

5. Requests the Member-Governments to send in their observations and comments on (i) the questionnaire sent by the Secretary-General in March 1994 and (ii) Model Legislation set out in Doc. No. AALCC/XXXIV/Doha/95/2;
6. *Also requests* the Member-Governments to send their comments and observations on the proposed Legal Framework for the Establishment of Safety Zones for Displaced Persons in their Country of Origin prepared by the Secretariat;
7. *Directs* the Secretariat to study further the concept of Safety Zones in light of the comments received; and
8. *Decides* to include the item "Status and Treatment of Refugees" in the Agenda of the Thirty-fifth Session of the Committee.

(iii) Secretariat Briefs

A. Model Legislation on the Status and Treatment of Refugees

a. STRUCTURE

The Model Legislation on the Status and Treatment of Refugees proposed by the Secretariat comprises a preamble and Thrity-one sections arranged in Three Parts viz. General Provisions; (Sections 1-9); Rights and Obligations (of Refugees)—(Sections 10-24); and Organizational Arrangements (Section 25-31). Read together they set out the *rationae personae*, and *rationae materiae*, of the proposed legislation and also provide for the establishment of an administrative/executive organ to deal with matters relating to refugee status determination and the rights and duties of refugees in the receiving State. The last part also makes provision for quasi-judicial review of decisions in matters relating to the status and treatment of Refugees. The text of the Model Legislation on the Status and Treatment of refugees prepared by the Secretariat has already been circulated amongst Member States and has been annexed with this study.

b. GENERAL PROVISIONS (Sections 1-9)

Part I of the Model Legislation comprising nine sections addresses itself to such matters as (i) title, purpose and scope fo the proposed Act (Section 1-3); (ii) Definitions or use of terms (Section 4) (iii) the basic principles of the treatment of refugee (Section 5); (iv) Meaning of the term "refugees" (Section 6), (v) determination of a class of persons as refugees (Section 7); and (vi) exclusion and cessional clauses (Sections

8 and 9). Sections 1 and 3 dealing with the title and territorial applicability of the proposed legislation are self-explanatory and require no comment.

Section 2 of the proposed legislation in setting out the purpose seeks to reinforce and fortify the norm identified in the preamble of the proposed legislation i.e. the protection of persons who seek refuge. One criticism hitherto levelled against the legislative approach adopted by States to regulate refugees has been that the issue of refugee protection is approached as one of defining not the rights (of the refugees) themselves but rather the powers vested in refugee officials. It has been argued in this regard that the protection of refugees rights becomes an exercise of powers and discretion of those officials rather than enforcement of specific rights identified and generalized by law. In other cases, it is further argued, the realization of refugee rights is left to depend ultimately on the Ministerial discretion.

Mindful of this lacuna in some of the existing national legislations the AALCC Secretariat has proposed the couching of the purpose of the Act as establishing "a procedure for granting of refugee status to asylum seekers, to guarantee to them fair and due treatment and to establish the requisite machinery therefor".

(i) Basic principles

Section 5 of the Model Legislation whilst enumerating the basic principles of the treatment of refugees seeks to ensure that an asylum seeker receives fair and due treatment from state officials engaged in relief and assistance work for the refugees. The other principles enumerated in this section are *non-refoulement* non-discrimination, and the principle of family unity.

(a) Non-refoulement

The principle of *non-refoulement* has been incorporated in all regional and international instruments relating to the status and treatment of refugees, including the AALCC Bangkok Principles and thus requires no explanation or justification for its inclusion. It may be stated, however, that the principle of *non-refoulement* is neither absolute nor universal. The clauses allowing exceptions to the principles of *non-refoulement* are incorporated in the 1951 Convention, the 1967 Declaration on Territorial Asylum as well as the Bangkok Principles of 1966 are a pointer that this principle is not absolute. In Japan—which has acceded to the 1951 Convention—the Courts are known to allow refoulement when the Minister of Justice

finds the application of the principle of *non-refoulement* "seriously detrimental to the interests of Japan and security thereof".

(b) Non-Discrimination

The principle of non-discrimination has hitherto been incorporated in the Universal Declaration of Human Rights, 1948 and the OAU Convention Governing the Specific Aspects of Refugee problems in Africa, 1969. The International Convention on the Elimination of all forms of Racial Discrimination, 1965, the International Covenant on Civil and Political Rights, 1966 and the practice of States more than affirm that the principle of non-discrimination is a generally accepted principle of international law and that discriminatory practices of States are not permissible. However, as much as the reference to a "membership of a particular social group or political opinions" found in Article IV of the OAU Convention is omitted in the present clause the principle of non-discrimination incorporated herein may be considered as narrow and restricted in its scope and therefore may require further consideration.

(c) Family Unity

As regards the principle of family unity, it draws its strength from the Universal Declaration of Human Rights, 1948, the practice of competent international organizations in the field of humanitarian affairs as well as from the practice of States. The International Covenant on Economic, Social and Cultural Rights 1966; the International Convention on the Protection of all Migrant Workers and Members of their Families, 1990 and the 1984 Declaration of Cartagena adopted by Central and South American States and the African Charter on Human and People's Rights, 1981 all incorporate the principle of family unity. It may be stated that the concept of family unity may be found in Article 37 of the Vienna Convention on Diplomatic Relations, 1961, which admits of and allows immunity in respect of the family of a diplomatic agent. More recently the Convention of the Rights of Child, 1990 reaffirmed the principle of family unity.

(ii) Definition of Refugee (Sections 6 and 7)

Sections 6 and 7 define the *rationae personae* of the proposed legislation and are at the core of the matter of refugee status determination both in respect of individuals and—in the event of a large influx—the determination of the status of a group or class of persons as refugees. Historically, the

term refugee was used in various instruments prior to 1951 to refer to the ethnic or territorial origins of different uprooted groups, and to their loss of national protection. There was in those instruments no reference to persecution in the sense that this term is currently employed.

The first formal reference to persecution as part of the refugee definition came in the 1946 Constitution of the International Refugee Organization (hereinafter called the IRO), a temporary specialized agency of the United Nations and the predecessor of UNHCR. Paragraph 7 (a)(i) of Section C of the Constitution of the IRO referred to a "persecution or fear, based on reasonable grounds owing to race, religion, nationality or political opinions"* as being a valid objection to repatriation. Paragraph 3 of Section A of Part I extended IRO's competence to the "victims of Nazi persecution" still within their country of origin. IRO's Constitution also made reference for the first time to "displaced persons" as well as refugees—a concept which came to be extensively applied to UNHCR's mandate.

Thereafter the United Nations Declaration of Human Rights in 1948 alluded everyone's right to seek asylum from "persecution," without further defining the term, and the General Assembly employed the term "well-founded fear of persecution" for specified reasons as the central criterion in determining the ambit of UNHCR's Statute.

This definition was essentially repeated in the 1951 Convention relating to the Status of Refugees while its application was limited to victims of persecution as a result of events occurring before January, 1951. The extent and scope of the term "refugee" was, however, expanded in as much as it included "membership of a social group" as one of the possible causes of persecution. States parties could also, if they desired, restrict the causative events to those occurring in Europe. The 1967 protocol to the Convention removed both the temporal limitation as well as the optional geographic limitation from this definition.

The definitions of the term "refugee" in the Convention and Protocol have, since 1967, remained unchanged, although it may be recalled that Recommendation E of the Final Act of the Conference of Plenipotentiaries which adopted the Convention in 1951, urged all States parties to extend its benefits as far as possible to persons who did not fall within its strict ambit. While this, of course, is not binding on States it is indicative of the general agreement, at that time, of the need for a liberal interpretation of the term refugee, by States in determining as to who should receive international protection.

* Section B

This need also became very apparent in regard to the UNHCR's activities, and by the 1960s the need for groups outside the original statutory definition to be assisted was clear, particularly in the wake of the General Assembly resolution on the Granting of Independence to Colonial Peoples and the independence movements in Africa.

Consequently there were a series of General Assembly resolutions, extending over the next two decades, which formally endorsed the High Commissioner's involvement with a much broader category of exiles. Thus in 1959 the General Assembly requested the High Commissioner to use his "good offices" to transmit contributions to "refugees not within the competence of the United Nations" (without defining this phrase further). Then from 1961 to 1963 a series of General Assembly resolutions endorsed UNHCR activities for refugees within the High Commissioner's mandate "or those for whom he extends his good offices".

This liberalizing trend was reinforced in 1969 by the OAU Convention Governing the Specific Aspects of Refugee problems in Africa, which added to the statutory refugee definition an important expansion of the term in so far as it applied in Africa, viz., that:

"Refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country 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"

This expanded definition remains the most formal extension of the refugee concept accepted by Governments, and has, following proposals made at the Arusha Conference of Refugees in Africa in 1979, been endorsed by the General Assembly as applying to UNHCR's activities in the African continent.

Sections 6 and 7 of the model legislation are based on these considerations. An additional factor in the favour of the term refugee adopted in section 6 is that most of the African States that have during the 1980s enacted legislation relating to the status and treatment of refugees have adopted somewhat similar definitions.

(iii) Exclusion clause (Section 8)

The previous conduct of an asylum seeker is a significant input in the decision concerning his refugee status to the point of automatically excluding

him from the protective umbrella of the international instruments. Thus, where a person has committed a crime against peace, a war crime or a crime against humanity or a serious non-political crime outside the country of refuge *prior* to his admission to that country as a refugee, or has been guilty of acts contrary to the Purposes and Principles of the United Nations, he can not claim refugee status under the proposed Act. Nor can the benefit of the principle of *non-refoulement* be claimed by a person who on reasonable grounds is regarded as a danger to the security of the country in which he is, or who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Such serious offences as the Unlawful Seizures of Aircraft, the Taking of Hostages and murder are just and fair grounds for extradition or expulsion of the individual.

This exclusion clause as incorporated in Article 1 (F) of the 1951 Convention has since been adopted in several national laws, for instance Article 8 of the Malawi Refugee Act, 1989; Section 3(4) of the Zimbabwe Refugee Act, 1983 and Section 3(2) of the Lesotho Refugee Act 1989. Article 33 paragraph 2 of the 1951 Convention, Article 3 of the General Assembly Declaration on Territorial Asylum 1967 and the 1966 Bangkok Principles are among the instruments which affirm the exception to the rule of *non-refoulement*. In sum, the principle of *non-refoulement* is not absolute and the term "refugee" excludes fugitives from justice.

Among the primary duties of a refugee is not to have committed a common crime. For if he has, he can be excluded from the country of refuge. The aim of the exclusion clause Article 1 F of the 1951 Convention is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime and to ensure that he does not enjoy the benefit of refugee status so as to exonerate himself from justice. It also seeks to render due justice to a refugee who has committed a common crime of a less serious nature or has committed a political offence. Only a crime committed or presumed to have been committed by an applicant "outside the country of refuge prior to his admission to that country as a refugee" is a ground for exclusion.

A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. Article 32 of the 1951 Geneva Convention provides that a refugee lawfully in the territory of a contracting State shall not be expelled "save on grounds of national security or public order". Such a refugee shall be expelled only in pursuance of a decision reached in accordance with due process of law. Except

where compelling reasons of national security otherwise require the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority". Further Article 33 which prohibits expulsion or return however provides in paragraph 2 that under extreme circumstances a refugee may be expelled when "there are reasonable grounds for regarding (him) as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country".

(iv) Cessation Clause

When the circumstances in connection with which a person has been recognized as a refugee have ceased to exist he can no longer continue to refuse to avail himself of the protection of the country of his nationality or return to the country of his nationality or to return to the country of his habitual residence. In such case the 1951 Convention ceases to apply. The Convention *a fortiori* does not apply to persons receiving protection or assistance from organs or agencies other than the UNHCR. This cessation clause of the 1951 Convention has *inter alia* been incorporated in Section 3 paragraph 5(1)(a) of the Zimbabwe Refugee Act 1983 and Article 4 of the Lesotho Refugee Act, 1983.

The Statute of the UNHCR envisages, it may be recalled, two forms of permanent solution for the problem of refugees viz. voluntary repatriation or their assimilation into new national communities paras a, b, and c of Section 9 of the proposed model conform to these objectives and draws its strength *inter alia* from Article II of the AALCC Bangkok Principles, 1966.

c. RIGHTS AND OBLIGATIONS OF REFUGEES (Sections 10-24)

(i) Rights of Refugees

Part II of the Model Legislation comprising *fifteen sections (10 to 24)* addresses itself to the Right and Obligations of Refugees whilst in the territories of the State affording them protection. The first of these viz. section 10 addressed to the rights of refugees offers alternative formulations. *Option A* is based on the express recognition of all rights set out in the regional and universal conventions to which the State is a party and recognizes and accepts the references to the term 'refugees' in those instruments as references to refugees recognized and protected by and under the proposed Act. This formulation draws its inspiration from

Section 12 of the Zimbabwe Refugee Act, 1983. This alternative would require that either the specific provisions of the instruments which are to be given effect be set out in a schedule or annexed to the proposed act or be identified and included in the corpus of the Statute.

The Second alternative i.e. *option B* is somewhat restrictive in its scope of application and apart from fair and due treatment without discrimination restricts the rights of the refugees to those that are generally accorded to aliens in particular such matters as right to property, right to transfer assets, and the rights to engage in agriculture industry etc. It may be recalled in this regard that the Bangkok Principles concerning Treatment of Refugees adopted by the AALCC had included the minimum standard of treatment and that Article VI of those Principles provided *inter alia* that a State shall accord to refugees treatment in no way less favourable than that accorded to aliens and that the standard of the treatment shall include the rights relating to aliens to the extent that they are applicable to refugees.

A refugee whether he is in the territory of the State of asylum, transit, or in the receiving State for resettlement enjoys certain basic civil rights. Article 14(1) of the Universal Declaration of Human Rights stipulates: "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The Preamble to the 1951 Convention relating to the Status of Refugees reaffirms that "human beings shall enjoy fundamental rights and freedoms without discrimination" and the Convention endeavours to assure refugees the widest possible exercise of these fundamental rights and freedoms.

The rights and protection to be afforded or granted to a refugee by a State are obligatory not only under the Convention but also under customary international law and general principles recognized by nations. It may be recalled in this regard that the Bangkok Principles adopted by the AALCC in 1966 recognizes this principles and a State, party to the 1951 Geneva Convention and its 1967 Protocol thereto, is obliged to grant the protection and rights to the refugees as described in the instruments. The 1951 Geneva Convention primarily codified the then existing international custom and general principles of law on the international legal rights and obligations of refugees.

(ii) Established Standards of Treatment

While the Convention on Refugees 1951 envisages the same treatment as is accorded to aliens generally, it goes a little further with respect to some specific rights, in respect of which refugees are granted more favourable

treatment than that accorded to aliens. The four established standards of treatment are: (i) National treatment i.e. the treatment accorded to nationals; (ii) The treatment accorded to nationals of the country of habitual residence; (iii) Most-favoured-Nation treatment accorded to nationals of a foreign country; and (iv) Treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

(a) National treatment

This standard is generally accorded to refugees as regards (a) freedom to practice their religion and the religious education of their children (Article 4); (b) access to courts (Article 16, paragraphs 1 and 2); (c) wage-earning employment of refugees who have completed three years residence in the country or who have a spouse or one or more children possessing the nationality of the country (Article 17, paragraph 2); (d) rationing (Article 20) (e) elementary education (Article 22, paragraph 1); (f) the right to public relief and assistance (Article 23); (g) matters of labour legislation and social security (Article 24) and (viii) taxation (Article 29).

(b) The standard of treatment accorded to nationals of habitual residency

This treatment is accorded to refugees with regard to (a) the protection of their intellectual property, such as inventions, trade marks and trade names, and of their rights in literary, artistic and scientific works (Article 14), (b) access to courts, (c) legal assistance and (d) exemption from *cautio judicatum solvi* in countries other than that of their habitual residence (Article 16, paragraph 3).

(c) Most-favoured-nation treatment

This treatment is granted to refugees as regards (a) their right to form and join non-political and non-profit making associations and trade unions (Article 15), (b) the right to engage in wage-earning employment, if the refugees concerned do not fulfil the conditions necessary for the enjoyment of national treatment (Article 17, paragraph 1).

(d) Treatment not less favourable than that accorded to aliens

The principles of treatment as favourable as possible and in any event not less favourable than that accorded to aliens is applied to refugees

with regard to (a) acquisition of movable and immovable property, property rights and interests (Article 13); (b) the right to engage on their own account in agriculture, industry, handicrafts and commerce, and to establish commercial and industrial companies (Article 18), (c) to practice liberal professions (Article 19); (d) to obtain housing (Article 21); and (e) to benefit from higher education (Article 22, paragraph 2).

(iii) Obligations of Refugees (Section 12)

The principle of national sovereignty requires that all persons including refugees, conform to the laws and regulations of the country of asylum as well as to the measures taken for the maintenance of public order. Section 11 of the Model Legislation draws its strength from Article 2 of the 1951 Convention and Article 3 of the OAU Convention of 1969.

(iv) Provisional Measures (Section 14)

Article 8 of the 1951 Convention stipulates that in time of war or other grave and exceptional circumstances a State may take provisional measures essential to national security in the case of a particular person pending a determination that the person is in fact a refugee and that the continuance of such measures is necessary in his case in the interest of national security. The stipulation of Article 8 of the Convention Relating to the Status of Refugees, 1951 should be read together with Article 44 of the Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War, 1949. Article 44 of the Fourth Geneva Convention, *inter alia* stipulates that in applying the measures of control the power in whose jurisdiction protected persons find themselves shall not treat refugees as enemy aliens, exclusively on the basis of their nationality.

d. ORGANIZATIONAL ARRANGEMENTS (Sections 25-36)

States generally determine their own policies regarding the admission of refugees and displaced persons and there are no international conventions which require the admission of refugees and displaced persons. States are free to enact their own laws and regulations governing such admissions. In deciding whom to admit, States are often guided by generally acceptable humanitarian principles of international law.

Several States are also known to screen refugees at the border and many reject refugees without any procedural review. The right of refugees to appeal, adverse or negative refugee status determination is unevenly available. According to a UNHCR report on the procedures employed by

States Parties to the 1951 Convention and to the Protocol of 1967 thereto, only 28 States permitted appeals. In Malawi, for instance, any person who is dissatisfied with a decision of the Refugee Committee in regard to his application for refugee status or revocation of its decision granting him refugee status may appeal to the Minister and the Minister may confirm, set aside or vary the decision.

The two-fold thrust of Part III of the Model Legislation is to provide a machinery for refugee status determination by a Bureau, Department, Division or Unit of the receiving State. In practice, however, the refugee status determination machinery varies from State to State. Thus, in Thailand the Government officials involved in the refugee status determination process for the Vietnamese Boat People were all drawn from the Ministry of Interior, who based their decisions on the recommendations of lawyers and the appeals considered by more senior officials from the same Ministry. In Malaysia the responsibility of refugee status determination both in the initial stages and the review stages was entrusted to the National Task Force for Vietnamese Illegal Immigrant composed of officials from the Army, Navy and Police. There the National Task Force, in turn, is known to have appointed officers to interview asylum seekers and both the first instance and review decisions were taken by senior officials of the National Task Force. In the Philippines the asylum seekers were interviewed and first instance decisions made by immigration officials. Appeals against the first instance decisions were reviewed by an Appeal Board comprising senior Government officials.

The African State practice is not very divergent. In Nigeria, a National Commission for Refugees, an Eligibility Commission and an Appeal Board for refugee Status determination and safeguarding the rights of asylum seekers were established in 1989. In Zimbabwe the Refugees Act of 1983 provides that any person who is aggrieved by a refusal of the Commissioner to recognize him as a refugee may appeal in writing to the Minister "The right to appeal against a negative decision of the Commissioner may also be executed in the event of withdrawal of recognition of a person as a refugee. In Malawi too, as mentioned above, any person dissatisfied with a decision in regard to his application for a refugee Status or revocation of the decision granting refugee status to him may appeal to the Minister who may confirm, set aside or vary the decision.

The Lesotho Refugee Act incorporates somewhat detailed provisions in this regard and establishes an Inter-ministerial Committee for the determination of Refugee Status, and a Refugee Advisory Board. Under that Act where the Minister on the advice of the Inter-ministerial Committee

for the Determination of Refugee Status decides not to recognize an asylum seeker as a refugee that person has the right to re-apply to the Minister to reconsider his application and the Minister may refer the matter to the Advisory Board who (the Board) shall then make recommendation on the same to the Minister for a final decision. The Lesotho Act goes on to stipulate that where after the reconsideration of the applicant's case the Minister decides to reject the recommendation of the Committee or the Board the applicant shall have the right to seek an appropriate relief from the High Court of Lesotho regarding his application.

It is against this backdrop that Part III of the draft of the Model Legislation entitled Organizational Arrangements aims at establishing an institutional and administrative machinery for matters dealing with refugee status determination. This part of the draft proposes the establishment of an executive organ and a review/appellate body for the purpose of judicial or quasi judicial review of the decisions, or orders of the executive body (Sections, 25, 26 and 27). This part also explicitly provides the composition and functions of both the executive organs as well as the review/appellate authority and other matters allied to their functioning. (Section 28 to 36).

ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

Model Legislation on the Status and Treatment of Refugees

An Act for the recognition and protection of persons who seek refugee status within the territory of this country.

Be it enacted by (as, for example, the Parliament, or the President and Parliament, etc of the concerned country) as follows:

GENERAL PROVISIONS

1. **Short title**—This Act/Law shall be called the Refugees (Recognition and Protection) Act, (year of enactment).
2. **Purpose of the Act**—The purpose of this Act is to establish a procedure for granting of refugee status, to asylum seekers, to guarantee to them fair and due treatment and to establish the requisite machinery therefor.
3. **Scope of the Act**—This Act shall apply throughout the territory of this State or in such areas of the State as the Government may notify.
4. **Definitions**—In this Act, unless the text otherwise requires—
 - (1) Asylum seeker' means an alien who in need of protection, seeks recognition and protection as a refugee.
 - (2) Member of his family', in relation to a refugee includes—
 - (a) the spouse (s) of the refugee;
 - (b) any unmarried child of the refugee under the age of majority;
 - (c) the father and mother of the refugee who, by reason of age or disability, are, mainly dependent upon the refugee for support; and
 - (d) any other person related to the refugee by blood or marriage who is solely dependent upon him;
 - (3) 'Identity Card' means a document issued under the provisions of this Act to a recognized refugee.
 - (4) 'Refugee' means a refugee as defined in Article 6;
 - (5) 'Refugee Committee' means the Committee established as an administrative organ by and under the provisions of this Act.