be prepared to take whatever measures are necessary to obtain satisfactory durable solutions. It would be unwise to upset a delicate balance between these two considerations by establishing ultimate responsibility in this way on the country of first refuge. To say this is not to dismiss the humanitarian problems of a situation where refugees may face a long and indefinite period in refugee holding centres. It is to place on the international community generally the onus of providing as soon as possible solutions to such humanitarian problems.

In view of the importance of providing a durable solution as soon as possible the admitting State should accept its own responsibility to find durable solutions for the refugees, and in accordance with the principle of equitable burden-sharing or other relevant principles it should be prepared to play its part in the settlement of the refugees.

It is possible that some admitting States will seek to avoid their obligation to find a satisfactory durable solution, by confining arbitrarily their responsibility to temporary refuge.

In regard to this problem, it should be asserted that the obligation to find a satisfactory durable solution applies to the admitting State as, well as to other States. This principle militates against premature decisions which are unreasonable and unconscionable.

The initial grant of temporary refuge can provide a valuable "breathing space for the admitting State, particularly where at the early stages the dimension, of the final total influx was difficult to determine and the admitting State felt. constrained in the circumstances to reserve its position on the question of appropriate solutions. The final dimension of the total influx could be such that the State felt able to provide a satisfactory durable solution within its own territory.

The institution of temporary refuge may also be relevant and helpful to natural disaster situations where as a result of famine or drought or some other form of natural disaster, large numbers of persons are compelled to seek refuge in neighbouring States. Normally such disasters are no, so extensive as man-made disasters and temporary refuge is all that the victims require. Since the victims of these disasters may have in common with de jure refugees that they are outside the normal system of national protection for reasons which are not connected with personal convenience but concern their very survival, they may also be said to be persons requiring international protection.

J. Temporary Refuge and International Solidarity

In large-scale influx situations, the grant of temporary refuge usually acts as a signal to the international community that international assistance is needed to find satisfactory durable solutions.

Since large-scale influx situations can create problems for the, country of refuge which that country alone cannot handle, international solidarity and co-operation are often essential.

While international assistance should never be made a pre-condition for compliance with basic humanitarian obligations such as that of non-refoulement, international assistance can be indispensable for the satisfactory handling of large-scale influx situations.

If the principle of non-refoulement is a fundamental principle, so is the principle of international solidarity. No universal system of protection applicable to large-scale influx situations will be workable satisfactorily unless both principles are made twin pillars of the system.

In that system, temporary refuge is an essential link between the principle of non-refoulement and the principle of international solidarity.

International solidarity in obtaining durable solutions should be seen as applying to all forms of solutions. It may be manifested by assistance in whatever way is appropriate in enabling voluntary repatriation to take place, in sharing the burden of resettlement or in providing assistance to enable a durable solution to be found in the country of refuge.

In view of the gravity of problems that can arise in large-scale influx situations, international solidarity in obtaining durable solutions should be manifested wherever necessary in prompt and effective measures.

One of the most important questions facing the international community in regard to the problems of large-scale influx may be that of the adequacy of existing international machinery to deal with these problems, particularly in regard to the question of durable solutions. Action in relation to durable solutions may be required at the outset of an influx; and that action may have to be taken at a political level as well as at a level of purely humanitarian and non-political concern. The matter of origins or causes may be directly relevant to the question of durable solutions, and the answer to the question of the satisfactory humanitarian and political response to a mass flow situation may depend upon the nature of the situation as a whole. The subject of international machinery to provide an early and effective response is one that is assuming greater importance and urgency at the present time and is already before the international community for consideration.

The practice of temporary refuge underlines the complexity and urgency of problems which can arise in mass movement situations and the need for effective and prompt international action,

International solidarity can be manifested at every level universal, regional and bilateral. Increasingly, universal solidarity is being seen as essential in many cases of large-scale influx. Some of the problems which can arise in such cases are only susceptible to effective treatment at the universal level. Perhaps one of the most significant trends in recent years has been the increasing universalization of refugee problems, marked especially by the international conferences which have been convened to consider refugee situations in different parts of the world.

At the same time, regional solidarity continues to be of great importance particularly where the provision of satisfactory durable solutions is concerned. [50]

The importance of international solidarity would seem to require a statement of that principle which was forthright and strong. The principle should be stated in regard not only to burden-sharing (in the sense of resettlement) but to durable solutions generally.

In regard to situations of large-scale influx the prime concern should be not that a State might find difficulty in granting or continuing to grant asylum but that a satisfactory durable solution should be found as soon as possible. International solidarity should be expressed in relation not to one durable solution but to durable solutions generally.

In this view, it would be a valid criticism of the 1967 United Nations General Assembly Declaration on Territorial Asylum that its provision on international solidarity is in relation only to the situation where a State finds difficulty in granting or continuing to grant asylum. [51] No express provision is made in the Declaration for international solidarity in a wider context which included common action in favour of voluntary repatriation.

It should be considered whether provisions should not be included in future international instruments on the obligation of countries of origin to facilitate the voluntary return of refugees and to respect the rights of their returning nationals. [52] Consideration could also be given to the development of international machinery for facilitating voluntary repatriation under satisfactory conditions and arrangements.

The Declaration expresses the obligation in regard to international solidarity as that of considering appropriate measures to lighten the burden. [53]

In an international instrument containing the principle of non-refoulement, however, what is required is a strong and forthright statement of the obligation of States 'to take measures' and not just "to consider measures". These measures must be in regard to durable solutions as well as to emergency assistance.

In relation to a universal system for protection of refugees, it can be said that to weaken the principle of international solidarity is to weaken the principle of non-refoulement.

K. Concluding Observations

The Australian proposal to examine the concept and practice of temporary refuge in the context of problems raised by large-scale influx involves essentially a plea for flexibility in the formal system of international protection for refugees and for the development of international co-operation and organization in the humane and effective handling of refugee situations.

In the submission of this paper, the understanding of the proper function of temporary refuge leads to certain conclusions about the basic principles in an international protection system applicable to large-scale influx situations. These basic conclusions are that:

□ if protection is to be extended to all who request and require protection, admission by itself must be seen to be without prejudice to the question of whether a durable or temporary solution should be provided by the admitting State;

□ in regard to the durable solution, the basic principle is that a satisfactory durable solution should be obtained as soon as possible; and

□ wherever necessary, in accordance with the principle of international solidarity States should take prompt and effective measures to obtain satisfactory durable solutions.

It has also been argued that there is a need to elaborate the legal concept of temporary refuge in relation to the status of persons granted temporary refuge. Such an elaboration may be a valuable contribution to the development of international measures for the protection of persons requiring protection.

[1] It will be recalled that last year the General Assembly of the United Nations invited States to offer comments and suggestions on how these problems could be handled. Resolution 35/41.

[2] Article I of the United Nations General Assembly Declaration on Territorial Asylum: "Asylum granted by a State, in the exercise of its sovereignty..."

[3] See p. 11.

[4] Keesing's Contemporary Archives (1956) p. 15227.

[5] The following account is taken from Louise W. Holborn "Refugees: A Problem of Our Time" Vol. I, pp. 758-780.

[6] That this attitude was not due simply to a lack of humanity can be judged from the fact that at this time Malaysia had provided asylum for 200,000 Moslems from the Southern Philippines.

[7] Report of the Conference on the Situation of Refugees in Africa. United Nations document A/AC.96/Inf.158, p. 8.

[8] Article 3 of the United Nations General Assembly Declaration on Territorial Asylum; Article III of the Principles concerning Treatment of Refugees adopted in 1966 by the Asian-African Legal Consultative Committee; Paragraph 3 of Resolution 14 (1967) on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of The Council of Europe; and the article on non-refoulement adopted by the Committee of the Whole of the 1977 United Nations Diplomatic Conference on Territorial Asylum.

[9] Article I of the 1972 Carnegie draft Convention on Territorial Asylum; and Article I of the consolidated text of articles adopted by the 1975 United Nations Group of Experts. The article on asylum adopted by the Committee of the Whole of the 1977, United Nations Diplomatic Conference on Territorial Asylum spoke of "endeavour". Article II of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa spoke of "best endeavours to receive refugees and to secure the settlement of those refugees".

[10] See, for example, the recent resolutions of the United Nations General Assembly on the annual Reports of the United Nations High Commissioner for Refugees.

[11] Article 31. A provision on temporary admission also appears in the 1957 Hague Agreement relating to Refugee Seamen, Article 7.

[12] Article II(1) and (5).

[13] Article 3 (3).

[14] Paragraph 3

[15] Article III(4).

[16] This draft Convention was prepared by a Working Group convened by the Carnegie Endowment with the co-operation of the United Nations High Commissioner for Refugees.

[17] Article 3

[18] Resolutions 2294(XXII), 2399(XXIII), 2594(XXIX), 2650(XXV), 2789(XXVI), 2596(XXVII), 3271(XXIX), 3454(XXX) 31/35, 32/26 32/67, 34/60 and 35/41.

[19] Resolutions 832(IX), 925(X), 1039(XI), 116(XII), 1285(XIII), 1388(XIV), 1499(XV), 1673(XVI) and 1959 (XVIII).

[20] Resolution 638(VII).

[21] Resolution 2750(XXVI).

[22] Resolution 33/26.

[23] Resolution 32/70.

[24] Resolution 319(X).

- [25] Resolution 428(V).
- [26] Resolution 1039(XI).
- [27] Resolution 1248(XIII).
- [28] See p. 18.
- [29] Article 31 of the 1951 United Nations Convention relating to the Status of Refugees and article II(3) of the 1969 OAU Convention.
- [30] Temporary refuge, of course could be defined in a more extended legal sense to cover also the status generally of a person granted temporary refuge. This, aspect is examined infra.
- [31] See p. 11.
- [32] *Annuaire de l'Institut de Droit International* 1950, Vol. 43, Part II, P. 376
- [33] Resolution 35/41.
- [34] In the Report of the Arusha Conference, the following statement appears in the recommendation on Asylum in Africa: "Recognizes that while on the international level asylum is still a right of the State..."
- [35] It is an unfortunate situation where States are urged to grant "asylum" but nowhere is an authoritative and detailed definition of the term to be found. When States are asked to grant "asylum", what is it precisely that they are being asked to grant? What is, the relationship of "asylum" to the, protection accorded to a refugee under the 1951 United Nations Convention and other international instruments?
- [36] During their meeting in Bangkok on 21 February 1979, the ASEAN Foreign Ministers agreed that Refugee Processing Centres would be provided in South East Asia on the condition that refugees would be admitted on the basis of firm commitments from third countries that the refugees would leave the countries for their countries of resettlement within a reasonable time.
- [37] This aspect is examined on pp. 22-29.
- [38] See the High Commissioner's Background Note on Temporary Refuge, p. 1.
- [39] e.g. Articles 15, 17, 18, 19, 21, 23 and 28
- [40] e.g. Articles 26 and 32.
- [41] e.g. Articles 3, 4, 5, 7, 8, 9, 13, 14, 16, 20, 22, 27, 29, 30 and 33
- [42] Grahl Madsen "the Status of Refugees in International Law"; Vol. I, p. 349
- [43] For an affirmative answer see Grahl Madsen, *op. cit.*, pp. 362-363
- [44] e.g. Article 13 (Movable and Immovable Property).
- [45] The present number of ratifications of the Convention should not obscure the fact that in the region of Asia, where two thirds of humanity is found, few States have become Parties to the Convention. Some of the largest movements of refugees in modern history have taken place in Asia.
- [46] The Note could also define a "large-scale influx", a concept which has appeared in a number of international instruments on refugees.
- [47] Broadly similar provisions are found in Resolution 14 (1967) on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe, and in the 1966 Bangkok Principles adopted by the Asian-African Legal Consultative Committee (Article III(4)).
- [48] An elaboration of these standards has been made in the recent Report of the Working Group on Problems of Protection in Asia established in April last year by the Manila Round Table.
- [49] A very large part of the present soaring costs of assisting the growing millions of refugees is in relation to the support of vast agglomerations of refugees who are largely dependent on international assistance for physical survival.
- [50] Regional solidarity is expressly mentioned in Article II(4) of the OAU Convention and in paragraph 4 of Resolution 14 (1967) on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe.
- [51] Article 2(2). See also Article II(4) of the 1969 OAU Convention, paragraph 4 of Resolution 14 (1967) on Asylum to Persons in Danger of Persecution of the Council of Europe, Article 5 of the 1972 Carnegie draft Convention and Article 5 of the consolidated text of Articles of the 1975 United Nations Groups of Experts.
- [52] Provisions of this kind are found in the 1969 OAU Convention Article V.

[53] Article 2(2).

Disclaimer: © UNHCR