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## Expanding the International Definition of Refugee: A Multicultural View

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# Expanding the International Definition of Refugee: A Multicultural View

Isabelle R. Gunning

## **Abstract**

This Article urges the international use of an expanded definition of refugee because, as will be shown, the African definition is more reflective of the dominant circumstances currently causing individuals to flee. Moreover the African definition is more representative of the goals and of the multicultural character of an international society as envisioned by the United Nations Charter.

# EXPANDING THE INTERNATIONAL DEFINITION OF REFUGEE: A MULTICULTURAL VIEW

Isabelle R. Gunning\*

*Two unrelated women live in a Central American country in the throes of a civil war. One lives in the city and is an active member of a labor union involved in peaceful activities for democratic changes in her country. The other lives with her family in a rural area making her living on a farm. The government in question is determined to quell all civil disturbances and social disorder. It has a two-pronged plan of attack: (1) to imprison and torture all known troublemakers such as union activists, and (2) to roust and bomb, at random, rural villages where rebel soldiers conceivably might hide. As a result of the government's plan, both women have had friends and relatives, who like themselves are either activists or farmers, killed. Both fearfully gather up their families and few possessions and flee to the United States requesting that they be considered refugees and allowed to remain. The urban activist is fortunate. She has brought enough documentation of her political activities and evidence of political persecution in her home country that she is granted refugee status. The village dweller is told that no law covers her situation, and she and her children are returned to her village where they die in yet another government bombing.*

Both of these hypothetical women are representative of the plight of hundreds of thousands of forced migrants. While both would be commonly perceived as "refugees," there is a disparity in their treatment under prevailing international<sup>1</sup> law.

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1. Throughout this Article, the author uses the term "international" to denote that to which the vast majority of countries do (or should) subscribe. Conventions such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *opened for signature* Sept. 10, 1969, 1001 U.N.T.S. 45 [hereinafter African Con-

Although international law would recognize the city dweller as a refugee due to her "well-founded fear of being persecuted,"<sup>2</sup> it would not recognize the village dweller because her fear stems solely from war and civil strife. Thus, international law would allow the village dweller to fall through the cracks, subjecting both herself and her family to the possibility of death. On the other hand, if the two women lived on the African continent, where regional refugee law encompasses both victims of persecution and those of war and civil strife, it would catch the village dweller, thereby saving her life. The disparity in the treatment of these two women under international law reflects an important problem in the international legal arena on the question of who is legally defined as a "refugee"—that subset of the broad category of forced migrants who are legally entitled to receive governmental humanitarian aid. This Article addresses this problem and argues that the narrow international definition should expand to include both of these hypothetical women, much as African regional law would now do.

The most often invoked definition of refugee comes from two significant international conventions: the 1951 International Convention on the Status of Refugees (the "1951 Convention")<sup>3</sup> and the 1967 Protocol on the Status of Refugees (the "1967 Protocol").<sup>4</sup> The two define "refugee" as a person

[who] owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>5</sup>

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vention] are also international in that they are subscribed to by more than one country, but they will be described herein as "regional."

2. This type of fear is a requisite element in the definition of refugee under international law. See *infra* note 5 and accompanying text.

3. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

4. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

5. *Id.* art. I, para. 2, 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 3, 606 U.N.T.S. at 268 (adopting definition of refugee from article 1 of 1951 Convention); 1951 Convention, *supra* note 3, art. 1, para. A(2), 189 U.N.T.S. at 152. This Article will sometimes refer to "Convention" refugees or "mandate" refugees. These terms refer to persons who satisfy the requirements of the 1951 Convention or the 1967 Protocol.

This definition focuses on individual persecution and thus excludes people fleeing war and civil strife. So, for example, the hypothetical urban activist would be able to argue successfully that she is a victim of individual persecution on the basis of her political opinion. The hypothetical farmer who flees the threat of war conditions, however, could be returned to her dangerous homeland.

The Organization of African Unity's 1969 Convention on Refugee Problems in Africa (the "African Convention")<sup>6</sup> defines refugee to include a broader category of forced migrants. While it includes the definition of refugee found in the 1951 Convention and the 1967 Protocol, which focuses on individual persecution, the African Convention also includes:

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>7</sup>

This Article urges the international use of this expanded definition because, as will be shown, the African definition is more reflective of the dominant circumstances currently causing individuals to flee. Moreover, the African definition is more representative of the goals and of the multicultural character of an international society as envisioned by the United Nations Charter.

Part I of this Article examines the history of institutionalized international cooperation toward refugees that started after World War I, examining both the European and African responses. Part II demonstrates that the international definition of refugee should mirror the current dominant causes of forced migration—war and civil strife. This Part also illustrates that formal international acceptance of refugees fleeing war and civil strife logically follows the current recognition of such refugees on an ad hoc basis by the United Nations High Commissioner for Refugees (the "UNHCR").<sup>8</sup> In addition, this

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6. African Convention, *supra* note 1.

7. *Id.* art. I, para. 2, 1001 U.N.T.S. at 47.

8. The establishment of the United Nations High Commissioner for Refugees (the "UNHCR") was accepted in principle when the United Nations adopted the Resolution on Refugees and Stateless Persons, G.A. Res. 319, 4 U.N. GAOR at 36, U.N.

Part examines the shift in UNHCR expenditures to illustrate the shift in the predominance of "non-traditional" refugees fleeing war and civil strife and argues that this shift should be reflected in the form of an international convention. Part III illustrates the importance of the U.N. Charter and its goals. This Part demonstrates why adopting an international refugee definition along the lines of the African Convention would better serve these U.N. goals, thereby reflecting the multicultural perspective of a modern international society. In Part IV, this Article will explore the practical concerns involved in expanding the definition of a refugee. This Part argues that two major obstacles confronting states that admit refugees, the costs, both financial and social, and interference with foreign policy, can be overcome. This Article concludes that the international community should formally revise the definition of refugee, using the African Convention as a model, to include those groups who flee their homeland due to war and civil strife.

#### I. *THE HISTORY OF INTERNATIONAL COOPERATION TO ASSIST REFUGEES*

The predominant causes of forced migration are wars, famine, civil strife, and persecution.<sup>9</sup> Forced migrants—people who involuntarily leave their homelands—are generally distinguished from economic migrants—people who voluntarily leave their homelands in search of greater economic opportunities.<sup>10</sup> Although economic migrants might be consid-

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Doc. A/1251 (1949). The United Nations approved the Statute of the Office of the United Nations High Commissioner for Refugees (the "Statute of the UNHCR") by G.A. Res. 428 Annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950) [hereinafter Statute of the UNHCR]. Since the Statute of the UNHCR is an annex to a General Assembly resolution, it cannot bind states. Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT'L & COMP. L.Q. 415, 416 (1982). In addition, the United Nations General Assembly, during the same session in which it approved the Statute of the UNHCR, passed certain resolutions. See Draft Convention Relating to the Status of Refugees, G.A. Res. 429, 5 U.N. GAOR Supp. (No. 20) at 48, U.N. Doc. A/1775 (1950); Problems of Assistance to Refugees, G.A. Res. 430, 5 U.N. GAOR Supp. (No. 20) at 49, U.N. Doc. A/1775 (1950). See generally I L. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME 55-149 (1975) [hereinafter I L. HOLBORN] (detailing establishment and history of UNHCR).

9. See Frelick, *The Twilight of Refuge in the West*, in WORLD REFUGEE SURVEY: 1987 IN REVIEW 25 [hereinafter 1987 WORLD REFUGEE SURVEY].

10. There are arguments against making a distinction between economic and

ered courageous and ambitious, there is no belief that these individuals are entitled to receive any aid or support from other countries.<sup>11</sup> For individuals who are forced to leave their country of origin, their predicament is urgent (they may die or be tortured) and beyond their control. Economic migrants, however, lack that sense of urgency. If they remain at home, they might not be as well off, but they are not perceived to be in dire straits. Economic migrants may face poverty, but not death.

For forced migrants, the world community feels a moral concern and obligation. The challenge in creating international laws to embody this sense of moral obligation has been to balance the moral imperative to help those people in dire circumstances with each state's need to protect its own territorial sovereignty and national resources. The influx of refugees, especially in massive numbers, can have a negative impact on the receiving state's territorial sovereignty.<sup>12</sup> Social conflicts result from nationals and refugees competing for limited resources such as jobs, education, food, and social services. Similarly, political conflicts develop between the receive-

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non-economic migrants. One of the most forceful is based upon the concern that the exclusionary term "economic migrant" is employed to obscure other political distinctions being made between immigrants. See, e.g., Note, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 324-25 (1985). For example, in the United States, those migrants with the greatest chance of obtaining refugee status tend to be from communist countries. *Id.* at 315. People of color from Haiti or El Salvador tend to have a much lower chance of remaining legally in the United States. Some observers state that there is certainly persecution in Haiti and El Salvador, but that the U.S. government is loathe to recognize it both because these countries are allies of the United States and because the refugees are not white. See Zolberg, *The Roots of American Refugee Policy*, 55 SOCIAL RESEARCH 649, 658-65 (Winter 1988) (describing history of U.S. refugee policy after World War II and explaining role that foreign policy considerations played, revealing that "refugees" encouraged to defect from Eastern Europe were not politically persecuted or even dissatisfied but leaving because of poor living conditions).

11. In the United States, for example, economic migrants are admitted only to the extent that their skills are needed. If an economic migrant has a particular skill that benefits the U.S. economy, the migrant is welcomed into the country. See T. ALEINIKOFF & D. MARTINS, *IMMIGRATION: PROCESS AND POLICY* 156 (1985) (discussing labor certification requirements of immigrants and the existence of categories or jobs presumed to be chronically in shortage in the United States as listed in 20 C.F.R. § 656.10). In contrast, when economic migrants arrive with common skills that could compete with native born workers, the United States is unabashedly anxious to keep them out. *Id.* (citing Schedule B in 20 C.F.R. §§ 656.11, 656.23).

12. See Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L.J. 483, 495 (1985).

ing state and the exporting state, such as when the state exporting the migrants perceives the receiving state as aiding its political enemies or as casting aspersions on conditions within the exporting state. As a result of these conflicts, not all forced migrants are admitted.

#### A. *The European Response to Forced Migration*

The response of the international community after the First World War to the phenomenon of forced migration was to define a discrete subclass of forced migrants as "refugees" who, in turn, became the object of international attention and legal obligation. Those qualifying as refugees found themselves entitled to help in the form of coordinated efforts by both the host government and international institutions designed to work for their benefit.<sup>13</sup> Yet initially, while efforts were made to introduce and to coordinate relief programs, the manner in which migrants were classified as refugees often had a distinct ad hoc nature. For instance, whatever large group of people appeared most to require aid became the definition of

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13. Some concerns of refugees, such as freedom of movement, are articulated in human rights documents that are not specifically concerned with refugees. *See, e.g.*, Universal Declaration on Human Rights, art. 13, G.A. Res. 217A, U.N. Doc. A/810, at 71, 74 (1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 12, 999 U.N.T.S. 171, 176. In addition, many major human rights documents prohibit the use of torture. *See, e.g.*, Universal Declaration on Human Rights, art. 5, *supra*, at 73; International Covenant on Civil and Political Rights, art. 7, *supra*, at 175; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 12(1), 993 U.N.T.S. 3, 8; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224; American Convention on Human Rights, Nov. 22, 1969, art. 5(2), OEA/ser. K/XVI/1.1, doc. 65, rev. 1, corr. 2 (1970), *reprinted in* 9 I.L.M. 673, 676 (1970).

Concerns for the rights of individuals as citizens during wartime have been largely addressed in humanitarian norms and conventions that pre-date and foreshadow the rise of human rights norms and conventions. The more contemporary Geneva conventions illustrate a parallel growth with other human rights concepts and prohibit certain types of treatment that would create forced migration. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

This Article focuses on those conventions and institutions that specifically relate to refugees.



refugee. Because Eastern Europeans were the largest group of displaced peoples after World War I, the reasons for their migration became the starting point for the development of an internationally accepted definition for refugees.

### 1. Post-World War I International Refugee Organizations

The first institutionalized international effort to help refugees was the creation of the office of the High Commissioner for Refugees by the League of Nations in 1921.<sup>14</sup> The first High Commissioner was a temporary office charged with handling the problems of Russian refugees.<sup>15</sup> The causes of the migration—famine, ethnic and religious persecution, and war—were not the focus of the High Commissioner's concerns.<sup>16</sup> Instead, the key elements were that those fleeing "no longer enjoy[ed] the protection of the Government of the Union of Socialist Soviet Republics and had not acquired another nationality."<sup>17</sup> Whatever the cause or causes, the focus of the international community was on the large numbers of people who were leaving Russia and international refugee efforts mobilized to aid them.

Similarly, in 1938, when the number of Germans fleeing their homeland became large enough for international con-

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14. See 7 LEAGUE OF NATIONS O.J. 755-58 (1921) (noting report on question of Russian refugee, adopted June 27, 1921, that includes resolution submitted to council on appointment of High Commissioner); 5-6 LEAGUE OF NATIONS O.J. 485 (1921) (noting U.N. Secretary General's letter on adoption of resolutions to choose High Commissioner); 1 L. HOLBORN, *supra* note 8, at 5-8 (noting League of Nations appointment of High Commissioner for refugees); UNITED STATES COMMITTEE FOR REFUGEES, REFUGEE PROTECTION: AN ANALYSIS AND ACTION PROPOSAL 30 (1983) [hereinafter U.S. COMMITTEE FOR REFUGEES PROPOSAL] (noting establishment of League of Nations High Commissioner for refugees in 1921).

15. 1 L. HOLBORN, REFUGEES, *supra* note 8, at 7 (1975).

16. See *id.* at 3 (noting that 1.5 million Russian refugees resulted from actions of Bolshevik armies in European Russia, Russian famine in 1921, and breakdown of White Russian resistance in Siberia); see, e.g., R. CONQUEST, THE NATION KILLERS 13-21 (1970) (noting that before the 1917 revolution Russia was involved in conquest of many smaller groups and nations); 2 W. H. CHAMBERLIN, THE RUSSIAN REVOLUTION 1917-1921, at 406-07 (1952) (discussing Armenians during World War I and anti-Armenian pogroms of 1905). See generally 1 L. TROTSKY, THE HISTORY OF THE RUSSIAN REVOLUTION (1932) (giving extensive historical background of Russia's revolution). Russia had a history of persecution of ethnic and religious "minorities."

17. See Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements dated July 5, 1922, and May 31, 1924, *opened for signature* May 12, 1926, 89 L.N.T.S. 47, 49.

cern, the League of Nations (the "League") adopted another instrument, the Convention Concerning the Status of Refugees Coming from Germany,<sup>18</sup> designed to handle the problem in a coordinated and international manner.<sup>19</sup> A few years later, when the flow of Austrians became noticeable, the League amended this 1938 Convention to handle these refugees as well.<sup>20</sup>

## 2. Post-World War II International Refugee Organizations

The League's attention to the problem of refugees was curtailed by the outbreak of World War II. Immediately following the War, however, the international community began coordinating aid for refugees through a series of temporary international agencies that culminated in 1950 in the creation of the UNHCR.<sup>21</sup>

The first of these coordinated efforts actually occurred during World War II, when the Allied Powers, in an effort to aid the millions of people who were being displaced due to the war, established the United Nations Relief and Rehabilitation Administration (the "UNRRA").<sup>22</sup> Initially, the international community's concern was focused on the dislocation caused by the war. The UNRRA, however, was established as a temporary agency "to plan, coordinate, administer or arrange for the administration of measures for the relief of victims of war . . . through the provision of food, fuel, clothing, shelter and other basic necessities,"<sup>23</sup> in addition to the "preparation . . .

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18. Convention Concerning the Status of Refugees Coming from Germany, *opened for signature* Feb. 10, 1938, 192 L.N.T.S. 59.

19. See G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 3 (1983).

20. See Additional Protocol to the Provisional Arrangement and to the Convention, Signed at Geneva on July 4th, 1936, and February 10th, 1938, respectively, Concerning the Status of Refugees Coming from Germany, Sept. 14, 1939, 198 L.N.T.S. 141.

21. See *supra* note 8.

22. See The Agreement for the United Nations Relief and Rehabilitation Administration, Nov. 9, 1943, in 3 UNRRA: THE HISTORY OF THE UNITED NATIONS RELIEF AND REHABILITATION ADMINISTRATION 23 (G. Woodbridge ed. 1950) [hereinafter UNRRA Agreement]; see also A. GRAHL-MADSEN, 1 THE STATUS OF REFUGEES IN INTERNATIONAL LAW (1966) 18 (explaining that on November 9th, 1943, the Allied Powers agreed to establish the UNRRA to help rescue millions of displaced persons during World War II); U.S. COMMITTEE FOR REFUGEES PROPOSAL, *supra* note 14, at 30. The UNRRA, however, was not authorized to resettle the displaced and had no authorization with regard to refugees as such. G. GOODWIN-GILL, *supra* note 19, at 4 n.19, 129.

23. UNRRA Agreement, *supra* note 22, at 23.

for the return of prisoners and exiles to their [country of origin].”<sup>24</sup>

The UNRRA was replaced in 1946 by the International Refugee Organization (the “IRO”).<sup>25</sup> The establishment of the IRO represented a shift in concern from the immediate after effects of the war to refugees generally. Although dislocations of war were of concern to the IRO, the mandate of the United Nations began to focus on the dominant and specific causes of forced migration. Categories of people were defined as refugees, including “victims of the nazi or fascist, . . . or of the quisling or similar regimes [which had opposed] the United Nations,”<sup>26</sup> as well as certain persons of “Jewish origin or foreigners or stateless persons [who had been] victims of nazi persecution.”<sup>27</sup> The constitution of the IRO also recognized that as a general matter the specific causes of forced migration—“persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions”—were aspects of the refugee definition.<sup>28</sup>

The IRO was replaced in 1950 by the UNHCR, and one year later the 1951 Convention became the instrument that legally defined a refugee.<sup>29</sup> The 1951 Convention defined the subset of forced migrants who were to be considered refugees under the UNHCR mandate.<sup>30</sup> In light of refugee flows from a

24. *Id.*

25. See Constitution of the International Refugee Organization, *opened for signature* Dec. 15, 1946, 18 U.N.T.S. 3 [hereinafter IRO Constitution]. See generally 1 L. HOLBORN, *supra* note 8, at 29-43 (examining creation and history of IRO).

26. IRO Constitution, *supra* note 25, Annex I, part 1, § A(1)(a), 18 U.N.T.S. at 18.

27. *Id.* Annex I, pt. I, § A(3), 18 U.N.T.S. at 18; see G. GOODWIN-GILL, *supra* note 19, at 4 (noting specification of categories to be assisted in Constitution of IRO).

28. *Id.* Annex I, pt. I, § C(1)(a)(i), 18 U.N.T.S. at 19. This concern with persecution based on a particular religious belief or political opinion has historical roots. The very word “refugee” was originally used in France in 1573 with respect to Calvinists who were suffering religious oppression. By 1797 the English were using the term “refugee” to describe American Tories who fought on the British side during the American Revolution and fled the American colonies. See Zolberg, *supra* note 10, at 650-52.

29. 1951 Convention, *supra* note 3, ch. I, art. 1, 189 U.N.T.S. 137, 152-56.

30. *Id.* preamble, art. 1, 189 U.N.T.S. at 150-52. There was some difference between the definition in the Statute of the UNHCR and the 1951 Convention definition. Compare *id.* art. 1 with Statute of the UNHCR, *supra* note 8, ch. II, ¶ 6(A)(ii), G.A. Res. 428 Annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950). See generally 1 L. HOLBORN, *supra* note 8, at 177-78 (noting difference between refugee definition in UNHCR Statute and in 1951 Convention, but stating that this distinc-

number of countries, the old pattern of defining refugees on a case-by-case basis, such as "Russian refugees," failed to identify adequately those who should be helped. It was more useful to focus on the various forms of persecution that were the dominant causes of forced migration and to extend further the definition laid down in the IRO constitution. Thus, the 1951 Convention defined refugee in terms of an individual with a "well-founded fear of being persecuted."<sup>31</sup>

Despite the use by the UNHCR of a more universal definition, there was still an ad hoc aspect to the 1951 Convention definition. The well-founded fear of persecution that qualified an individual as a legal refugee had to relate to World War II or specifically "to events occurring in Europe before January 1, 1951."<sup>32</sup> The subset of forced migrants legally to be helped was clearly expected to be a temporary category. Indeed, the UNHCR was established as a temporary agency, and provisions were made to review the need for its continued existence in the statute of its formation.<sup>33</sup>

In the ensuing years, however, the problems of refugees did not dissipate. Various treaties and agreements were drafted and ratified to provide aid to individuals and groups that did not fit into the 1951 Convention's legal definition of "refugee." So, "refugee seaman"<sup>34</sup> and "stateless persons"<sup>35</sup> were defined and given some aid under separate international agreements. In addition, the U.N. General Assembly passed

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tion did not cause concern because all known groups considered in need of international protection were included within scope of both).

31. 1951 Convention, *supra* note 3, art. 1(A)(2), 189 U.N.T.S. at 152. For the language used in the 1951 Convention, see text accompanying *supra* note 5. Membership in a particular social group was one category included in the 1951 Convention that was not included in the Statute of the UNHCR. See G. GOODWIN-GILL, *supra* note 19, at 12.

32. 1951 Convention, *supra* note 3, art. 1(B)(1)(a), 189 U.N.T.S. at 154. Contracting parties did have the option of specifying whether the events occurred "in Europe before January 1, 1951" or "in Europe or elsewhere before January 1, 1951." *Id.*

33. Statute of the UNHCR, *supra* note 8, ch. I, ¶ 5, G.A. Res. 428 Annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. No. A/1775 (1950).

34. Hague Agreement Relating to Refugee Seamen, *opened for signature* Nov. 23, 1957, 506 U.N.T.S. 125; see I L. HOLBORN, *supra* note 8, at 203 (giving history of Hague Agreement Relating to Refugee Seamen).

35. Convention Relating to the Status of Stateless Persons, *opened for signature* Sept. 28, 1954, 360 U.N.T.S. 130; see U.N. Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175.

special resolutions providing assistance to groups of forced migrants who could not be legally classified as refugees, such as Hungarians seeking asylum in neighboring countries,<sup>36</sup> Chinese in Hong Kong,<sup>37</sup> Algerians in Tunisia and Morocco,<sup>38</sup> and Angolans in the Congo (now Zaire).<sup>39</sup>

By the mid-1960s, the world community, through the United Nations, recognized that the ever-increasing flow of refugees could no longer be tied to World War II. As a result, in 1967, the Protocol Relating to the Status of Refugees was completed and opened for signature.<sup>40</sup> The 1967 Protocol retained the basic "well-founded fear of being persecuted" definition from the 1951 Convention but omitted the stated time limits and allowed for the omission of the geographic requirements.<sup>41</sup>

The 1967 Protocol was a response to the changing nature of forced migration. It was a positive expansion of the legal definition of refugee, eliminating temporal and geographic limitations, while adopting a universal, cause-related definition. Nevertheless, the 1967 Protocol was not adequate even for its time. Before 1967, the UNHCR had begun aiding refu-

36. G.A. Res. 1129, 11 U.N. GAOR Supp. (No. 17) at 63, U.N. Doc. A/3572 (1956); G.A. Res. 1006(ES-2), U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/3355 (1956).

37. G.A. Res. 1784, 17 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/5217 (1962); G.A. Res. 1167, U.N. GAOR Supp. (No. 18) at 20, U.N. Doc. A/3805 (1957).

38. G.A. Res. 1672, 16(1) U.N. GAOR Supp. (No. 17) at 28, U.N. Doc. A/5100 (1961); G.A. Res. 1500, 15(1) U.N. GAOR Supp. (No. 16) at 20, U.N. Doc. A/4684 (1960); G.A. Res. 1389, 14 U.N. GAOR Supp. (No. 16) at 21 (1959); G.A. Res. 1286, 13(1) U.N. GAOR Supp. (No. 18) at 26, U.N. Doc. A/4090 (1958).

39. G.A. Res. 1671, 16(1) U.N. GAOR Supp. (No. 17) at 27, U.N. Doc. A/5100 (1961).

40. 1967 Protocol, *supra* note 4. See generally I L. HOLBORN, *supra* note 8, at 177-82 (discussing 1967 Protocol).

41. 1967 Protocol, *supra* note 4, art. I, ¶¶ 2-3, 19 U.S.T. 6223, 6225, T.I.A.S. No. 6577, at 3, 606 U.N.T.S. 267, 268-70. These sections provide:

"General Provisions"

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . ." and the words "as a result of such events" in article 1 A(2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention, shall . . . apply.

*Id.*

gees outside of Europe and it became clear after the adoption of the 1967 Protocol, that these refugees (primarily Algerians and Tunisians) did not fit the new definition set out in the 1967 Protocol. The largeness of the numbers of individuals fleeing indicated that the requirement of *individual* persecution of which the 1967 Protocol spoke was often inapplicable.<sup>42</sup> Africans were fleeing war and war-like conditions related to the liberation process. Although the number of forced migrants outside of Europe was quite large when the 1967 Protocol was drafted and opened for signature, it was thought that once the decolonization process was complete, involuntary movement related to war and war-like conditions would essentially end.<sup>43</sup> That thought was incorrect, however, and the number of African and Asian refugees fleeing war and war-like conditions has instead increased dramatically. This phenomenon has led to the current need to redefine the international definition of refugee.

### B. *The African Response to Forced Migration*

While European states were hoping that the number of forced migrants outside of Europe would decrease after the late 1960s, African states foresaw that the numbers of refugees would reach a crisis stage by the 1970s.<sup>44</sup> Two years after the opening for signature of the 1967 Protocol, a broader definition of refugee was needed, at least for the African continent, and in 1969, the Organization of African Unity (the "OAU") opened for signature the Convention on Refugee Problems in Africa.<sup>45</sup>

The African Convention is a regional treaty developed by the OAU, the principal political umbrella organization for the

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42. *Id.* art. I, ¶ 2, 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 3, 606 U.N.T.S. at 268 (adopting art. 1 of 1951 Convention without time limits). Article 1(A)(2) of the 1951 Convention required that refugees show a "well-founded fear of being persecuted." 1951 Convention, *supra* note 3, 189 U.N.T.S. 137, 152; see G. GOODWIN-GILL, *supra* note 19, at 7-8 (noting that size of refugee problem in Africa in 1960s made individual determinations for refugees impractical and unworkable).

43. See E. Ngolle, *The African Refugee Problem and the Distribution of International Refugee Assistance in Comparative Perspective: An Empirical Analysis of the Policies of the Office of the United Nations High Commissioner for Refugees 1960-1980*, at 42-43 (Ph.D. dissertation 1985).

44. *Id.* at 136 (illustrating that number of refugees reached crisis stage in 1970s).

45. African Convention, *supra* note 1, 1001 U.N.T.S. 45.

continent.<sup>46</sup> The intent of the OAU was to "Africanize" the then existing international definition of refugee, as it appeared in the 1967 Protocol, by recognizing causes of forced migration prevalent in Africa, which the larger international community continued to view as temporary. Consequently, article I of the African Convention not only covers the individually focused causes in the well-founded fear of persecution definition, but also encompasses the refugee who flees war or civil strife by explicitly recognizing the general conditions in a country.<sup>47</sup>

The African Convention, like other regional and international treaties, binds all ratifying parties.<sup>48</sup> Thirty-five Member States of the OAU have ratified the African Convention,<sup>49</sup> which came into force in 1974.<sup>50</sup> Beyond the African Convention's legal force on those ratifying parties, it also carries considerable authority throughout the African continent. The language of the African Convention seeks to bind Member States of the OAU and not just those OAU Member States that ratify it.<sup>51</sup> It is noteworthy that in its draft form, the African Conven-

46. See Z. CERVENKA, *THE ORGANIZATION OF AFRICAN UNITY AND ITS CHARTER* 1-5 (1969). In 1963, only four years before the drafting of the 1967 Protocol, the OAU was founded. See *Charter of the Organization of African Unity, opened for signature* May 25, 1963, 479 U.N.T.S. 39.

47. African Convention, *supra* note 1, arts. I(1), I(2), I(4), I(5), 1001 U.N.T.S. at 47-48; United States Committee for Refugees, Joe Oloka Onyango, "Plugging the Gaps: Refugees, OAU Policy and the Practice of Member States in Africa," at 6 (October, 1986). Another progressive aspect of the Convention is found in paragraph 3 of article II, which prohibits rejecting a refugee at the frontier. *Id.* art. II(3), 1001 U.N.T.S. at 48. This represents a significant extension of the internationally accepted norm of non-refoulement. See 1 L. HOLBORN, *supra* note 8, at 192. The principle of non-refoulement prohibits states from returning a refugee to any country where she is likely to face persecution or danger to her life or her freedom. However, many states have interpreted this to apply only *after* a refugee has entered. If a refugee is at the frontier then rejection can occur. See generally G. GOODWIN GILL, *supra* note 19, at 69-97 (detailing principle of non-refoulement).

48. See generally I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 603-04, 619 (3d ed. 1979) (explaining role of signature and ratification and pointing to maxim "*pacta tertiis nec nocent nec prosunt*" as expressing concept that treaties only apply to those party to it).

49. *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* 227 (M. Bowan & D. Harris eds. 1984 & Supp. V 1988).

50. African Convention, *supra* note 1, 1001 U.N.T.S. at 46 n.1.

51. *Id.* art. II(1), 1001 U.N.T.S. at 48. See generally 1 L. HOLBORN, *supra* note 8, at 188, 197-98 n.35 (discussing the African Convention's use of the term "Member States" as opposed to "Contracting Parties"). The African Convention's attempt legally to bind states without their express consent is controversial. See I. BROWNLIE,

tion was signed by forty-one of the forty-two independent African states that comprised the OAU in 1969.<sup>52</sup>

Although the OAU's intent was to develop a regional definition of refugee, the African Convention ultimately predicted the course of the world's refugee problems. If the 1967 Protocol definition is not amended, international coordinated efforts to aid many forced migrants might be frustrated. For example, the UNHCR has given assistance to Afghan refugees in Pakistan,<sup>53</sup> many of whom would have had difficulty fitting the 1967 Protocol definition either because the numbers were so great that no individual determinations could practically be made, or because the individuals were, in fact, fleeing war-like conditions in their homeland.<sup>54</sup> While the UNHCR has some authority to help such refugees,<sup>55</sup> the constrictions of the 1967 Protocol definition have opened such assistance to attack, for instance, by the government of Afghanistan, which has questioned the legitimacy of labelling such people as refugees.<sup>56</sup> If the international refugee definition followed the African Convention definition, such objections would be unavailable.

## II. THE DEFINITION OF "REFUGEE" SHOULD REFLECT THE CAUSES OF FORCED MIGRATION

International refugee law should reflect the current domi-

*supra* note 48, at 619-21 (noting controversy regarding existence and extent of exceptions to rule that treaty only applies to those party to it).

52. 1 L. HOLBORN, *supra* note 8, at 188, 197-98 n.35. The attempt to bind non-ratifying parties, regardless of the legal impact on non-signatories, coupled with the informal approval of the African Convention by the vast majority of OAU members, indicates the strong influence of the African Convention on the continent.

53. *Report of the United Nations High Commissioner for Refugees*, 37 U.N. GAOR Supp. (No. 12) at 70, U.N. Doc. A/37/12 (1982) (listing UNHCR funds expended in 1981 by country, including Pakistan).

54. 36 U.N. GAOR C.3 (53rd mtg.) paras. 1-2, U.N. Doc. A/C.3/36/SR.53 (1981) (stating that since 1979 military intervention in Afghanistan, 2.5 million refugees had entered Pakistan).

55. *See, e.g.*, G.A. Res. 3143, 28(1) U.N. GAOR Supp. (No. 30) at 84, U.N. Doc. A/9030 (1973). The General Assembly requested that the High Commissioner "continue his assistance and protection activities in favour of refugees within his mandate as well as for those to whom he extends his good offices or is called upon to assist in accordance with relevant resolutions of the General Assembly." *Id.* 28(2) U.N. GAOR Supp. (No. 30) at 84, U.N. Doc. A/9030 (1973).

56. 34 U.N. GAOR C.3 (46th mtg.) paras. 57-58, U.N. Doc. A/C.3/34/SR.46 (1979) (Afghanistan representative claiming that UNHCR assistance to "so-called refugees" violated UNHCR statute and 1951 convention).



nant causes of forced migration—war and civil strife. This would be consistent with the history of international refugee law, since the definition of refugee at any particular time has largely mirrored the dominant circumstances creating forced migration. For instance, when the League of Nations created the High Commissioner for Refugees in 1921, the High Commissioner focused on Russian refugees, then the most prevalent group of forced migrants.<sup>57</sup> As other nationalities of people were identified as being part of the influx of refugees from the Soviet Union, the League of Nations made arrangements to include Armenians,<sup>58</sup> Assyrians,<sup>59</sup> and others as refugees.<sup>60</sup> When large numbers of Germans fled their homeland in 1936, they too were included as refugees by special treaty.<sup>61</sup>

Similarly, the various refugee agencies created by the United Nations after World War II reflected the changes that occurred following the war. Initially, the efforts of the United Nations focused on prisoners of war and other exiles. Soon thereafter, however, the United Nations redefined refugee and recognized persecution as the dominant cause of forced migration after World War II. Yet even after the ratification of the 1951 Convention and the adoption of a universal international refugee definition that focused on persecution, the United Nations continued to allow the UNHCR to respond to the particular problems of different groups of forced migrants as those problems arose, such as with the Hungarians and with the Chinese.<sup>62</sup> The UNHCR continues to use its “good offices” to aid refugees who do not fit into the 1967 Protocol definition—those fleeing war and war-like conditions—as crises develop.<sup>63</sup> International refugee law has always been responsive to the changing circumstances causing forced migration.

The predominance of forced migrants fleeing war-like

57. *See supra* notes 14-17 and accompanying text.

58. Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 47.

59. Arrangement Concerning the Extension to other Categories of Refugees of Certain Measures taken in favor of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 63.

60. Convention Relating to the International Status of Refugees, Oct. 28, 1933, art. 1, 159 L.N.T.S. 199, at 203.

61. *See supra* note 18 and accompanying text.

62. *See supra* notes 36-37 and accompanying text.

63. *See supra* note 55.

conditions indicates that war and war-like conditions as a cause of flight can no longer be viewed as temporary and left for special resolutions or the "good offices" of the UNHCR. War and civil disturbances are the dominant and continuing causes of flight and should be so reflected in the international legal definition as they have been in the African Convention for the past twenty years.

A. *The Recognition by the UNHCR of Refugees Fleeing Conditions of War and Civil Strife*

The need eventually to expand the definition of refugee was contemplated at the time the 1951 Convention was drafted. Even then, states parties were encouraged to extend the practices of the 1951 Convention to those who did not strictly fall within its narrow definition.<sup>64</sup> In fact, many countries followed this recommendation even before the 1967 Protocol lifted the temporal and geographic limitations.<sup>65</sup> As early as 1957, the General Assembly allowed the UNHCR to use its "good offices" to aid refugees who fell outside the mandate.<sup>66</sup> In 1975, after the adoption of the 1967 Protocol, the UNHCR was aiding so-called "displaced persons from Indochina outside their country of origin."<sup>67</sup>

The drafters of the 1951 Convention certainly realized

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64. G. GOODWIN-GILL, *supra* note 19, at 13 (noting that Conference of Plenipotentiaries recommended in Final Act that states should not apply 1951 Convention strictly).

65. *Id.*

66. G.A. Res. 1167, 12 U.N. GAOR Supp. (No. 18) at 20, U.N. Doc. A/3805 (1957) (authorizing UNHCR to use "good offices" to encourage arrangements for Chinese refugees in Hong Kong). See *Report of the United Nations High Commissioner for Refugees: Report of the UNREF Executive Committee*, 12 U.N. GAOR Supp. (No. 11) at Annex I, para. 107, U.N. Doc. A/3585/Rev.1 (1957) (noting inability of Executive Committee to reach agreement on question of whether Chinese refugees in Hong Kong fit into UNHCR mandate).

67. See U.N. Doc. A/AC.96/516/Add 1, ¶¶ 44-71 (1975); U.N. Doc. A/AC.96/INF.147 (1975). The term "displaced person" had previously been used to specify those who were displaced *within* their country of origin. G. GOODWIN-GILL, *supra* note 19, at 8-9. The UNHCR, while extending its protection beyond its mandate and the 1951 Convention and the 1967 Protocol definitions, seemed reluctant to confront this reality, and both the UNHCR and the authorizing General Assembly resolutions tended to use euphemisms such as "displaced persons" or "asylum seekers" to refer to these people outside the mandate who were receiving assistance. *Id.* (citing U.N. Doc. A/AC.96/516/Add. 1, ¶ 92 (1975) referring to "displaced persons and refugees," and U.N. Doc. A/AC.96/544, ¶ 87(f) (1975) referring to "asylum seekers").

that the existing definition of refugee did not encompass all those in need. Most likely, the definition was the result of political compromise. It is possible that some felt that refugee status could be granted selectively on an ad hoc basis to those not covered by the definition, whereas others felt that the definition could later be amended to include migrants fleeing for other reasons.

Whatever the mixture of motivations, the historical practices of the UNHCR strongly suggest that the ultimate intention was indeed to expand the definition. Although not all states followed the recommendation to apply loosely the 1951 Convention standards, the UNHCR almost immediately began to use its "good offices" to provide aid to war victims. This expansion of the definition of refugee on the part of the UNHCR was done with the permission of the General Assembly, which authorized the inclusion of forced migrants not covered by the 1951 Convention.<sup>68</sup> The expansion by the UNHCR of the definition reflects the approval of the world community, not just through the supervision and authorization of the General Assembly, which includes most countries of the world, but also through the almost uniform support of UNHCR activities by states in the form of voluntary contributions to UNHCR programs.<sup>69</sup>

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68. In 1965, the General Assembly eliminated the formal distinction between Convention and non-Convention refugees with respect to the UNHCR responsibility to pursue international protection and to provide permanent solutions. See G.A. Res. 2039, 20 U.N. GAOR Supp. (No. 14) at 41, U.N. Doc. A/6014 (1965). In 1975, the General Assembly gave the UNHCR authority to act on behalf of non-Convention refugees who were in a situation "analogous" to that of Convention refugees because they were victims of man-made events over which they had no control. See G.A. Res. 3454, 30 U.N. GAOR Supp. (No. 34) at 92, U.N. Doc. A/10034 (1975).

69. The UNHCR receives its funding from three sources: (1) the United Nations; (2) voluntary contributions from governments of U.N. members; and (3) voluntary contributions from non-governmental organizations. See 2 L. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME 1404 (1975) [hereinafter 2 L. HOLBORN]. In part, every U.N. member committed itself to support financially the programs of the UNHCR (assuming its continued existence) by approving the provision in the Statute of the UNHCR that the agency's administrative expenses be borne by the United Nations. Statute of the UNHCR, ch. III, paras. 20-21 *supra* note 8, G.A. Res. 428 Annex, 5 U.N. GAOR Supp. (No. 20) at 48, U.N. Doc. A/1775 (1950); see 2 L. HOLBORN, *supra*, at 1406. The real strength of the support and commitment of individual states in the world community for the actions taken by the UNHCR, however, is revealed in the breadth and level of voluntary contributions.

In the 1950s, the UNHCR had trouble obtaining voluntary contributions. It was not uncommon in those early years for the UNHCR to estimate or to target a particu-

## International support for an expansion of the definition of

lar monetary goal to come from governmental contributions and to fall far short of its goal. *Id.* at 1406. For the next two decades, however, governmental contributions increased in amount from US\$4.67 million in 1960, dipping down to US\$3 million in 1965, and then exploding in 1977 to US\$124 million, to US\$322 million in 1979, and to US\$418 million in 1980. Ngolle, *supra* note 43, Table 14 at 98 (compiling statistics from Reports of the United Nations High Commissioner for Refugees, 1960-1981). In only a five year span, from the 1966-1971, the number of contributing states rose from 50 to over 80. *See* 2 L. HOLBORN, *supra*, at 1406. The greatest portion of voluntary contributions comes from Western countries, with the United States and the European Communities together accounting for over 40% of contributions in 1981. Ngolle, *supra* note 43, Table 12, at 94 (citing Report on UNHCR Assistance Activities and Proposed Voluntary Funds Program Budget 1980-81, at chs. I-VII (1980)). The impact of Western states is felt in other areas. With one exception, the UNHCR's High Commissioner and much of its decision-making hierarchy have come from Western countries. *Id.* at 82-83. While concerns have been raised about the political manipulation of the UNHCR by Western states, scholarly support for this has been mixed. *See id.* at 146-52. The top twenty contributing countries in 1981 also included Asian, Arab, and African countries, such as China, Japan, Saudi Arabia, Kuwait, Qatar, and Nigeria. *Id.*, Table 12, at 94. Certain less developed countries also contributed. *Id.*

Those countries who receive UNHCR aid also indicate their support for the actions of the UNHCR, because the UNHCR may not interfere in any situation without government support and, practically, is not able to intervene without some government cooperation. Thus, wherever the UNHCR is able to implement a program of refugee assistance, governmental knowledge and approval exists, thereby indicating the support of receiving states for the UNHCR. In looking at UNHCR program expenditures for Africa, Asia, and Latin America, it is clear that these areas represent a significant portion of the UNHCR program budget. *Id.* at 116-18 (indicating the presence of UNHCR programs in Africa, Asia, and Latin America and the enormous increase in assistance to these areas during the two decades between 1960 and 1980).

The area of weakness in international support for the actions of the UNHCR is comprised of Soviet-bloc states. The Soviet Union and its Eastern European allies were opposed to the creation of the UNHCR from the beginning. *Id.* at 66. Although the United States also initially opposed the UNHCR, its attitude has turned into affirmative support. *See* Clark, *Human Rights and the United Nations High Commissioner for Refugees*, 10 INT'L J. LEGAL INFO. 287, 290 n. 9 (1982). In contrast, the Soviet Union and its allies have continued to be relatively antagonistic toward the UNHCR. Ngolle *supra* note 43, at 66 n.12. While the Soviet Union usually does not contribute to UNHCR assistance programs, the Soviet Union, along with the German Democratic Republic, did contribute US\$445,000 in in-kind services toward boat and air-lifting assistance in 1974. *See* Clark, *supra*, at 305 n.82. (citing 30 U.N. GAOR Supp. (No. 12) at 60, U.N. Doc. A/10012 (1975)). Other communist countries, such as China, have contributed more regularly. *See e.g. Report of the United Nations High Commissioner for Refugees*, 26 U.N. GAOR Supp. (No. 12) at 59, U.N. Doc. A/8412 (1971) (listing China's contribution to UNHCR for 1970); *Report of the United Nations High Commissioner for Refugees*, 37 U.N. GAOR Supp. (No. 12) at 73, U.N. Doc. A/37/12 (1982) (listing China's contribution to UNHCR for 1981 and 1982). While there have been some tensions, a number of communist governments have worked with the UNHCR to implement UNHCR assistance plans within their borders. Ngolle, *supra* note 43, Table 28, at 126 (listing Angola, Ethiopia, Mozambique, Vietnam, Laos, and

refugee to include war and civil strife victims is also reflected in statements by both the UNHCR and various non-African states. In 1981, the UNHCR commented on the growth and the necessity to afford protection to those not falling within the UNHCR Statute or the 1951 Convention.<sup>70</sup> In 1982, the UNHCR expressed the opinion that persons not fitting into the 1967 Protocol definition were perhaps not entitled to the full panoply of rights guaranteed by the 1967 Protocol, but clearly described these forced migrants as refugees according to the wider concept.<sup>71</sup> In 1985, again the UNHCR pointed to the growing recognition that persons displaced for reasons of severe internal upheavals of armed conflict deserved to be protected from danger.<sup>72</sup>

Representatives of a variety of countries as well as the Commissioner of the UNHCR have recognized that aid should be given to victims of war and civil strife. In fact, a representative of Pakistan at the United Nations indicated that those countries who had refused to assist such refugees "had forfeited their right to talk of human rights and of their commitment to the United Nations Charter or other human values."<sup>73</sup> Similarly, in response to Thailand's acceptance of neighboring Cambodians fleeing civil strife in 1979, the Secretary of State of the United States described this action as "correct,"<sup>74</sup> and members of the U.S. Congress described this action as "fulfill[ing] internationally recognized standards for assisting and protecting Indochinese refugees."<sup>75</sup>

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China in the years 1976 to 1981). While support for the actions of the UNHCR is weaker in communist countries than in non-communist countries, there is no universal negative reaction to the UNHCR among communist countries.

70. See 36 U.N. GAOR C.3 (50th mtg.) para. 2, U.N. Doc. A/C.3/36/SR.50 (1981).

71. Note on International Protection, Thirty-Third Session of the Executive Committee of the High Commissioner's Programme, para. 19, U.N. Doc. A/AC.96/609/Rev. 1 (1982).

72. Note on International Protection, Thirty-Sixth Session of the Executive Committee of the High Commissioner's Programme, para. 37, U.N. Doc. A/AC.96/660 (1985).

73. See 36 U.N. GAOR C.3 (53rd mtg.) para. 2, U.N. Doc. A/C.3/36/SR.53 (1981).

74. 79 DEP'T ST. BULL. 10 (Dec. 1979) (quoting U.S. Secretary of State Cyrus Vance).

75. See STAFF OF SENATE SUBCOMM. ON IMMIGRATION AND REFUGEE POLICY OF THE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., *REFUGEE PROBLEMS IN SOUTHEAST ASIA*: 1981 20 (Comm. Print 1982); see also COMM. ON THE JUDICIARY, UNITED STATES

It can still be argued, however, that the approval of the world community for the activities of the UNHCR is merely indicative of approval for ad hoc aid and suggests little about the development of a commitment to consistent long-term aid for war victims. Indeed, one could argue that there is a qualitative distinction between victims of persecution and victims of war. Perhaps lack "of the protection of [the] country [of one's homeland]" is the most significant phrase of both the 1951 Convention and the 1967 Protocol definition.<sup>76</sup> A religious, racial, or political group at odds with the dominant group in political power in their country and suffering persecution on that basis clearly lacks state protection. War victims, on the other hand, are perhaps not so much lacking in state protection as they are innocent bystanders of some internal or external conflict in which their otherwise concerned government is engaged. Victims of war and civil strife may be in an unfortunate situation, but they, unlike the victims of persecution, are not individuals who lack state protection.

This distinction between victims of persecution and victims of war and civil strife, although not unreasonable, is perhaps a semantic one, dependent upon how one defines "lack of protection." Failure to protect its nationals need not be a conscious and deliberate choice on the part of a particular government. If a government's intent is not a determinative factor, then inadequate protection is essentially equivalent to a deliberate denial of protection. From the perspective of the individual refugee, whether she be bombed by her own government because of her union activity or because of a state policy to bomb randomly villages in order to flush out rebel forces, her need to flee to safety is largely the same as the victim of war.

History supports the theory that the intent of a government in failing to protect nationals should not control the classification of such persons as refugees. For instance, when the world community institutionalized aid to refugees through the

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SENATE, 96TH CONG. 1ST SESS., *WORLD REFUGEE CRISIS: THE INTERNATIONAL COMMUNITY'S RESPONSE* 6 (Comm. Print 1979) (using the 1951 Convention definition but also including "persons who have left their country as a result of military operations or civil war").

76. See 1967 Protocol, *supra* note 4, art. I(2), 19 U.S.T. 6223, 6225, T.I.A.S. No. 6577, at 39-40, 606 U.N.T.S. 267, 268; 1951 Convention, *supra* note 3, art. 1(A)(2), 189 U.N.T.S. 137, 154.

League of Nations after World War I, refuge was granted without regard to the intent of the new Soviet government.<sup>77</sup> Whether because of persecution or dislocation by the revolution, these refugees were apparently without state protection and leaving in large numbers.<sup>78</sup> Moreover, while some UNHCR projects to help non-mandate refugees have been specifically authorized by the General Assembly, the General Assembly has issued open-ended grants of authority to help such refugees. For example, in 1973 the General Assembly authorized the UNHCR "to continue [its] assistance *and protection* activities in favour of refugees within [its] mandate as well as for those to whom [it] extends [its] good offices *or* is called upon to assist in accordance with relevant resolutions of the General Assembly."<sup>79</sup> In a similar vein, two years later, the General Assembly gave a more precise definition of those non-mandate refugees the UNHCR was authorized to help. The General Assembly defined such refugees as those with "analogous" situations to that of Convention refugees, that is, victims of "man-made" events over which they have no control.<sup>80</sup> The General Assembly's decision to authorize a broad grant of authority to the UNHCR providing for intervention in situations where involuntary forced migrants are outside of the mandate definition is significant. It suggests that the General Assembly, as the representative of the world community, is moving away

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77. See *supra* notes 14-17 and accompanying text.

78. See *supra* note 16. This is true of most of the arrangements and agreements developed by the League of Nations: "[A] refugee had been defined solely as a person of specified origin who no longer enjoyed the protection of his government. Nothing was said of the reason for his lack of protection." 1 L. HOLBORN, *supra* note 8, at 74.

79. G.A. Res. 3143, 28(1) U.N. GAOR Supp. (No. 30) at 84, U.N. Doc. A/9030 (Dec. 14, 1973) (emphasis added); see G. GOODWIN-GILL, *supra* note 19, at 10 n.37 (citing this resolution and noting subsequent relevant resolutions).

80. G.A. Res. 3454, 30 U.N. GAOR Supp. (No. 34) at 92, U.N. Doc. A/10034 (1975). The focus on "man-made" events is most likely to distinguish war victims from famine victims. Famine victims do tend to command the attention of their home governments in a way that neither persecuted groups nor casualties of war and civil strife do. Moreover, it is possible to import foodstuffs and development techniques, whereas it is impossible to "import" tolerance or peace. It is important to note, though, that sometimes famines are man-made, generally in civil war situations where food is used by governments as a weapon. See, e.g., Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 554-64 (1987) (discussing Ethiopian government's selective distribution of food to non-rebel areas).

from a policy of ad hoc assistance and towards a policy of consistent assistance by using an expanded definition of refugee. Such a revised definition focuses not on the intent of government, but rather on whether the cause is man-made and beyond the control of the migrant.

These UNHCR statements, in addition to the UNHCR's continued practice of using its "good offices" to recognize refugees not covered by the 1967 Protocol definition, indicate that the time is ripe for expanding the definition of refugee.

B. *The Shift in UNHCR Expenditures Reflects a Shift in the Causes of Forced Migration*

The change in the conditions creating refugees is best evidenced by the shift in UNHCR expenditures over time from European states to African and Asian states. In 1963, European states received approximately 51% of UNHCR total expenditures, whereas African states received 24% and Asian states received 12%.<sup>81</sup> The European percentage continued to drop to a low of 7% in 1970 and in 1971.<sup>82</sup> At the same time, the African share of UNHCR expenditures increased from 24% in 1963, climbing to a high of 68% in 1969 and in 1970.<sup>83</sup> Since 1970, the African percentage fell from a high of 59% in 1971 to a low of 23% in 1976 and ended in 1980 at 34% of total UNHCR expenditures.<sup>84</sup> Over the same period of time, the percentage of UNHCR expenditures going to Asian countries after 1963 fluctuated between 8% (1964, 1968, 1969) and 22% (1971).<sup>85</sup> The Asian share fluctuated at a higher level in the 1970s—between 14% (1977) and 34% (1978)—and then dramatically increased to 60% (1979).<sup>86</sup>

UNHCR resource expenditures have generally tracked the shifts in geographic distribution of refugees in the world. From 1975 to 1980, Africa accounted for a low of 19.9% of all

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81. E. Ngolle, *supra* note 42, Table 23, at 115 (compiling statistics from U.N. General Assembly, Reports of the UNHCR, 1963-1980; Reports on Assistance Activities and Proposed Voluntary Funds Program Budget, 1975-1980; Yearbook of United Nations, 1963-1980).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* This Asian share fell only slightly in 1980 to 55%. *Id.*



refugees in 1975 to a high of 72.2% in 1977 and dropped to a still hefty 58.4% of all refugees in 1980.<sup>87</sup> At the same time, Asia accounted for a high of 67.8% of all refugees in 1975 to a low of 10.8% in 1978 and rose to 29.3% in 1980.<sup>88</sup>

An examination of these UNHCR expenditures indicates both the willingness of the UNHCR to give aid to those refugees who do not fit into the traditional definition and the tremendous increase in the percentage of "non-traditional" African and Asian refugees fleeing "civil wars, ethnic conflicts, wars of liberation and natural catastrophe."<sup>89</sup>

In the 1980s, the number of refugees fleeing conditions of war and civil strife has continued to increase.<sup>90</sup> For example, in 1987 almost half of the world's twelve million refugees were Afghans residing in Pakistan, which is the country with the largest refugee population in the world.<sup>91</sup> While the Pakistani government and the world community, through both direct contributions and the work of the UNHCR, have been responsive, thereby recognizing an international obligation to aid these migrants, these migrants are not people who fit into the strict constructs of the 1967 Protocol definition. The Afghan refugee movement started in late 1979, following civil strife related to the takeover by a leftist group on April 27, 1978.<sup>92</sup> While some movement could be attributed to political persecution as the new Kabul government repressed dissent, part of the government's response to the disorder were general attacks and bombings of villages.<sup>93</sup> On Christmas Eve 1979, the

87. *Id.*, Table 25, at 119 (compiling statistics from Yearbook of United Nations, 1970-80)

88. *Id.*

89. *Id.* at 145.

90. This is not to suggest that no modern refugee movements have resulted from persecution. Persecution has caused the migration not only of individuals, but of populations, for example, in Uganda under Idi Amin. In 1971, Ugandan President Obote was overthrown in a coup d'etat led by Idi Amin. See T. AVIRGAN & M. HONEY, *WAR IN UGANDA, THE LEGACY OF IDI AMIN* 4 (1982). In 1972, Amin gave all non-citizen Asians three months to leave the country, and in the ensuing panic, most of Uganda's 80,000 Indians, including 20,000 citizens, fled the country. *Id.* at 4-5. Amin oversaw acts of widespread torture and murder as he purged Langi and Acholi tribes. *Id.* at 31. The Amin regime came to an end in 1979. *Id.* at 132-54.

91. See Dupree, *Afghan Refugees in Pakistan*, in 1987 WORLD REFUGEE SURVEY, *supra* note 9, at 17.

92. *Id.*

93. *Id.*

Soviet Union invaded Afghanistan, and the numbers of Afghan refugees fleeing into Pakistan increased dramatically,<sup>94</sup> clearly in response to the war raging in their country.

Indeed, the trend of increasing numbers of refugees fleeing due to war and civil strife has continued. In 1987, seven countries and the Palestinian nation each produced in excess of 200,000 refugees.<sup>95</sup> Afghanistan headed the list with some 5,751,000 refugees.<sup>96</sup> Palestinians ranked second with 2,217,805 refugees.<sup>97</sup> Ethiopia, whose refugees would appear to fit into the 1967 Protocol definition, ranked third with 1,122,300 refugees.<sup>98</sup> While several thousand Ethiopians have been voluntarily repatriated through UNHCR efforts, others continue to flee due to human rights abuses by their government.<sup>99</sup> Mozambique ranked fourth with 917,000 refugees.<sup>100</sup> Refugees from Mozambique were not fleeing persecution at the hands of their own government, but fleeing civil strife created by the conflict between the South African-backed insurgents and the government of Mozambique.<sup>101</sup> Ranking behind Mozambique was a third African state, Angola, which generated 404,000 refugees.<sup>102</sup> Here, too, refugees, and others internally displaced, were fleeing not persecution, but war-torn

94. *Id.*

95. *Id.* at 33. The seven countries are Afghanistan, Ethiopia, Mozambique, Angola, Iraq, Cambodia, and the Sudan. *Id.* In 1988, the number of countries increased to ten. See *WORLD REFUGEE SURVEY: 1988 IN REVIEW* 35 (listing Afghanistan, Mozambique, Ethiopia, Iraq, Angola, Sudan, Cambodia, Somalia, Iran, and Rwanda).

96. 1987 *WORLD REFUGEE SURVEY*, *supra* note 9, at 33.

97. *Id.* The international community has long viewed Palestinians as unique and early on created the United Nations Relief and Works Agency for Palestine Refugees in the Near East (the "UNRWA"), a separate international organization to provide relief efforts for Palestinian refugees. G.A. Res. 302, U.N. Doc. A/1237 (1949). But it is important to note that Palestinian displacement is a product of war.

98. 1987 *WORLD REFUGEE SURVEY*, *supra* note 9, at 33.

99. *Id.* at 38.

100. *Id.* at 33.

101. *Id.* at 40. Kidnapping, torture, disfigurement, and rape at the hands of armed bandits and South African-backed insurgents might arguably fit under an interpretation of the 1967 Protocol definition that allows for persecution at the hands of a non-governmental entity that the government is unwilling or unable to control. See Brennan, *Mozambicans: A People at Risk*, in 1987 *WORLD REFUGEE SURVEY*, *supra* note 9, at 41. Still, the situation for Mozambicans does not fit into the notion of individual persecutions as defined by the 1967 Protocol definition because the reasons for their ill-treatment were not based on race, ethnicity, or politics, but were part of a war strategy of terror on the part of the insurgents. *Id.*

102. 1987 *WORLD REFUGEE SURVEY*, *supra* note 9, at 33.

conditions as a result of the Angolan civil war that has plagued that country almost since its independence in 1975.<sup>103</sup> Ranking behind Angola was Iraq, which generated some 400,000 refugees.<sup>104</sup> Here again, refugees were fleeing war conditions created by the war between Iraq and Iran.<sup>105</sup>

Ranking behind Iraq was Cambodia, which generated 314,450 refugees.<sup>106</sup> These refugees, trapped along the border between Thailand and Cambodia, encompassed both those fleeing government persecution and those fleeing severe drought conditions.<sup>107</sup> But in addition to these factors, the occupation of Cambodia by Vietnam and the presence of Khmer Rouge troops waging guerilla warfare cannot be ignored.

Sudan ranked behind Cambodia, generating 205,000 refugees.<sup>108</sup> Sudanese refugees have fled their homes in part because of food shortages and in part because of civil strife be-

103. *Id.* at 35-36. In 1987, Angola not only generated refugees but also received refugees in smaller numbers from Namibia, South Africa, and Zaire. *Id.* Refugees from Namibia were fleeing war conditions in that country created by the South West African Peoples Organization's ("SWAPO") continuing war for independence against South African occupation. *See id.* at 36.

South African refugees are harder to classify. Arguably they might be considered Convention refugees based upon the apartheid or racial conditions existing in South Africa or based upon a theory of political persecution, *i.e.*, that those who support democracy in South Africa are singled out for persecution by the government. *See, e.g.*, 1 L. HOLBORN, *supra* note 8, at 189 (arguing there is "little question" that refugees in southern Africa and those in the then-Portuguese controlled colonies were persecuted). On the other hand, in 1987, the approximately 16 South African refugee camps that existed in Angola were administered by the African National Congress (the "ANC"), which is seeking to overthrow the white minority regime in South Africa. *See* 1987 WORLD REFUGEE SURVEY, *supra* note 9, at 36. The ANC sees itself engaged in an armed struggle against the South African government. Whether freedom fighters can be refugees has been uncertain. The UNHCR has long been understood to exclude freedom fighters, while the OAU has included them. *See* 1 L. HOLBORN, *supra* note 8, at 190-91. However they be defined, both the Angolan government and the UNHCR have responded to their needs. 1987 WORLD REFUGEE SURVEY, *supra* note 9, at 36.

104. 1987 WORLD REFUGEE SURVEY, *supra* note 9, at 33.

105. *See* Smith, *Living with War and Revolution*, TIME, Aug. 17, 1987, at 32 (noting the large number of refugees from Iran who are "draft dodgers"); Kopvillem, *Refugees from Iran*, MACLEAN'S, Feb. 2, 1987, at 29-30 (noting that while some educated and secular Moslems and ethnic minorities flee persecution, many admit fleeing because of war). *But cf.* Darnton & Field, *Ticket to Loneliness*, NEWSWEEK, Aug. 28, 1989, at 43 (noting drop in refugees in West Germany from Iraq-Iran region since cease-fire).

106. 1987 WORLD REFUGEE SURVEY, *supra* note 9, at 33.

107. *Id.* at 46.

108. *Id.* at 33.

tween the Sudanese government and the Sudanese People's Liberation Army.<sup>109</sup> In addition, Sudan is a resting place for a number of refugees generated by other countries. Most of these are northern Ethiopians who have been fleeing war conditions since 1967 as the Ethiopian government has battled both the Eritrean People's Liberation Front and the Tigray People's Liberation Front.<sup>110</sup> Migrants from Chad and Uganda have also sought refuge in Sudan due to civil strife in their respective homelands.<sup>111</sup>

The bulk of forced migrants no longer originate in European countries, but rather they come from Africa and Asia. They are most often not fleeing individual persecution, but rather war and war-like conditions. This represents a change from the "model refugee" as initially defined after World War II in the 1951 Convention and in the 1967 Protocol. At the time these instruments were drafted; migration because of war and civil strife had not been great enough to impact the institutionalized international efforts to aid refugees. This situation, however, has clearly changed, and the time has come to revise the definition of refugee to include forced migrants fleeing war and civil strife.

### III. *THE RELATIONSHIP BETWEEN THE U.N. CHARTER AND AN EXPANDED INTERNATIONAL DEFINITION OF REFUGEE*

#### A. *The U.N. Charter Reflects International Concerns*

Expanding the definition of refugee to include victims of war and civil strife is not only consistent with the historical development of international refugee law and reflective of the current causes of forced migration, but it is also consistent with the three major goals that form the humanitarian purposes embodied in the U.N. Charter (the "Charter"): (1) peace, (2) human rights, and (3) formal equality and self-determination.<sup>112</sup>

The policy-oriented view used in this Article to define the

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109. *Id.* at 42.

110. *Id.*

111. *Id.*

112. U.N. CHARTER art. 1, paras. 1-3, art. 2, para. 1. See *infra* notes 126, 128, & 133-34 for the text of these paragraphs.

concept of refugee incorporates the goals of the U.N. Charter, the constitutive document of the United Nations.<sup>113</sup> The United Nations and the Charter are significant because their creation represented a major shift in international relations and in international law.<sup>114</sup>

The United Nations is the first international organization to acquire virtually world-wide membership and universal jurisdiction over all member nations.<sup>115</sup> The United Nations was not the first attempt at institutionalized international cooperation. After the First World War, the victors of that War attempted to establish such an institution by creating the League of Nations. However, the League of Nations was destroyed by the outbreak of World War II and never did achieve widespread membership.<sup>116</sup>

The United Nations, while it reflects the political triumph of the Allied Powers, also symbolizes a consensus reached on certain aspirations. The main underlying concern is that of in-

113. This policy-oriented or teleological methodology rejects the notion that legal rules are neutral and objective. See generally Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1670-76 (1982). It is not that the rules (themselves a reflection of policy considerations) are to be ignored, but rather that, in legal analysis, rules and policy considerations both should be consciously considered as being integral to the legal process. See Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L & COMP. L.Q. 58 (1968). Some positivist or formalist scholars would disagree with this approach. For a discussion of the criticism of the formalist position, see generally *id.*

114. See Anand, *Rôle of the "New" Asian-African Countries in the Present International Legal Order*, 56 AM. J. INT'L L. 383, 384 (1962) (suggesting that in United Nations one sees "for the first time in history, a general international organization which for all practical purposes, is of a world-wide character"). See generally 228 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, THE UNITED NATIONS AND THE FUTURE (E. Patterson ed. 1943) (addressing key issues faced by the United Nations upon its inception).

115. The United Nations includes 159 member nations, representing 98% of the world's population. See ENCYCLOPEDIA OF ASSOCIATIONS, INTERNATIONAL ORGANIZATIONS 682 (1989).

116. See, e.g., H. MORGENTHAU, POLITICS AMONG NATIONS 463-66 (5th ed. rev. 1978) (noting structural weaknesses of League of Nations). Morgenthau points out that the League of Nations was unable to attract some of the contemporary great powers, most notably the United States. *Id.* at 464. This is most ironic, given the active participation of U.S. President Woodrow Wilson in the development of the League of Nations. See, e.g., Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 2-3 (R. Lillich & E. Newman ed. 1979). The inability of the League of Nations to attract the great powers contributed to its inability to prevent the wars that occurred during its existence. See MORGENTHAU, *supra*, at 464-66.

ternational harmony.<sup>117</sup> The United Nations was established by the victors of the Second World War as an effort to maintain the newly attained status quo.<sup>118</sup> The structure of the organization reveals that the great powers that emerged from World War II expected to maintain their global authority.

The United Nations is organized into six basic organs, of which two are most important: the General Assembly and the Security Council.<sup>119</sup> Of these two bodies, the Security Council is the more powerful, having the authority to take action, including economic boycotts and mobilization of armed forces, for the preservation of world peace and security.<sup>120</sup> The Security Council, however, is also the less democratic of the two bodies. While the General Assembly is open to all members of the United Nations, the Security Council is open to only eleven members.<sup>121</sup> Five of these eleven members, the United States, the United Kingdom, the Soviet Union, the People's Republic of China, and France, are permanent members.<sup>122</sup> In order to enable each of these five members to assert control of the Security Council, all non-procedural decisions made by the Security Council must be made with their unanimous approval.<sup>123</sup> These five permanent members, however, also chose to share power with the general membership of the United Nations.<sup>124</sup> Even in the powerful Security Council,

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117. See U.N. CHARTER art. 1, para. 4 ("Purpose and Principles: The purposes of the United Nations are: . . . 4. To be a centre for harmonizing the actions of nations in attainment of . . . common ends").

118. See MORGENTHAU, *supra* note 116, at 101 (arguing that United Nations was intended to serve as an instrument of China, France, Great Britain, Soviet Union, United States, and their allies, for maintaining status quo after World War II).

119. U.N. CHARTER arts. 9-32.

120. *Id.* art. 24, para. 1, arts. 41-42.

121. *Id.* art. 23, para. 1.

122. *Id.*

123. *Id.* art. 27, para. 3.

124. Arguably, the victors had no choice but to choose a cooperative and co-optive model of global rule. Sheer force can be an expensive and eviscerating proposition against smaller but determined opponents even for powerful states. Nonetheless, the self-interest involved in choosing a cooperative institutional model does not undermine the value of the aspirations. While the victors themselves, having created the relatively new structure, may have a clear view of the manipulability and nature of the goals, succeeding generations often "approach these rules as facts of international life given to them by their forebears and sanctified by the passage of time." See F. A. BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 162 (1985). While the goals of the United Nations, then, are hardly immune from political manipulation and machination and do not take on a life of their own, they do interact and impact upon

while all five permanent members must agree on non-procedural actions, at least two of the non-permanent members must also concur.<sup>125</sup> This underlying concern for international harmony is furthered by the three goals of the U.N. Charter.

## 1. The Three Goals of the U.N. Charter

### a. *Maintaining International Peace*

The first goal of the United Nations is to maintain international peace.<sup>126</sup> After two world wars, it is not surprising that the victorious states, as well as other states in the world, were left with an increased concern for peace. Indeed, it is likely that the desire to share power with all the other countries in the world was fueled by this concern for peace. An illustration of the international community's concern for peace after World War II are the activities the United Nations committed itself to monitor and to resolve. The United Nations committed itself to prevent not just the outbreak of war, but any number of activities that could lead to war. It focused on "aggression" and "breaches of the peace" short of war as well as on all other "international disputes or situations which might lead to a breach of the peace."<sup>127</sup> The Charter laid the groundwork for the monitoring of a broad range of activities that were short of war but portended war.

### b. *Promoting Human Rights and Fundamental Freedoms*

The second goal of the United Nations is to promote

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the way nations (and individuals) behave in the international context. For an analogous discussion (and debate) on the tensions between power politics and the power of ideas in the civil rights context see generally Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

125. U.N. CHARTER art. 27, para. 3.

126. U.N. CHARTER art. 1, para. 1. This paragraph states that one of the purposes of the United Nations is

[t]o maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

*Id.*

127. *Id.*

human rights and fundamental freedoms for all.<sup>128</sup> The "new"<sup>129</sup> concern for human rights and fundamental freedoms enshrined in the U.N. Charter grew out of the international horror at Nazi Germany's extermination of Jews and other "undesirable" individuals.<sup>130</sup> Genocidal treatment of minorities, particularly religious minorities, had been a recurring problem in late nineteenth and early twentieth century European history and had been addressed by the international community in an ad hoc fashion through bilateral and multilateral treaties.<sup>131</sup> The enshrinement by the United Nations of respect for human rights in its Charter elevated that concern to a global one.

Making violations of the human rights of individuals and groups of individuals a subject of international concern was a new way to handle an old problem, but it also represented a major shift for international law. Before World War II, the subject of international law concerned relationships among states, not a state's treatment of its own nationals. Making human rights a global concern paved the way for the incorporation of such individual rights into international law.<sup>132</sup>

### *c. Fostering Formal Equality and Self-Determination*

The third goal of the United Nations is to foster the equality of all nations<sup>133</sup> and the right of self-determination of all

128. *Id.* art. 1, para. 3. This paragraph states that one of the purposes of the United Nations is "[t]o achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for the fundamental freedoms for all without distinction as to race, sex, language or religion." *Id.*

129. The author uses the term "new" as regards a *global* concern for human rights. It should be noted, however, that Latin American countries have had a regional interest in human rights issues that predates the foundation of the United Nations. See T. BUERGENTHAL, R. NORRIS, D. SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS* 2-3 (2d ed. 1986). See generally, T. FARER, *THE GRAND STRATEGY OF THE UNITED STATES IN LATIN AMERICA* 63-124 (1988) (discussing the Inter-American Commission on Human Rights and human welfare issues regarding the United States and Latin America).

130. During the Nazi period, other "undesirable" individuals included homosexuals, Poles, and others. See, R. BLEIER, *SCIENCE AND GENDER* 11 (1984).

131. See Humphrey, *supra* note 116, at 1-3.

132. See *id.* at 5.

133. U.N. CHARTER art. 2, para. 1. This paragraph states that "[t]he organization is based on the principle of the sovereign equality of all its members." *Id.*



peoples.<sup>134</sup> The concept of the formal equality of all nations is not only stated in the U.N. Charter but is embodied in part of the structure of the United Nations. While the Security Council, by its structure, recognized and solidified the then current practical inequalities of nations, the General Assembly, with its democratic inclusion of all nations with equal voices, recognized and solidified the political aspiration of formal equality. The recognition of the formal equality of states developed as the new unifying force for international peace and cooperation.

The rise of nationalism also engendered self-determination, the corollary to the concept of formal equality.<sup>135</sup> The term self-determination originally appeared during World War I and was used to justify the liberation of Central and Eastern European peoples from foreign domination,<sup>136</sup> but was not applied to colonized Africans. Its inclusion in the Charter reflected and foretold of the increasing universality of the concept. The Charter created, as one of its principal organs, a Trusteeship Council.<sup>137</sup> The Trusteeship Council was designed to oversee the administration of trust territories and, among other things, to "promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development toward self-government or independence as may be appropriate to the

134. *Id.* art. 1, para. 2. This paragraph states that one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.*

135. Professor Hans Morgenthau has attributed this appearance of the concept of formal equality to the decline of the "international society." See H. MORGENTHAU, *supra* note 116, at 254-57. Morgenthau sees, in spite of the wars and competitiveness amongst European nations, a fairly homogeneous international society in Europe that politically dominated the globe. *Id.* at 255, 357. The community of heads of states and foreign service diplomats viewed their allegiance to a broader international community rather than to their individual countries, and much of the direct aggressive competitiveness that European states held towards each other was directed into the colonization of so-called "politically empty spaces" in Africa, Asia, and the Americas. *Id.* at 357-59.

In Morgenthau's view, the rise of nationalism led to the decline of the international society. *Id.* at 254-57. The foreign service and diplomatic community fragmented itself toward individual states to the detriment of the unifying values of the international society. *Id.* at 256-57.

136. *Id.* at 100.

137. U.N. CHARTER art. 7, para. 1.

particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned."<sup>138</sup> Colonialism was hardly denounced, but the logical conclusion of the supposed benefits of trusteeship—self-government or independence—was finally enshrined as an international goal.

## 2. The Development of the Three Goals of the U.N. Charter

The three goals of the U.N. Charter have endured and adjusted to changing circumstances. The first goal, maintaining international peace, has continued to be of paramount concern. While peace has not always been successfully maintained, the world has avoided, so far, a third world war.<sup>139</sup> One significant development is that the broad range of activity monitored by the United Nations as possibly portending war has come to include some egregious human rights violations. The involvement of the United Nations in the independence movement in Zimbabwe (then Rhodesia) is an example. The efforts of the United Nations in encouraging the United Kingdom to grant Rhodesia independence was an aspect of its responsibility over non-self-governing territories as well as evidence of its commitment to eradicate human rights violations, which involved racially discriminatory policies.<sup>140</sup> Even after the white minority regime in power declared unilateral independence in 1962, the United Nations continued to press for the eradication of racial discrimination. In fact, the Security Council went so far as to impose economic sanctions.<sup>141</sup> Indeed, international peace bears a close relationship to the protection of human rights.

The concepts of human rights and fundamental freedom, a second goal of the U.N. Charter, have gained international acceptance. What started as a goal in the U.N. Charter and the

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138. *Id.* art. 76. The League of Nations had a similar system, administered by the permanent mandates commission. See Humphrey, *supra* note 116, at 2.

139. A short list of "regional" wars would include: the Korean War, the Vietnam War, and the Iran-Iraq war, as well as various battles in the Middle East, Eastern Europe, and Africa.

140. See *INTERNATIONAL HUMAN RIGHTS*, *supra* note 116, at 391 (citing G.A. Res. 1760, 17 U.N. GAOR, Supp. (No. 17) 3, U.N. Doc. A/5517 (1962)).

141. See S.C. Res. 253, 23 U.N. SCOR at 5, U.N. Doc. S/INF/23/Rev.1 (1968); S.C. Res. 232, 21 U.N. SCOR at 7, U.N. Doc. S/INF/21/Rev.1 (1966).

Universal Declaration of Human Rights<sup>142</sup> has developed into numerous treaties and conventions giving greater definition and legal weight to the concept of human rights.<sup>143</sup> While the exact contours of the individual rights to be legally protected remains hotly debated,<sup>144</sup> the very existence of the treaties, the regional and international human rights mechanisms, and the debate itself show the clear expansion of the kinds of matters now considered human rights concerns.<sup>145</sup>

Finally, the modern legacy of the third goal of establishing formal equality and self-determination as articulated in the U.N. Charter has been a decline in European hegemony. The expected bureaucratization of colonization has been partially<sup>146</sup> undermined by the increase in liberation wars and the ultimate decolonization of primarily African states at a fairly rapid pace.<sup>147</sup> These new, so-called "Third World" countries have created their own alliances based upon different cultural and economic perspectives—for example, the non-aligned states<sup>148</sup> and the Organization of Petroleum Exporting Countries ("OPEC")—and have injected themselves into the largely European-dominated arena of superpower politics. Consequently, the international arena has taken on a diverse and

142. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948); see Humphrey, *supra* note 116, at 6-7.

143. See INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (R. Lillich ed. 1986) (containing 49 international human rights treaties, agreements, and other instruments).

144. See McDougal, Lasswell & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U.L. REV. 919 (1975).

145. See generally L. GOODRICH, *THE UNITED NATIONS IN A CHANGING WORLD* 159-78 (1974) (detailing development of Human Rights Protection since existence of U.N. Charter).

146. The author uses the term "partially" because the Trusteeship Council continues to function, and there remain a number of countries, such as Namibia, who are still in the process of acquiring their independence. *But cf.* Wren, *An Early Independence Is Now Seen for Namibia*, N.Y. Times, Jan. 12, 1990, at A6, col. 1 (stating that Namibian independence could be proclaimed by mid-March, 1990).

147. See generally U. SUD, *DECOLONIZATION TO WORLD ORDER: INTERNATIONAL ORGANIZATIONS AND THE EMERGING PATTERN OF GLOBAL INTERDEPENDENCE* (1983) (discussing international organizations, colonialism, and decolonization).

148. See generally R. JACKSON, *THE NON-ALIGNED, THE UN AND THE SUPERPOWERS* (1986) (defining non-alignment and describing the origins and evolution of the non-aligned movement); Statement by His Excellency General Soeharto, President of the Republic of Indonesia, Head of the Indonesian Delegation to the Summit Meeting of the Third Conference of Non-Aligned Countries (Lusaka, 1970) (describing history of conferences between non-aligned countries, general policy of non-alignment, and future goals for non-aligned countries).

multicultural character that is, and should be, increasingly reflected in international law.<sup>149</sup> The historical development of the three U.N. Charter goals sets the context for amending the definition of refugee.

B. *The Application of the Goals of the U.N. Charter to the Expanded Definition of Refugee*

The argument set forth in this Article for amending the international definition of refugee coincides with the underlying concern of the United Nations for world harmony. First and foremost, if an expanded definition of refugee is to prove successful in alleviating burdens for both refugees and receiving countries, international cooperation is essential.

One could imagine a "free market" mode of international relations wherein each country acted solely with its own interests in mind. One might expect or hope that from this a rational international order would develop. This Article, however, subscribes to the view that the historical international

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149. This need for a multicultural or diverse perspective in international law is also reflected in the private international law arena, especially in international contracts. See Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 *STAN. J. INT'L L.* 263, 267-70 (1986) (discussing lack of input of developing and socialist countries in 1964 Hague Conference at which Hague Conventions were adopted and suggesting need for "broadening the base of participating countries"). The kinds of problems a multicultural perspective in the contracts area embraces often affect different levels of economic development. For example, in the debates on the U.N. Convention on Contracts, developed and developing countries disagreed about the amount of time a buyer has to notify a seller of a nonconformity and what the nature of the remedy against a buyer who fails to comply with contract terms in a timely manner should be. *Id.* at 289-93. The concern of the developing nations was that in buying highly technical equipment from developed nations, a buyer in a developing country might have to wait one year for a qualified expert to examine the goods for defects, which might be far too long a period of time from the developed country seller's perspectives. *Id.* at 300-03. A compromise on this issue was eventually reached, but the existence of such compromises over diverse perspectives has led to much debate over the U.N. Convention on Contracts itself. For supporting positions see *Proposed United Nations Convention on Contracts in the International Sale of Goods: Hearings on Treaty Doc. 98-9 Before the Senate Comm. in Foreign Relations*, 98th Cong., 2d Sess. 77-82 (1984) (Statements/letters of National Foreign Trade Council, American Association of Exporters and Importers and American Bar Association). For opposing views see *id.* at 73-76 (Statements of Armstrong World Industries and Professor Arthur Rosett) and Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 *OHIO ST. L.J.* 265 (1984).

movement toward cooperation and away from the "free market" mode is a positive and rational one.

This is not, of course, to say that national self-interest has disappeared. Rather, this Article recognizes and affirms the idea that national self-interests are inextricably bound to and furthered by coordinated international responses to world concerns. Especially in the context of refugee concerns, a coordinated international approach is the most rational. This is true, in part, because concerns for individual human rights are better handled when such matters are subject to international scrutiny. The treatment by a state of its own nationals and refugees should be reviewed by the world community, rather than leaving the treatment of individuals solely to domestic legislative and judicial mechanisms (that may or may not exist) within the country in which those individuals reside or of which they are citizens.<sup>150</sup> Moreover, such an approach is more rational for refugees because once an individual flees across a state border the problem becomes inherently international in scope. Accordingly, an international solution seems the most appropriate.<sup>151</sup>

An expanded definition of refugee is also consistent with the three main goals of the U.N. Charter. A definition that includes victims of war and civil strife is consistent with the goals of (1) maintaining peace through the monitoring and elimination of human rights violations; (2) advancing and expanding human rights and fundamental freedoms; and (3) recognizing a multicultural approach to international law in a world of equal nations.

### 1. An Expanded Definition of Refugee and the Goal of Peace

The goals of peace and human rights are intertwined. The maintenance of peace includes monitoring human rights violations, which engender international tension and portend war. Indeed, refugee influxes have been at the heart of certain wars.

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150. See generally Humphrey, *supra* note 116, at 3-10 (discussing mid-20th century changes in international law wrought by the rise of human rights law).

151. See R. COX & H. JACOBSEN, *THE ANATOMY OF INFLUENCE: DECISION-MAKING IN INTERNATIONAL ORGANIZATIONS* 420-21 (1973). As these authors noted, "[I]f a task is both essential and on an international scale, some international structure or organization must exist or be created to carry it out." *Id.* at 421.

For example, the brief war between India and Pakistan in 1971 underscores the interrelationship between refugee influxes, gross human rights violations, and peace. The tensions between India and Pakistan during this period were heightened due to the large flow of forced migrants fleeing Pakistan into India and the failure of the international community to classify these forced migrants as refugees. In 1947, the British Parliament passed the India Independence Act creating both Pakistan and an independent India.<sup>152</sup> Pakistan was comprised of two separate parts. West Pakistan was populated primarily by Urdu-speaking people who, although a minority, were economically and militarily dominant over the majority Bengali-speaking inhabitants of East Pakistan.<sup>153</sup> Ethnic conflicts in Pakistan erupted in March 1971 after the first free elections in October 1970. East Pakistan wanted its own country (Bangladesh)—an idea the government of Pakistan rejected. Thousands of civilians were killed; the prime targets were opposition politicians, students, professors, and Hindus.<sup>154</sup> From this mixture of civil strife, gross human rights violations, and political and ethnic persecution, millions of Pakistanis fled to India. This influx of Pakistanis heightened pre-existing tensions between India and Pakistan, leading to war on December 3, 1971, which resulted in the establishment of the separate state of Bangladesh.<sup>155</sup>

There is still some question as to whether India would have been ready and able to go to war without being able to characterize the influx of Pakistanis as a civilian invasion.<sup>156</sup> The international community, however, merely watched and failed to provide relief to refugees under the 1967 Protocol. The Committee on the Elimination of Racial Discrimination seemed to reject the notion that the "tragic events in East Pakistan" were racially based.<sup>157</sup> Moreover, despite an investigation of the situation by the International Commission of Jurists,

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152. Indian Independence Act, 1947, 10 & 11 Geo. 6, ch. 30, § 1.

153. *INTERNATIONAL HUMAN RIGHTS*, *supra* note 116, at 485.

154. *Id.* at 486.

155. *Id.*

156. *See id.* at 488 (noting characterization made by Indian representative at United Nations).

157. Report of the Committee on the Elimination of Racial Discrimination, 28 U.N. GAOR, Supp. (No. 18) at 40-41, U.N. Doc. A/9018 (1973).

which concluded that the actions of the Pakistani army against Hindus and others constituted a violation of the U.N. Treaty on Racial Discrimination,<sup>158</sup> the sheer numbers of Pakistanis—ten million—would have made individual determinations as envisioned by the 1967 Protocol impossible. Thus, the welfare of the (ten million) Pakistanis who fled to India would have been better met and the tensions between India and Pakistan might have been reduced, rather than heightened, if the international community could have characterized these Pakistanis as refugees under an internationally accepted definition.

The threat of instability, which massive influxes of refugees pose, has been described in war-like terms in other situations. A Malaysian newspaper once noted that the influx of Vietnamese refugees into Malaysia was “as much a weapon of war as a softening-up raid by waves of bombers.”<sup>159</sup> Similarly, commentators in the United States have described Cuban refugees as “bullets aimed at this country.”<sup>160</sup> The causes of wars, like the India-Pakistan conflict, are too complex to be completely prevented by prompt coordinated international responses to influxes of refugees, but in the spirit of the U.N. Charter’s maintenance of peace through monitoring international “situations which might lead to a breach of the peace,”<sup>161</sup> international intervention in such a situation is an essential response to prevent war.

## 2. An Expanded Definition of Refugee and the Goal of Human Rights

The need to expand the definition of refugee is also in keeping with the promotion of human rights. Human rights principles are often violated when masses of individuals are forced to flee because of war or civil strife.<sup>162</sup> As in the war

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158. See INTERNATIONAL COMMISSION OF JURISTS, THE EVENTS IN EAST PAKISTAN, 1971, at 51-53, 81-82 (1972). See generally INTERNATIONAL HUMAN RIGHTS, *supra* note 116, at 487 (noting that International Commission of Jurists called international conference in 1971 to set up commission to inquire into events in East Pakistan). See also International Convention on Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

159. Garvey, *supra* note 12, at 486 (quoting New Straits Times (Malaysia) (June 1987)).

160. *Id.*

161. U.N. CHARTER art. 1, para. 1.

162. See Garvey, *supra* note 12, at 485 n. 17.

between India and Pakistan, whether ten million Pakistanis were maimed and killed as a result of racial discrimination, political persecution, or the effects of civil war, all ten million have had fundamental rights and freedoms violated.<sup>163</sup> By recognizing an international legal obligation to aid victims fleeing war conditions, mechanisms intended to promote human rights and fundamental freedoms would be advanced.

### 3. An Expanded Definition of Refugee and the Goal of Formal Equality and Self-Determination

The expansion of the international legal obligation to aid migrants who include war and civil strife victims is also supported by the goal of establishing formal equality and self-determination. The U.N. Charter concept of formal equality envisions the legal equality of all nations large and small. The concept of self-determination envisions that groups of culturally or religiously related people can aspire and attain a recognition of their community, ultimately through the creation of new sovereign states that will be respected equally. Expansion of the international definition of refugee to include other circumstances that cause forced migration is consistent with these goals. If all states are equal, then all of their experiences with forced migrants should be considered and included in any international definition that claims to respond to an international, and not merely a regional, refugee crisis.

Arguably, such a vision of equality goes beyond mere formal equality. Formal equality may demand that whatever Western definition is developed, it be applied equally by all countries. The United Nations, however, has caused the international community to adopt a multicultural view.

## IV. *THE BLENDING OF HISTORICAL EXPERIENCES INTO A MULTICULTURAL VIEW*

The modern legacy of the United Nations' goals has been a decline in European hegemony and an increase in the multicultural character of international law. An expanded definition of refugee furthers these goals because by including not only persecution, but also war and civil strife as legitimate

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163. See, e.g., Universal Declaration of Human Rights, arts. 3, 5, G.A. Res. 217A, U.N. Doc. A/810, at 72-73 (1948) (noting right to life and right to be free of torture).



causes of forced migration, such a revised definition encompasses both the cause traditionally identified with the European experience and those causes identified with the African and Asian experiences.

#### A. *The European Concept of the "Nation-State"*

Conceptually, the problem of refugees is of European origin. The notion of the "territorial state" or "nation-state" is a product of European history.<sup>164</sup> One corollary to the creation of the nation-state was that the individual was defined in relation to these political divisions. People who identified with a state and its territory were presumed to be protected by the state even when away from it. In contrast, a state owed no responsibility to persons who left its territory if such persons could not identify with such state. This refusal of states to accept responsibility for such "strangers" led to the development of an international definition for refugees.

#### B. *Non-Territorial Development in Africa*

Despite the relatively recent adoption of territorial sovereignty by African nations, their peculiar history has affected their attitude towards refugees. While territory, itself, has been sometimes jealously guarded, people have not been associated with a territory to the extent they have been in European experiences. African history is a product of community relationships that are not territorially based.<sup>165</sup>

In pre-colonial Africa, the existence of nomadic peoples

164. See J. HERTZ, *THE NATION-STATE AND THE CRISIS OF WORLD POLITICS* 99-123 (1976) (tracking rise and demise of territorial state). The concepts of sovereignty and nationalism developed with the establishment of international law. *Id.* at 111-12.

165. The author uses African history as a stark example because the expanded definition of refugee originated in the African Convention. It is important to note, however, that other so-called "Third World" nations also have histories far less dependent on the concept of a territorial state. See, e.g., *STUDIES IN THIRD WORLD SOCIETIES, CONTEMPORARY NOMADIC AND PASTORALIST PEOPLES: AFRICA AND LATIN AMERICA* (1981) [hereinafter *STUDIES IN THIRD WORLD SOCIETIES*].

Chinese history also reveals that the concepts of nation-state and nationalism are relatively new, having taken hold in the early twentieth century. See J. LEVENSON, *CONFUCIAN CHINA AND ITS MODERN FATE* 98 (1968). There was always the concept of *kuo* as a "local political unit," while it is now understood to encompass "the nation," in classical times the *kuo* was subordinate to a greater Chinese Empire, *t'ien-hsia*. This conceptual empire went beyond territorial China and beyond the concept of territory

whose lifestyle necessitated constant movement is a clear example of the lack of dependence on a fixed territory in African communities. For example, in pre-colonial West Africa, the Fulani people were well known in oral and written history as consisting of two groups: one with a nomadic lifestyle, herding cattle, sheep, and goats and the other with a settled lifestyle, serving as scholars, judges, and kings.<sup>166</sup> Whereas the nomadic group, the Fulanin daji, moved with their herds, the other group, the Fulanin gida, settled to establish kingdoms by the nineteenth century.<sup>167</sup>

In looking at the nomadic Fulani more closely, studies have shown that their "disrespect" for territorial borders did not make them "aliens" within the communities in which they interacted. Rather, the Fulani, who moved to the Central Sudan as part of their customary search for pastures, by 1804, had come to be regarded as equal citizens of that region.<sup>168</sup>

The Fulani were important contributors both economically and politically. Economically, they held a near monopoly on the ownership of cattle, and thus, were the main suppliers of meat, milk, butter, hides, and skins.<sup>169</sup> Politically, the Fulani remained active both before and after the introduction of Islam.<sup>170</sup>

The Fulani are but one example of a number of nomadic groups in Africa who, although mobile, developed complex social, political, and economic relationships with both their sedentary relatives and other groups.<sup>171</sup> In African history, where

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or political power to "the regime of value," the mark of "civilization" that transcended boundaries. *See id.* at 98-99.

166. PASTORALISTS OF THE WEST AFRICAN SAVANNA xiv-xv (M. Adamu & A. Kirk-Greene eds. 1986).

167. *Id.*

168. M. Adamu, *The Role of the Fulani and Twareg Pastoralists in the Central Sudan, 1405-1903*, in PASTORALISTS OF THE WEST AFRICAN SAVANNA, *supra* note 166, at 55-56.

169. *Id.* at 57. The Fulani cattle also supplied manure for use by the settled farmers of the region. *Id.*

170. *Id.* at 58-59. The Fulani participated in the Islamic military reform campaigns of the second half of the eighteenth century that led to the overthrow of the existing governments and the establishment of emirs. *Id.* Many Fulani men were chosen to fulfill the emir positions. *Id.* at 59. This actually led to many pastoralist Fulani becoming sedentary. *Id.*

171. *See generally* PASTORALISTS OF THE WEST AFRICA SAVANNA, *supra* note 166 (examining historical perspectives, language, literature, and social and economic aspects of nomads in West Africa); STUDIES IN THIRD WORLD SOCIETIES, *supra* note 165 (examining different nomadic and pastoral groups in both Africa and Latin America).

territorial boundaries were much more fluid than in the traditional nation-state construct, nomads were not mere visitors to the communities through which they travelled.<sup>172</sup> Often times the nomads' herds were essential to the economic life of these communities<sup>173</sup> and the nomads would also participate in the political life of their communities. The responsibility of the government to the individual, then, transcended territorial borders.

In post-colonial African history, territorial sovereignty has become a prominent issue. While African states after their independence have come to guard carefully their colonial borders,<sup>174</sup> these boundaries, drawn by the former colonial powers, reflected little, if any, attempt to consider "tribal" or ethnological factors.<sup>175</sup> People from a variety of different groups were placed together under the banner and within the territory of one state, while relatives in some of these same groups were placed under a different banner and within the territory of a different state. For example, one can see by following language patterns that the aforementioned Fulani are now found in contemporary Guinea, Upper Volta, Niger, and Nigeria.<sup>176</sup> Thus, these territorial divisions led African countries to absorb refugees from neighboring countries. This African response reveals why African states were not viewed as requiring UNHCR aid in the early 1960s. During this time period, it was

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172. The permeability of borders is now perceived as a problem by modern African nation-states where minority communities of nomads continue to live in traditional ways. See PASTORALISTS OF THE WEST AFRICA SAVANNA, *supra* note 166, at xiii. For similar concerns expressed in East Africa see STUDIES IN THIRD WORLD SOCIETIES, *supra* note 165, at 16.

173. Some would argue that economic benefits provided on a consistent basis by "foreigners" is not sufficient to establish "membership" in a community. A good example would be the use of Mexican labor in the United States. Starting in 1942, the United States entered into a series of agreements with Mexico for the temporary importation of some four to five million Mexican agricultural workers under the "Bracero Program." See T. ALEINIKOFF & D. MARTINS, *supra* note 11, at 175 n.a. The program ended in 1964 but is believed to have created the current historical pattern of Mexican migration and employment in the United States. Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 79-80 (1975). Studies suggest that the continued use of agricultural labor in the Southwestern United States indicates a need in foreign labor that is often satisfied through extralegal channels. T. ALEINIKOFF & D. MARTINS, *supra* note 11, at 174 n.3.

174. See I. BROWNLIE, AFRICAN BOUNDARIES 7 (1979).

175. See, e.g., *id.* at 6-7.

176. See PASTORALISTS OF THE WEST AFRICAN SAVANNA, *supra* note 166, at xv.

the European states that became the primary recipients of UNHCR aid.<sup>177</sup>

An expanded definition of refugee that incorporates the concept of territorial sovereignty as well as the notion of extra-territorial responsibility would thereby reflect the contemporary multicultural nature of international law.

#### V. *THE PRACTICAL CONSEQUENCES OF AN EXPANDED REFUGEE DEFINITION*

The need to respond to current problems and the desire to attain enunciated international goals necessitate that the international community revise the definition of refugee to include victims of war and civil strife. There are, however, two noteworthy arguments against such a revision. The first argument is based on the concern that there are insufficient national and international resources to aid these "extra" refugees. The second argument is based on the concern that a state's ability to conduct foreign policy would be impaired were the definition of refugee to be revised.

##### A. *Availability of National and International Resources*

The concern with the sufficiency of existing funds to support an expanded definition of refugee implicates both the state's moral obligation to help persons in need and its need to protect its own sovereignty by conserving its limited social services in order to maintain internal social tranquility. While it may be desirable to expand international protection to include war victims, how can the international community afford to do so? An unofficial, ad hoc expansion of international protection as urgent situations arise may be inconsistently applied, but it may yet be the only way that each state can control the costs of providing aid. When the combination of sufficient economic resources and social acceptance align to make acceptance of any group of war victims practical, a state is al-

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177. See E. NGOLLE, *supra* note 43, Table 23, at 115 (compiling statistics from reports of the UNHCR (1963-1980)). While African refugees "spontaneously settle," some studies indicate that the costs of absorption by ethnic or tribal groups is very high. Kinship groups may absorb their relatives but the refugee relations may live in extreme poverty and insecurity while going unnoticed by governments and agencies. See L. ERIKSON, G. MELANDER & P. NOBEL, *AN ANALYSING ACCOUNT OF THE CONFERENCE ON THE AFRICAN REFUGEE PROBLEM 19-20* (May 1979).

lowed and encouraged to accept such refugees. On the other hand, when resources are scarce or native populations are hostile to any particular group of refugees, a state is free to reject such war victims without any concern for violating international norms. It is the best that can be done given limited resources.

There are, however, a number of responses to the limited resources argument against expanding the definition of refugee. In fact, the issue is not whether resources, national and international, are unlimited, but rather whether resources would be unduly stretched if victims of war and civil strife were included in the international definition. One indication that resources are sufficient is presented by the UNHCR's record of expenditures, which reveals that much of its resources are already spent on victims of war and civil strife. With the proportion of forced migrants fitting into the traditional 1967 Protocol definition decreasing and that of victims of war and civil strife increasing, recognition of war and civil strife victims as refugees would merely establish a legal obligation to aid these forced migrants.

Even if resources would be strained, the international community should not ignore the needs of increasing numbers of victims of war and civil strife. One could seek to balance the seriousness of the nature of limited resources with the recognition of the equally imperative moral claim of war victims on international resources. For example, the UNHCR has suggested that refugees covered by the "wider concept" might not be entitled to the full panoply of rights enjoyed by those refugees covered under the 1967 Protocol.<sup>178</sup> Under the 1967 Protocol, refugees are entitled to certain rights—sometimes on a par with nationals and sometimes only on a par with other aliens—that allow the refugee to settle to some degree in the country of refuge.<sup>179</sup> One way to reduce national costs while still accommodating these refugees would be to modify some of the rights granted under the 1967 Protocol as they apply to victims of war and civil strife.

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178. See *supra* note 71 and accompanying text.

179. See 1967 Protocol, *supra* note 4, art. I(1), 19 U.S.T. 6223, 6225, T.I.A.S. No. 6577, at 39, 606 U.N.T.S. 267, 268 (adopting articles 2-34 of 1951 Convention); 1951 Convention, *supra* note 3, arts. 2-34, 189 U.N.T.S. 137, 156-76.

Some rights accorded under the terms of the 1951 Convention and the 1967 Protocol such as freedom of religion<sup>180</sup> and protection of artistic rights<sup>181</sup> cost little for the host government and should remain intact. The maintenance of other rights, however, may be costly for the host country. The first of the two most obvious examples is article 17, concerning wage-earning employment.<sup>182</sup> Article 17 recognizes states' concern with protecting their national labor market by not requiring that refugees be treated as nationals automatically. Instead, states may treat refugees as they would treat other aliens, unless certain conditions are met.<sup>183</sup> Section 2 of article 17 provides that restrictive measures imposed on aliens be lifted if the alien fulfills one of the following conditions:

- a) He has completed three years' residence in the country;
- b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse; [or]
- c) He has one or more children possessing the nationality of the country of residence.<sup>184</sup>

One way to alleviate the possible burden caused by an influx of refugees due to war and civil strife would be not to give these refugees the benefits of this section. It could be argued that victims of war and civil strife should be considered temporary visitors in a way that persecution victims are not, because one could logically expect that an internal or external war would end long before the erosion of the prejudices that are at the root of persecution. Victims of war and civil strife would, accordingly, be entitled to only a minimum temporary refugee

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180. 1967 Protocol, *supra* note 4, art. I(1), 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 39, 606 U.N.T.S. at 268 (adopting articles 2-34 of 1951 Convention); 1951 Convention, *supra* note 3, art. 4, 189 U.N.T.S. at 156, 158.

181. 1967 Protocol, *supra* note 4, art. I(1), 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 39, 606 U.N.T.S. at 268 (adopting articles 2-34 of 1951 Convention); 1951 Convention, *supra* note 3, art. 14, 189 U.N.T.S. at 162.

182. 1967 Protocol, *supra* note 4, art. I(1), 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 39, 606 U.N.T.S. at 268 (adopting articles 2-34 of 1951 Convention); 1951 Convention, *supra* note 3, art. 17, 189 U.N.T.S. at 164.

183. 1967 Protocol, *supra* note 4, art. I(1), 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 39, 606 U.N.T.S. at 268 (adopting articles 2-34 of 1951 Convention); 1951 Convention, *supra* note 3, art. 17, § 1, 189 U.N.T.S. at 164.

184. 1967 Protocol, *supra* note 4, art. I(1), 19 U.S.T. 6223, 6225, T.I.A.S. No. 6577, at 39, 606 U.N.T.S. 267, 268 (adopting articles 2-34 of 1951 Convention); 1951 Convention, *supra* note 3, art. 17, § 2, 189 U.N.T.S. 137, 164.

status, such as a place to stay with food and shelter, but no right to work.

Wars, however, can continue for years, and the more humanitarian approach might be to allow these victims of war and civil strife to work on a par with other refugees, but without an automatic lifting of restrictions after three years. Instead, conditions in the refugees home country could be reviewed to determine whether a safe and voluntary repatriation were possible.<sup>185</sup> A much longer period of time could be required before the benefits of residency were granted.

In a similar vein, the host country can control costs by not automatically lifting restrictions on those refugees who have married nationals. Requirements on the length of the marriage or an inquiry into its "validity"—that it was not entered into for immigration benefits—could be employed.<sup>186</sup> Such requirements or investigations would arguably cost less than providing social services to these refugees.

The second costly guarantee of rights is contained in article 23, which requires that refugees receive the same public relief and assistance as nationals.<sup>187</sup> When public assistance, even in wealthy countries, is at the subsistence level, it is diffi-

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185. While a detailed discussion of a tiered system of the rights accorded to refugees is beyond the scope of this Article, it is important to note that a review of conditions in the exporting country would need to rely upon a variety of different sources. For example, in the United States, the U.S. Department of State Human Rights Annual Report might be one source. Reports from governmental organizations interested in refugees or human rights concerns, such as Amnesty International, would be essential. In addition, information from both the government of the exporting state and any opposition sources within that country would also be necessary. The multiple sources requirement would avoid allowing a receiving government to claim that conditions had improved for political purposes. Analogous concerns have been raised in the United States in immigration proceedings where refugee determinations are made. Immigration judges are required to assess the objective basis for an alien's "well-founded fear" of persecution, in some cases relying upon brief State Department letters stating that "the situation has improved," when other sources give detailed accounts of human rights abuses. *See, e.g., Note, Salvadoran Illegal Aliens, A Struggle to Obtain Refuge in the United States, supra* note 10, at 304-07, 326-27 (discussing difficulty encountered by Salvadorans seeking asylum based on assertions of disruptive conditions in El Salvador contrasted with advice given by U.S. State Department to U.S. travellers to El Salvador on expected dangers).

186. Such requirements are used in U.S. immigration law. *See, e.g. Immigration Marriage Fraud Amendments of 1986, Pub. L. 99-639, 100 Stat. 3537* (codified as amended at 8 U.S.C. § 1101 (1988)).

187. 1967 Protocol, *supra* note 4, art I(1), 19 U.S.T. 6223, 6225, T.I.A.S. No.

cult to see how a reduction in expenses can be made by modifying this requirement. One solution would be to establish refugee camps. Camps have been used extensively in refugee assistance programs.<sup>188</sup> The virtue of the use of camps is twofold. First, public assistance costs can be reduced because provisions can be supplied in mass quantities. Indeed, it would be easier to receive and to distribute the resources from the UNHCR or from other governmental or charitable organizational resources to an essentially captive population than if such resources were to be distributed selectively as between nationals and refugees. Second, camps prevent any competition between refugees and nationals for jobs and the attendant social dislocation that can accompany competition between nationals and refugees for jobs or other scarce resources.

The drawbacks of camps are obvious. A captive population of "second class citizens" is an easy target when limited resources must be cut, especially in a country with economic troubles. These refugees are people without any political voice who may have few allies in positions of power. Conditions could, and have, become atrocious in certain camps.<sup>189</sup> In addition, there is the issue of how long refugees would be required to stay in such camps. Even if conditions were not terrible, a prison-like existence in a camp would be intolerable for any extended period of time. One could imagine the kind of situation that the United States faced after the great influx of Cuban Marielitos after 1980. From April through September, 1980, a Cuban exodus took place, resulting in the arrival of more than 120,000 Cubans in the ports of Florida.<sup>190</sup> Although many were granted asylum and released, by 1987

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6577, at 39, 606 U.N.T.S. 267, 268 (adopting articles 2-34 of 1951 Convention); 1951 Convention, *supra* note 3, art. 23, 189 U.N.T.S. 137, 168.

188. *See, e.g.*, I L. HOLBORN, *supra* note 8, at 468-75 (reviewing UNHCR programs after 1958 and discussing Camp Clearance Program designed to resettle refugees, and need for aid to refugees outside of camps); *see also* H. CHRISTENSEN, *SURVIVAL STRATEGIES FOR AND BY CAMP REFUGEES* (United Nations Research Institute for Social Development Report No. 823 1982) (reporting on situation in refugee camps in Somalia).

189. *See, e.g.*, *Temporary Suspension of Deportation of Certain Aliens, Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. at 55 (1984) (statement of the Honorable Sam Gejdensen, Connecticut Congressional representative, describing overcrowded, disease-ridden camps in Latin America).

190. *See* Reuters International News, Sept. 28, 1980 (noting halt in flow of



some 6,800 remained incarcerated indefinitely because of their criminal records, although some of their crimes were relatively minor.<sup>191</sup> Although Cuban Marielitos may be classified as refugees under the traditional definition because of persecution, a war may continue for many years, and refugees who flee such a war may find themselves in indefinite detention.

A grant of settlement rights to war and civil strife refugees might alleviate some of the problems associated with refugee camps. Initially, such refugees would be entitled at a minimum to a safe haven—a camp with food and shelter, safe from bombings, bullets, and torture. Receiving states would then be required to review, on a regular basis, the status of conditions in the country at war or in conflict. If conditions did not improve, then the rights outlined in the 1967 Protocol would gradually be introduced. Refugees would either be slowly incorporated into the society of the receiving state or moved to other countries. Refugees would not face indefinite detention and receiving countries would have time either to introduce these new refugees into the country or to work with the UNHCR and other countries to make alternate arrangements.

One way to maximize the prospect of a state receiving help from other countries would be to interpret a state's legal obligation to refugees in a broader fashion. Typically, when one thinks of the traditional refugee protected by the 1967 Protocol, the rights follow the individual. When an alien arrives at the borders or in the territory of a particular receiving state, the alien is entitled to a determination of refugee status. If the state grants refugee status, the particular receiving state owes the refugee certain obligations as outlined in the 1967 Protocol.<sup>192</sup> If a new legal obligation to all refugees were im-

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Cubans into United States that began in April after arrival of more than 120,000 Cubans arrived in United States since flow began).

191. See generally Audet, *Representing the Institutionalized Mariel Cubans—The Wisconsin Experience*, 1987 WIS. L. REV. 455, 459 (citing to Volsky, *Clamor Rises Over Detention of Cuban Refugees by U.S.*, N.Y. Times, Apr. 14, 1987, at A23, col. 4, stating that some of these Cuban Marielitos had been guilty of offenses as minor as stealing sheep).

192. Two points are important here. First, if a state has not signed and ratified the 1951 Convention or 1967 Protocol, then it is technically under no legal obligation to provide anything, unless an argument can be made that some or all of the rights in either of these instruments has passed into customary law and thus apply to all states regardless of whether the state has signed the document.

The second point is that even after a state signs and ratifies one of the instruments, the state may have certain domestic procedures to follow in order to create

posed on both receiving and non-receiving states, even if a state had few or no refugees at its border, it could be required by such a broad obligation to provide other kinds of assistance, such as money or food, either to the UNHCR or directly to over-burdened receiving states.

Such a broad obligation would be radically different from the traditional obligation imposed on states to aid refugees. Although a portion of the U.N. General Assembly's budget is allocated to fund the UNHCR, creating a situation where states, by paying their U.N. dues, contribute indirectly to the UNHCR, the majority of UNHCR funds come from the direct voluntary contributions of states. A broader obligation would make some portion of these voluntary contributions involuntary.

The disadvantages of a proposition that entails expanding the legal definition of refugee and the breadth of the legal obligation towards refugees are clear. A convention that requires a specific amount of money from states parties, even if it were defined as a percentage of some economic measurement such as gross national product, would not easily gain broad acceptance. Although a state might be willing to contribute voluntarily an amount it determined affordable, it might balk at having an international forum determine the amount of its obligation.

On the other hand, the proposition has its advantages. Aside from truly sharing the burden of refugees internationally, it also has the practical advantage of sparing the most economically vulnerable of the world's countries the prospect of handling the refugee burdens on just their own resources. Because the bulk of contemporary refugees originates in African and Asian countries, and because these refugees also tend to flee to neighboring African and Asian countries, a broad obligation on the part of all states would alleviate the burden en-

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domestic law which embodies the international requirements provided in the instrument. For example, in the United States, some scholars argue that without such enabling statutes, treaty law and customary international law are unenforceable, for the most part, in domestic courts. See Trimble, *A Revisionist View of Customary International Law*, 33 *UCLA L. REV.* 665 (1986). This would mean that even if a state had signed the 1951 Convention or 1967 Protocol, if it had passed no legislation, a legitimate refugee could be denied rights without any recourse in domestic courts. The state would be in violation of international law and other states could take various diplomatic steps to censure the state, but the individual refugee would have no legal basis for challenging the state's acts.

countered by those receiving states that are least able to provide for their own citizens as well as refugees.

The development of international institutions to coordinate aid for refugees would demonstrate a recognition of the international nature of the refugee problem and the need for international solutions. Without such a broad legal obligation, the solution is not an international one, but rather, a "ghettoized" one in whatever areas of the world are experiencing social dislocation through either persecution or war-like conditions.

While the advantages of such a radical re-conception of responsibility for refugees are many, this Article does not take that path. The virtue of merely expanding the definition of refugee within the traditional conception of responsibility to refugees is precisely that far from being a radical break; it is a logical outgrowth of both the need to respond in some way to growing numbers of forced migrants who flee war and the need to integrate international law with the history and traditions of sovereign states.

The issue of adequate resources for an expanded definition of refugee that includes victims of war and civil strife is a serious one. But, as has been explored, there are a variety of ways to imagine conserving or pooling resources in the event that an expansion of the definition actually engendered a significant increase in the numbers of refugees. A tiered approach, however, giving migrants of war and civil strife only a portion of the assistance commanded by persecution victims and gradually increasing that assistance over time, is a practical necessity and should not detract from the premise of this Article that victims of war and civil strife have the same moral claim to international aid as do victims of persecution. The important point here is that the reasons and needs for expanding the definition outweigh a simple "it will cost too much" argument and must be met with creative approaches to managing costs before facing the option of standing by while innocent people die.

#### B. *Foreign Policy Implications of Aiding Refugees*

The second objection to expanding the definition of refugees to include victims of war and civil strife is that a state's

ability to conduct its foreign policy will be hampered if it is required to accept certain forced migrants. The argument is that when a state admits a refugee into its territory it is making a negative statement about the country from which the refugee originates. If the country from which the refugee flees and the receiving country are enemies their may be no concern. But if the two states are friendly, such a negative statement could have adverse foreign policy repercussions.<sup>193</sup> Accordingly, the choice of granting refugee status may be necessary for states to conduct freely their own foreign affairs.

This concern also arises, however, with regard to refugees that flee another country because of persecution. While national interests can never be excluded from international relations, international law is and should be designed to set some limits on the manner in which states conduct their international affairs. Because the 1967 Protocol definition of refugee already imposes such limits on foreign policy considerations, an expanded definition of refugee should similarly be an acceptable constraint.

Indeed, victims of war and civil strife arguably implicate such foreign policy considerations to a lesser extent than do persecution victims, and consequently, the expanded definition, by creating a legal obligation, may depoliticize the act of accepting refugees.<sup>194</sup> The expanded definition would loosen

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193. See, e.g., Teitlbaum, *Immigration, Refugees, and Foreign Policy*, 38 INT'L ORG. 429, 439 (1984). This concern was addressed by one commentator, who discussed the views expressed by critics of U.S. refugee policies under President Ronald Reagan with regard to Salvadoran refugees. *Id.* (quoting 1982 Memorandum from the Central American Refugee Center on Foreign Policy). This commentator noted specifically that the United States could not acknowledge human rights violations such as persecution existing in an allied country, and that the United States did not want to insult El Salvador by making such accusations. *Id.*; see Note, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, *supra* note 10, at 318. This concern has also been expressed by U.S. officials with respect to Haitian refugees:

[T]here is no question that the flood of asylum claimants presents extremely difficult problems for immigration law and policy. Most come not from the Soviet bloc but from nations with which the United States has, or until recently had, close political ties. These nations, such as Haiti and El Salvador, would bitterly resent our granting asylum to their citizens.

Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 40 (1984).

194. This was something the African Convention intended to do as well, describing the grant of asylum as "a peaceful and humanitarian act [that] shall not be regarded as an unfriendly act by any Member State." African Convention, *supra* note 1, art. II, § 2, 1001 U.N.T.S. 45, 48.

the political bind felt by a state confronted with a refugee from a friendly state seeking refuge from civil war. Politically, it may well be easier to recognize that one's ally is in the throes of a civil war or under siege from some other aggressive state than to identify that ally as a state that persecutes its own citizens.

Expanding the definition of refugees to include victims of war and civil strife is feasible. Although such aid entails certain costs there are a number of creative ways to minimize costs without ignoring the plight of thousands of individuals. Foreign policy considerations are also important, but, as illustrated, expanding the definition produces no greater encroachment upon national sovereignty than does the current definition. In fact, an expansion of the definition would make it less politically compromising for countries to provide aid to refugees from war-torn countries.

## VI. *CONCLUSION*

The international legal definition of refugee should be expanded to include those individuals and groups who flee war and civil strife, as provided in the African Convention. This expansion should occur for several reasons. First, the expansion should occur because the office of the United Nations High Commissioner for Refugees has been progressively including such war victims within its assistance programs. Legalizing the expansion would provide consistent and necessary aid to those in need. Second, the expansion should occur because the causes of forced migration have changed, and refugees fleeing war and civil strife now account for the greatest proportion of forced migrants. Third, such an expansion is consistent with the goals of the international community as set out in the U.N. Charter. Fourth, the expansion should occur because refusing to expand the definition of refugee indicates a refusal to accept today's increasingly important multicultural perspective, which blends the historical perspectives and experiences of both developed and developing states. Finally, such an expansion of the international refugee definition is economically and politically feasible. The costs can be managed by employing creative solutions, and foreign policy tensions encountered by states confronted with refugees would be eased by expanding the refugee definition.