PAPUA NEW GUINEA AND THE WEST IRIANESE REFUGEES.

BY

B. Martin Tsamenyi*

I. INTRODUCTION.

In August 1962, the Netherlands transferred sovereignty over West Irian (also known as West Papua or Irian Jaya) to Indonesia, after several years of dispute over that territory. Since then, there has been continuous opposition to Indonesian authority by some sectors of the indigenous population in West Irian. A group of West Irianese formed an organization called Organisasi Papua Merdeka (OPM). This Organization which is aimed at securing independence for West Irian, is carrying out an armed struggle by way of a guerilla war against the Indonesian authorities. This situation has led to a constant flow of West Irianese into Papua New Guinea without travel documents.

The Papua New Guinea Red Cross reported that between February and June 1984, about ten thousand West Irianese were known to have entered Papua New Guinea without travel documents. This was the largest number that has entered Papua New Guinea at any time since West Irian was incorporated into Indonesia in 1969. Like the previous movements, the crossings in 1984 were closely linked with the conflict between the OPM and the Indonesian authorities. In February 1984, a group of West Irianese were reported to have proclaimed their independence from Indonesia by raising the OPM flag in Jayapura (capital of West Irian). This event led to a series of incidents including armed clashes between the OPM and Indonesian troops in Jayapura. The flag - raising incident also appeared to have precipitated fighting between OPM supporters and Indonesian soldiers in different parts of West Irian. There were reports of large-scale arrests of OPM activists by Indonesian authorities and reprisals against the civilian population (ACFOA Briefing June 1984:1).

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* LLB (Hons) Ghana; M'Int. Law; Ph.D ANU. Lecturer in Law, University of Papua New Guinea.

The events of 1984 brought several issues to prominence. First, there was the issue of human rights violations within West Irian. Second, there was the resultant crossings into Papua New Guinea by West Irianese, and the Papua New Guinean response. Third, there was the issue of the adequacy of Papua New Guinea's foreign policy in relation to Irian Jaya; and fourth, there was the issue of the status of the "border-crossers" which was interwoven into the other issues. During 1984, whether or not the West Irianese who crossed the Papua New Guinea-Indonesian border were called "border crossers" or "refugees" became a matter of substance. The Papua New Guinea, Indonesian, and Australian Governments preferred to call these people "border crossers. The OPM, most Papua New Guineans, relief agencies, and for the most part, the press, called them "refugees".

These events and those before them, have posed domestic problems for successive independent Papua New Guinea governments. Government treatment of the border crossers has often been the source of student protest at the Universities in Papua New Guinea. The crossings have also been important issues in Papua New Guinea's relations with Indonesia. Not surprisingly, the crossings have generated a lot of debate within Papua New Guinea. The legal aspect of the debate, which is the concern of this article, involves two main issues: (1) Whether the border crossers (or some of them) are genuine refugees; and (2) Whether (if the border crossers are refugees) Papua New Guinea is under any legal obligations to recognise this status in view of the fact that Papua New Guinea is not a party to the Refugee convention.

The aim of this article therefore, is to address the issues identified above. The first part of the paper discusses the different categories of crossers. The second part analyses who a refugee is under international law. The third part considers the refugee status of the crossers. The fourth part discusses the issue whether Papua New Guinea is under any international legal obligations towards the border crossers. The final section briefly examines the policy options available to the Papua New Guinea government in resolving the 'refugee' problem.

Although this article occasionally uses the term "border crossers" this is a matter of convenience. Articles 4, 5 and 6 of the **Basic Agreement between Papua New Guinea and Indonesia on Border Arrangments,** (October 1984) do not specifically address the official view that these people should be called "border crossers". It seems likely that the term "border crossers" was coined in order to avoid direct legal responsibility in relation to refugees.

II. CATEGORIES OF BORDER CROSSERS.

The West Irianese who enter Papua New Guinea may be placed in at least three categories, depending on their reasons for crossing. These include: (a) crossings for 'traditional' purposes; (b) crossings motivated by purely economic considerations; and (c) crossings induced by the OPM - Indonesia conflict. This categorization is based partly on speculation and partly on some fragmented information available.

(a) Crossings for 'traditional' reasons.

The first category of border crossers consists of people entering Papua New Guinea for what may be termed 'traditional' reasons. People in this group are those who cross the border to participate in traditional social and economic activities such as funerals, marriages, or for agricultural purposes such as gardening, fishing and hunting. These activities are necessitated by the (Melanesian) ethnic links among residents on both sides of the border. In fact, some villagers still have traditional land rights across the border (Kerlihy: 108-124). Article 4(1) of the 1984 Border Agreement between Papua New Guinea and Indonesia on Border Arrangements acknowledged as much:

> Each country shall continue to recognize and permit movement across the Border by the traditional inhabitants of the other country who reside in the Board Area and are citizens of the country concerned for traditional activities within the Border Area such as social contacts and ceremonies including marriage, gardening, hunting, collecting and other land usage, fishing and other usage of waters, and customary border trade.

One need not belabour the point that these 'traditional-oriented' movements predate colonization of the New Guinea Island, and consequently the West Irian conflict. The persistence of such movements to the present time illustrates the refusal or inability of these people to recognise an international boundary, artificially demarcated by colonial authorities. Again, the 1984 Border Agreement between Papua New Guinea and Indonesia recognised this when it provided in Article 4(2) that 'such movements shall be the subject of special arrangements between the two Governments and normal immigration, customs, quarantine and health requirements shall not apply'.

(b) Crossings for Economic reasons.

The second category of border crossers most likely comprise people in search of remunerative employment in Papua New Guinea. People in this category may be attracted to Papua New Guinea because the Indonesian side of the border is relatively less develo-

ped than the Papua New Guinea side (see generally Kerlihy). Given this situation, it is possible to assume a situation of clandestine movement into Papua New Guinea by West Irianese in search of jobs.

(c) **Crossings induced by the OPM-Indonesian conflict.**

The third group of border crossers consist of people caught up in the conflict between the **OPM** and Indonesia following the transfer of sovereignty. This group may be subdivided into three.

(i) In the first sub-group are the members of the **OPM** and their supporters. The members of the **OPM** enter Papua New Guinea for a variety of reasons: to regroup, to escape arrest and to receive logistical support. There is also some evidence that supporters of the **OPM** enter Papua New Guinea because of actual or perceived Indonesian reprisals against them (TAPOL).

(ii) The second sub-group includes neutral groups of people fleeing to Papua New Guinea as a result of the general insecurity generated by the conflict between the **OPM** and Indonesia.

(iii) The third sub-group may include some West Irianese who are anti **OPM.** They cross the border because of victimization, or fear of victimization by the members of the **OPM** and their supporters.

III. WHO IS A 'REFUGEE'?

Having outlined the underlying reasons for the border crossings by West Irianese, this section now examines who a refugee is under international, with the view to determining which of the West Irianese are refugees.

In the legal sense, it is not possible to give a single definition of the term 'refugee'. This is because, under international law the status of refugees has not been traditionally regulated by customary rules of law but by multilateral conventions. Since 1922, a number of treaties have been concluded which have defined the term 'refugee' differently. The conventions include the following: The Arrangement of 5 July, 1922 (13 **League of Nations Treaty Series,** p. 237); The Instrument of 31 May, 1924 **(League of Nations Documents C.L. 72(2),** 1924); The Arrangement of 1926 (89 **League of Nations Treaty Series,** p.47); The 1933 Convention Relating to the International Status of Refugees (159 **League of Nations Treaty Series,** p.199); The 1938 Convention on the Status of Refugees coming from Germany, (192 **League of Nations Treaty Series** p.59:); The 1946 Constitution of the International Refugee Organization (18 **United Nations Treaty Series,** p.3); The 1951 Convention Relating to the Status of Refugees (189 **United Nations Treaty Series,** p.150). It follows that legally, a refugee cannot be defined except in the context of a particular convention.

This paper adopts the definition under the 1951 Refugee Convention as amended by the 1967 Protocol, for the reasons outlined below. If one's aim is to arrive at a definition of a refugee which is of general application, then the definition under the 1951 Convention and the 1967 Protocol ought to be adopted.

In the first place, the 1951 Refugee Convention, supplemented by the 1967 Protocol, is the most current and universal of the treaties under which a refugee is defined. Secondly, the 1951 Refugee Convention, to a large extent, embodies the earlier legal documents on refugees; and also regulates the status of refugees in a more coherent manner than the previous conventions. Thirdly, it is conceivable that the 1951 convention, together with the 1967 Protocol, may become universal as a result of the accession of all States. Although all the states have not yet acceeded, one can discern a move towards universality. As at 1st January 1979, 76 states had become parties to the 1951 Refugee Convention and 71 to the 1967 Protocal respectively. (See Human Rights International Instru-ments, U.N. Doc. St/HR/4/Rev. (1979).) It is plausible to argue that the practice of states in relation to refugees has crystallised the definition of a refugee contained in the 1951 Refugee Convention into a customary international law rule (Greig: 128 ff).

Under the 1951 Refugee Convention a refugee is defined in Article 1A (1)(b) as any person who.

> as a result of events occurring before 1 January 1951 and 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 or, who not having a nationality and being outside the country of his former habitual residence as a result of such fear is unwilling to return to it.

According to the Convention, the phrase 'events occuring before 1 January 1951', may mean events occurring in Europe or elsewhere, according to the meaning chosen by the party on signature, ratification or accession. This dateline has been removed by Article 1(2) of the Protocol of 1967 under which the contracting states undertake to apply the substantive provisions of the 1951 Convention as if the words; 'as a result of events occuring before 1 January 1951' were omitted from the definition of a refugee.

There are four aspects to this definition.

Firstly, the person claiming refugee status must be outside the country of his nationality or the country of his former habitual residence. The phrase 'is outside' is interpreted to mean that the person in question must have left the country of nationa-

lity or habitual residence, or must have remained outside the frontiers of that country. In a legal sense, therefore, one cannot be a refugee in one's own country of nationality or habitual residence. The phrase 'country of former habitual residence' only applies to a stateless person and is defined as the country in which a person has resided and where he has suffered persecution, or fears he would suffer persecution if he is returned (see UN Doc. E1850, 8A Conf/2/SR3, pp.9-10). The provision that a person claiming refugee status must be outside the country of his nationality, if read together with the proviso in Article 1A paragraph 2, about people with more than one nationality, will produce the result that in order to qualify as a refugee, such a person must be outside each and everyone of these countries.

The second aspect of the definition of a refugee is that the person claiming refugee status must have a well-founded fear of persecution for the reasons stated above (i.e race, religion, nationality, membership of a particular social group or political opinion). This requirement raises two main issues.

The first relates to the word 'persecution'. This term has been used in various instruments concerning refugees but has not been defined, thus raising problems of interpretation. According to the office of the United Nations High Commissioner for Refugees, 'there is no universally accepted definition of persecution, and in fact there cannot be one general definition for the purpose of the Statute of the High Commissioner for Refugees' (Melander:22).

Two interpretations of the concept of 'persecution' are discernible, namely a liberal view and a restrictive one.

The liberal view interprets persecution broadly to cover any kind of act perpetrated on the person, whether psychological or economic, which is severe enough to cause displeasure to the person concerned. Weis, for example, argues that measures in disregard of human dignity may constitute persecution (Weis:22). Vernant equates persecution with measures and sanctions of an arbitrary nature which are incompatible with the Universal Declaration of Human Rights. Melander also interprets persecution to include danger to life or liberty, including some discriminatory measures and suggests that at violations of human rights may serve as a useful criterion for defining persecution (Melander:7).

The restrictive interpretation, on the other hand, equates persecution only with deprivation of life or of physical freedom. Thus, Zink argues that persecution should be defined in terms of physical acts which may result in the loss of life or of physical freedom, excluding attacks on a person's physical integrity, unless such attacks may lead to the victim's death (Grahl-Madsen:193).

In order to resolve the controversy created by the two possible interpretations, Grahl-Madsen suggests that reference may be made to the use of the term 'persecution' in various conventions concerning refugees. He points out that the International Refugee Organization, for example, did not lay down any standard in this respect but it was required that the persecution must result in an actual pursuit of, or a personal threat to, the individual in question. The International Refugee Organization also considered persecution to exist in cases for example, of imprisonment, of deprivation of work or of drafting into a disciplinary battalion, for reasons of race, religion and political opinion (Grahl-Madsen:194). These views lean towards a liberal interpretation of the word persecution.

Reference may also be made to the 1951 Refugee Convention. Article 31, paragraph 1 of the Convention applies its provisions to refugees coming directly from a territory where their life or freedom was threatened. Article 33, paragraph 1, of the same Convention also speaks of territories where a refugee's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion. These provisions also suggest a liberal interpretation of persecution, for not only the life of a person but also his freedom, when threatened on account of the relevant factors, may amount to persecution. This argument is supported by the fact that the first paragraph of the Preamble to the 1951 Refugee Convention contains a direct reference to the Universal Declaration of Human Rights. The link suggests that the violation of some of the provisions of the Universal Declaration of Human Rights may constitute persecution within the meaning of the Refugee Convention (See for example, Articles 4, 5, 9, 12, and 17 of the Universal Declaration of Human Rights, adopted 10 December 1948; G.A. Res 217 A (III), UN Doc A/810 (1948)).

A liberal interpretation of persecution must be preferred. It is not likely that the drafters of the Refugee Convention intended to interpret the term persecution narrowly. The Refugee Convention is a humanitarian document, and should be construed in a way that reflects this purpose. A restrictive interpretation of persecution is contrary to the spirit of the Convention. Although the Convention may appear to favour a strict limitation of the scope of the obligations of parties to it by initially providing a cut-off date, by limiting the Convention to political events only, thereby excluding people fleeing from natural disaster and famine, these characteristics do not detract from its overriding humanitarian objectives.

Despite the above conclusion, it is important to bear in mind the fact that in recognising persecution of individuals or groups by another government, there is always an element of political relativity. Governments only recognize the existence of persecution in cases in which their own political and economic interests

are enhanced or not prejudiced by such recognition. In view of this, it is possible to argue that one cannot identify an objective standard for determining whether the policies of a particular government against its nationals amount to persecution or not. Such an argument is baseless because international law has created rights for the individual and has provided standards for the assessment of the actions of governments vis-a-vis their nationals. The United Nations Charter and the Universal Declaration of Human Rights have provided yardsticks against which the actions of governments may be measured.

In order to qualify as a refugee, a person's fear of being persecuted must be a 'well-founded' one. This qualification which is the second problem relating to the persecution requirement noted above, raises a number of problems. When is a person's fear well-founded? What is the standard for determining whether a fear is well-founded or otherwise?

The ad hoc Committee that drafted the 1951 Refugee Convention considered a fear to be well-founded when a person has actually been a victim of persecution or can show good reason why he fears persecution (E/AC. 32/5, 39 UN. Doc E/1618). According to Melander, a well-founded fear must be sincere and reasonable, not feigned or imaginary, and must be based on a plausible danger of persecution for political reasons (Melander:13).

The use of the term 'well-founded' seems to suggest that it is not the frame of mind of the person concerned that is decisive. In other words, the determination of whether a fear is well-founded or not must be based on an objective evaluation of the political conditions in the country of origin. On the other hand, fear may be considered as a subjective condition of the mind; thus making an objective determination of whether or not a person's fear is well-founded unjustified. However, it is conceivable that a purely subjective standard would be subject to abuses. It would mean that any body who claims to have a well-founded fear of persecution may qualify as a refugee.

The determination of whether a fear is well-founded must be based on the conditions prevailing in the country that the person flees from. Where there are possibilities that the person concerned is likely to become a victim of persecution if he returns to his country of nationality or habitual residence, then it may be said that there is a well-founded fear of persecution. But since the likelihood of a person becoming a victim of persecution may vary from person to person, the proper approach must be that, except in a situation where an entire population or a whole social group is being persecuted, the situation of each individual must be considered **sui generis** by taking into account objective factors as well as subjective considerations, including the background of the person(s) in question. As Weis correctly observes, 'the circumstances

and background of the person concerned, his psychological attitude and sensitivity towards his environment play a role as well as the general situation in his country' (Weis:20-1).

The third aspect of the definition of a refugee is that the events which are the cause of a person being outside his country of nationality or habitual residence must be political in nature. The finding that a person has a well-founded fear of being persecuted or that he has been a victim of persecution does not in itself entitle him to claim refugee status unless the fear of persecution or the persecution stems from the reasons enumerated in Article 1A, paragraph 2 of the Refugee Convention (i.e. race, religion, nationality, membership of a particular social group or political opinion). This enumeration appears to be exhaustive. In the legal sense, therefore, 'the events which are the root-cause of a man's becoming a refugee are always of a political nature' (Simpson:229). This 'political' criterion is not spelt out in the 1951 Refugee Convention in an explicit fashion; rather, it is a derivative from the word 'event' in Article 1 of the Refugee convention.

On the basis of the travaux preparatoires of the Refugee Convention, the term 'events' may be defined as happenings of main importance involving territorial or profound political changes as well as systematic programmes of persecution which are the after-effects of earlier changes (U.N. Doc A/CONF/2/108). Robinson argues that this interpretation is too restrictive and, accordingly, suggests that the word 'events' must be interpreted to mean 'happenings which create conditions under which a group of persons become victims of racial, religious, national, social or political persecution' (Robinson: 163). The word 'events' must be interpreted in line with the humanitarian spirit of the Refugee Convention. After all, every action of a government has potential political consequences.

The final element of our definition of a refugee is found in the two provisos in Article 1A paragraph 2 of the Refugee Convention. In order to qualify for refugee status, it is not sufficient that the person concerned be outside the country of nationality or former habitual residence owing to a well-founded fear of being persecuted for the relevant reasons noted above. The person must also satisfy either of two conditions, namely that, he is 'unable or, owing to such fear, is unwilling to avail himself of the protection of the country of his nationality' or in the case of a stateless person that he is 'unable or owing to such fear, is unwilling to return to the country of his former habitual residence'. Conversly, the person who is able and willing to avail himself of the protection of his country of nationality or, alternatively, a person who is able, but unwilling,to avail himself of such protection, his unwillingness being motivated by some considerations other than the relevant reasons set out above, may not qualify as a refugee. The essential aspect of this element is the absence or lack of diplomatic protection.

IV BORDER CROSSERS OR REFUGEES?

The last section has outlined the criteria for refugee status under international law. This section considers whether the West Irianese who cross the border into Papua New Guinea can be labelled genuine political refugees. The three categories of border crossers identified above are considered separately.

(a) Boarder Crossers for 'traditional' reasons.

It was indicated earlier that some West Irianese cross the border into Papua New Guinea for 'traditional' reasons. Obviously, persons in this category are not refugees. We have seen that the border agreement between Papua New Guinea and Indonesia, in article 4 paragraph 1, exempts 'traditional' border crossers from the normal immigration requirements of both countries. It follows that 'traditional' border crossers who settle permanently in Papua New Guinea cannot get the protection of Article 4 paragraph 1. The status of such people may have to be determined under Papua New Guinea municipal law. One problem here relates to the interpretation of article 4 paragraph 3 of the border agreement on 'temporary' or 'permanent' residence. In a practical situation, what amounts to 'temporary' or 'permanent' residence may have to be determined on the merits of each case, taking into account the type of activity involved.

Some qualifications need to be made concerning the assertion made above about the status of the 'traditional' border crossers. Traditional border crossers who develop a well-founded fear of persecution (for one of the relevant reasons outlined earlier) after their entry into Papua New Guinea, and as a result are not willing to return home may qualify as refugees. In this case, the fact that such people originally come to Papua New Guinea as 'traditional' border crossers will be immaterial. To qualify for refugee status, it is not essential that the events which cause a person to develop a well-founded fear of persecution occur before the person leaves the country of nationality. The mention by the Refugee Convention that the refugee must have left the country of nationality and be outside it for the specified reasons is an explicit recognition that persons who are outside their countries of origin at the time of the events which cause them to have well-founded fear should have the same protection as persons who leave their countries because of such events.

(b) People crossing the border for economic reasons.

The second category of border crossers indentified include people with purely economic motives. Generally, the international instruments on refugees exclude such people from enjoying refugee status. For example, article 1, paragraph 2 of the Convention of

10 February 1938 provided that persons who left Germany for reasons of purely personal convenience were not included in the definition of refugees coming from Germany. Similarly, paragraph 1(e) of the general principles in Annex 1 to the Constitution of the International Refugee Organization provided that it should be the concern of the Organization to ensure that its assistance was not exploited by persons who were not willing to return to their countries of origin because they preferred idleness to facing the hardships in other countries for purely economic reasons. Paragraph 6A(e) of the United Nations High Commissioner for Refugees Statute further states that reasons of purely economic nature may not be invoked for continuing to refuse to avail oneself of the protection of one's country of nationality. However, the fact that a person has economic motives may not neccessarily prejudice his claims to refugee status, for such motives are often indications that the individual has been denied the right in his own land to earn his living in peace or, in the occupation, skill, or profession in which he is qualified. The line between an economic motive and a political one is often difficult to draw in practice, because many economic decisions are in essence political decisions. (For a comparative situation, see Tsamenyi, 1980). The exception, however, cannot apply in general to West Irianese category of border crossers under discussion. For any person in this category to benefit from the proviso argued above, it must be shown that the economic motives for crossing into Papua are not for personal convenience as such but imply a condemnation or rejection of Indonesian domination of economic and political life in West Irian. It must also be shown that people in this category will suffer persecution in the hands of Indonesian authorities if they return home.

(c) People caught up in the OPM-Indonesian conflict.

A closely related and the most important source of pressure for the border crossings, as we have suggested, is the conflict between the **OPM** and Indonesia. To recapitulate, this group includes, (1) members of the **OPM** and their supporters, (2) neutral groups fleeing because of the general insecurity resulting from the conflict; (3) anti - **OPM** elements or persons involved in factional fighting within the **OPM.** It appears that the majority of border crossers, and the ones who have attracted the greatest attention, and caused the biggest problems for Papua New Guinea governments, fall into the category of people caught up in the OPM - Indonesia conflict. The refugees status of each of these sub-groups has to be determined separately.

(i) Concerning people with **OPM** connections it may be said that they qualify as refugees. To the extent that they have rejected the legitimacy of Indonesian domination they have well-founded fear of persecution for reasons of political opinion. Furthermore, by crossing the border into Papua New Guinea these people have, by implication, taken political action.

> One border crosser confirms this: 'By running away from Jayapura, we made a bad name for Indonesia. That is why they will kill us' (**Post Courier**: 31 May 1984, p.2).

It is very difficult to ascertain first hand whether these people are in fact persecuted by Indonesian authorities. However there is some secondary material which tends to support a finding of persecution. A recent study by **TAPOL** states, **inter alia**:

> Many mass killings are known to have taken place since the mid-1960s. The victims are almost invariably villagers victimised in the Army's Campaign to stamp out the guerilla resistance that has sprung up in many places. Incapable of penetrating the jungles and discovering guerilla hideouts and bases, the Indonesian troops resort to terror tactics against villagers aimed at intimidating the villagers and isolating the resistance (**TAPOL**: 73).

In another paragraph, one reads:

> In the latter half of 1981, government troops launched an **operasi sapu-berish** (operation clean-up). The objective is explained as being to undermine resistance to the government by intimidating and persecuting the families of those who leave home to join the resistance in the bush.
>
> Wives are attacked and raped, often with fatal results, women are arrested and held in custody and raped, and the parents of those who leave home are arrested and detained. In the villages people are chased out of their houses, their livestock killed, their houses burnt down and their property stolen (**TAPOL**: 40).

There are also reports by **TAPOL** of **OPM** guerillas tortured, imprisoned or executed for their part in the resistance against Indonesia (**TAPOL**: 77-8).

The credibility of these reports by **TAPOL** is affected by the anti-Indonesian perspective of **TAPOL**. However, such reports have been confirmed by independent sources. The Australian section of the International Commission of Jurists noted in a recent report that 'there is clear evidence of human rights violations in the area of Irian Jaya nearest to [Papua New Guinea] by the Indonesian authorities against local villagers' (ICJ:5). Similarly, the numerous Amnesty International reports on West Irian contain detailed accounts of human rights violations by Indonesia in West Irian (Brunton: 14-20).

It seems reasonable to assume that West Irianese in the category under discussion have a well-founded fear of persecution for reasons of their political opinion. To the extent that these people have rejected Indonesian domination, they may also be said to be unwilling to avail themselves of the protection of the Indonesian government. Thet therefore qualify as refugees.

In fact, interviews conducted among some of the border crossers reveal that many them are refusing to return home for fear of being killed by Indonesian soldiers.

> I don't want to go back because the soldiers will kill me.
>
> I know what it will be like if I go so, I want to stay here.
>
> We just want to remain here (in Papua New Guinea) because we are not sure if we will live long over there (in Jayapura) **Post Courier** 31 May 1984, p.2).

It appears that some of the border crossers may have fled into Papua New Guinea as a result of the general insecurity generated by the **OPM** - Indonesian conflict. People in this category may also qualify as refugees. If political events between a state and a resistance movement (such as the **OPM**) produce conditions of uncertainty and insecurity for portions of the community, and as a result they flee to another country, there is no reason why these people must be denied refugee status. However people in this category may only be refugees temporarily. Their refugee status lapses if the conditions of uncertainty and insecurity cease to exist. The test that ought to be used to determine when these conditions cease must be an objective one.

It was also indicated that some of the border crossers may have fled because the have become objects of mistrust and targets of **OPM** reprisals against Indonesia. It is plausible to argue that these people may not lay valid claims to refugee status because there is no conflict between them and the Indonesian authorities. In other words, that the source of their persecution is not the Indonesian authorities. This type of reasoning has no merit. The determination of the refugee status of people in this category must not be based on their relationship with the authorities in Indonesia, but with the **OPM.** Indeed, as Gilbert points out:

> The source of persecution is not limited. It may emanate from the government or a third party. Obviously, it will be much easier to show that the fear of persecution is well-founded if the government of the state of origin is perpetrating it, but persecution by a third party where the government offers no protection because of clandestine support or inability of control is just as good (Gilbert: 645).

Consistent with the reasoning above, a British Court held in the case of **McMullen** that persecution by the Irish Republican Army (IRA) was sufficient because the United Kingdom government was unable to control it (Gilbert: 646). A similar conclusion may be drawn in the case of the West Irianese. It is immaterial that their persecution emanates from the OPM.

V. PAPUA NEW GUINEA'S OBLIGATION UNDER INTERNATIONAL LAW.

It was argued in the last section that some of the West Irianese border crossers qualify as refugees under international law. This section discusses the question of whether international law imposes any obligations on Papua New Guinea with respect to the refugees. This analysis is important because, as indicated earlier, Papua New Guinea is not a party to any convention on refugees.

The international source of refugee law is basically conventional, with the Refugee Convention of 1951 coupled with the Protocol of 1967 representing the most current and universal effort at formulating rules of law on refugees. This raises an important question: Is Papua New Guinea under any legal obligations towards the West Irianese border crossers who qualify as refugees?

The official position in Papua New Guinea is that the government has no legal obligations with respect to the refugees and that any assistance Papua New Guinea renders to the West Irianese is purely because of (non legal) humanitrian considerations on account of the ethnic (Melanesian) link between Papua New Guinea and West Irian.

The principle **pacta tertiis nec nocent nec prosunt** is well-known in international law. Article 4 of the Geneva Convention on the Law of Treaties restates the same principle that a treaty does not create either obligations or rights for a third state without its consent. The reason for this rule may be found in the fundamental rule of sovereignty and independence of states, which provides that states must consent to rules before they can be bound by them.

Considering the issue of legal obligation purely in terms of the foregoing principle, it may be sad that Papua New Guinea is not under any legal obligations flowing directly from the Refugee Convention towards the West Irianese.

A better way to analyse the obligations of states towards refugees is in terms of International Human Rights law. From this, it will be seen that the obligations of states towards refugees transcend conventional undertakings.

Human rights standards have, in general, made considerable progress in international law since the end of the Second World War. One can identify a number of instances in which express references are made to human rights in the United Nations (UN) Charter. In the Preamble, members of the UN reaffirm their faith in fundamental human rights, in the dignity and worth of nations large and small, and pledge to provide social progress and better standards of life. Various articles of the Charter also refer to human rights and fundamental freedoms. For example, article 1, paragraph 3 is designed 'to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction s to race, sex, language, or religion'. Article 3, paragraph (1)(b) also empowers the General Assembly of the UN to initiate studies and to make recommendations for the purpose of 'assisting in the realization of human rights and fundamental freedoms for all'.

Reference may also be made to the Universal Declaration of Human Rights which was adopted on 10 December 1948 as a resolution of the UN General Assembly. The Preamble to the Universal Declaration of Human Rights states that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The Preamble further recalls the pledge of Member States of the UN to achieve the promotion of universal respect for and observance of human rights and fundamental freedoms. Among the basic rights and freedoms listed in the Declaration of Human Rights are the right to life, liberty and security of the person; rights against slavery, torture, inhuman and degrading treatment or punishment, arbitrary arrest, detention or exile. Specific mention must be made of Article 14 which is directly relevant to the refugee problem. The Article provides that 'everyone has the right to enjoy in other countries asylum from persecution'. In relation to the latter article, it must be stated that the view of international lawyers is that this article does not mean that the individual has a guaranteed right to obtain asylum in any country of his choice; and that the article, as it stands, creates no obligations for states to grant asylum.

Although the human rights provisions in the UN Charter are only set out in general terms, thus making it difficult to determine with certainty what specific rights are included, the Universal Declaration of Human Rights sets out in unambiguous terms the specific rights and fundamental freedoms to be protected. The rights and freedoms mentioned in the Universal Declaration of Human Rights are simply amplification of th general rights and freedoms mentioned in the UN Charter. Therefore, the two documents must be read together in order to determine and understand the precise scope of the human rights provisions under the UN Charter. That the human rights provisions in the UN Charter and the Universal Declaration of Human Rights are legally binding on members of the UN is beyond dispute.

There is no difficulty in interpreting the human rights provisions in the UN Charter and the Universal Declaration to cover refugees. In the Preamble to the Refugee Convention of 1951, it is stated that the Convention was concluded considering inter alia 'that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms ...',and 'expressing the wish that all states, recognizing the social an humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between states'. That the legal and social problems facing refugees demand humanitarian considerations need not be emphasized. The refusal by a state to accord refugees the necessary protection constitutes a violation of the human rights obligations under the UN Charter. This argument is supported by the link established by the Preamble to the Refugee Convention, between the said convention, the UN Charter and the Universal Declaration of Human Rights. The argument is further strengthened by the fact that the United Nations has created an office of the High Commissioner for Refugees with the Statute of the High Commissioner providing a definition of a refugee in terms almost identical to those of the Refugee Convention.

It can be argued that international law imposes legal obligations on all states with respect to refugees by virtue of the human rights provisions in the UN charter and the Universal Declaration of Human Rights. It follows that Papua New Guinea, by virtue of being a member of the UN, has some legal obligations towards the West Irianese border crossers who qualify as refugees. The Foreign Minister of Papua New Guinea, Rabbie Namaliu recognized this obligation when he stated in Parliament thus:

> Mr Deputy Speaker, as I have said more times than I care to remember, the Government of Papua New Guinea will not force people who are genuine political refugees to return to Indonesia against their will. And, as I have said just as often, we define a political refugee exactly the same as the term is defined in the United Nations Conventions... (Hansard: 24-23).

What then are the obligations cast on Papua New Guinea by international law? The exact scope of these obligations cannot be set out explicitly. At least, Papua New Guinea's obligations coincide with those under the Refugee Convention. This is not the same as saying that the Refugee Convention is binding on Papua New Guinea as such, but that the Convention represents part and parcel of the totality of the human rights obligations imposed on all states by international law.

Australia's view on the Refugee Convention is apt and to the point:

> ... the Convention consolidates, for the first time, all previous international instruments for the benefit of refugees, supplanting previous conventions on particular groups ... The provisions of the 1951 convention cover a wider field, and relate to many of the fundamental rights and freedoms contained in The Declaration of Human Rights, thus constituting a concrete step towards its establishment in international law (Van der Veur:15).

One particular obligation, and probably the most important, is the prohibition against expulsion (refoulement) of refugees. Under the rules of international law, every state has the prerogative to expel unwanted aliens, just as it has in their admission. However, exceptions have been made to this rule in favour of refugees. Refugees are not to be expelled to countries where they would be persecuted. Indeed, the expulsion of a refugee is a contraband trade in which the merchandise is the human being (Simpson: 247). This prohibition is re-stated in Article 33, paragraph 1 of the 1951 Refugee Convention.

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom should be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Apart from the 1951 Refugee Convention, some other international instruments also have provisions relating to expulsion and return of refugees. Article 8 of the Convention Concerning the Migration for Employment, adopted by the International Labour Conference in 1949, for example, contains restrictions on the right of expulsion. Article 24(2) of the Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons also prohibits the compulsory return of refugees to their countries of origin.

Taken in their entirety, these instruments may be considered as reflecting a customary rule of international law: that refugees shall not be returned or expelled to a country where their life or freedom would be in danger. This is what Goodwin-Gill means when he states that the principles of expulsion and non-refoulement have effects beyond their conventional relationship (Goodwin-Gill:141). He argues further:

> Earlier state practice supports the contention that, for example, Articles 32 and 33 of the 1951 Convention reflected or crystallised a rule of customary international

> law at the time of their formulation, and practice since that date reaffirms this conclusion. The high standard of proof which is required on the issue of **opinio juris** can in this case be satisfied. The relevant provisions are of a "fundamentally norm-creating character" and the fact that expulsion or return may be permitted in exceptional circumstances does not deny this premise, but serves simply to indicate the boundaries to the exercise of discretion.
>
> Furthermore, ... no state is entitled to make any reservation to the obligation of **non-refoulement** contained in Article 33.
>
> Both the 1951 Convention and the 1967 Protocol have enjoyed wide-spread and representative participation, and the time factor also operates in favour of the rule against return as a rule of customary international law ... In particular circumstances, its breach may therefore involve international responsibility towards other contracting parties, towards some regional institution, or, given further development of the concept of obligations **erga omnes** ... (Goodwin-Gill:141).

A resolution adopted by the United Nations Conference on the Status of Stateless Persons in 1954 confirms the views of Goodwin-Gill.

> The Conference, being of the opinion that Article 33 of the Convention Relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no state should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, has not found it necessary to include in the Convention Relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951 (360 **UN Treaty Series**:117).

A logical implication of the prohibition against **refoulement** is that refugees shall not be prosecuted for breach of immigation regulations. This is only logical, for a refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry. Therefore, it will be in keeping with the rule against **refoulement** to exempt from prosecution people escaping from persecution. This does not rule out any provisional detention that may be necessary in order to investigate the circumstances in which a refugee has

entered a country, but precludes the taking of legal actions against the person for illegal entry (see **travaux preparatoires** of the 1951 Refugee Convention, UN Doc. A/CONF. 2SR. 25).

VI. POLICY FRAMEWORK.

This section outlines and examines some guidelines that may be useful in dealing with the refugees. The main issue here concerns the manner in which Papua New Guinea treats the refugees. Before the options are considered, it is necessary to discuss the present policy on the refugees.

(a) The Present Position.

Papua New Guinea has no coherent policy dealing with the refugees. In fact, there is no policy at all. One can identify two contradictory positions.

The first is an implicit acknowledgement of the refugee status of some of the border crossers. Foreign Affairs officials often say that border crossers actively involved in OPM operations will not be sent back to Indonesia, but will be found asylum in third countries. Border crossers not in this category will only be sent back home if Indonesian authorities guarantee their safety (**Post Courier** 21 March 1981 p.1).

Occasionally, Papua New Guinea grants asylum to a limited number of border crossers subject to certain conditions. This practice, termed the grant of 'permissive residence' status, is a continuation of a colonial policy under which the Australian administration granted 'permissive residence' to West Irianese 'who could plausibly claim that they would suffer persecution if they were returned to Indonesia' (May: 99).

There is no direct legislative arrangement covering the grant of 'permissive residence'. However, the **Migration Act** (Part 2(2)) makes provisions for grant of entry permits subject to conditions. The conditions are not specified by the Act, but are indicated on individual entry permits. Usually, two conditions are attached to such permits. The first is that the permit holder will settle wherever he or she is directed (in the case of the West Irianese, away from the Indonesian border). Under the second condition a permit holder undertakes never, directly or indirectly to participate in any political activities for which he or she seeks asylum in Papua New Guinea (May:99). Although the term 'permissive residence' is not used in the **Migration Act**, one can argue that it is covered by the conditional entry permit authorised by the Act. There is a strong possibility that this provision was intended to cater specifically for the West Irianese border crossers.

From the official point of view, the grant of 'permissive residence' status to the West Irianese is a convenient way of dealing with the issue. The practice provides flexibility in the selection of border crossers for the granting of asylum. The decision to grant 'permissive' residence status becomes completely a matter of discretion since no objective criteria are listed to be taken into account. This is unlike asylum under the Refugee Convention where the convention provides an objective basis for determining who a refugee is for the purpose of granting of asylum.

It appears that 'permissive residence' status is granted to West Irianese who least need it, i.e., people whose political involvement in the **OPM** is not obvious, and therefore least likely to be victims of persecution at the hands of the Indonesian authorities. Generally, notorious **OPM** activists are not granted 'permissive residence' status. There have been some instances in which active **OPM** members have been denied asylum in Papua New Guinea. The Jacob Prai and Otto Ondawame cases in 1978 ([1979] PNGLR: 247) represented a general trend. There is also a growing opinion in Papua New Guinea to the effect that grant of 'permissive residence' status to West Irianese is factitious, as there is very little or no public knowledge about how many West Irianese have actually been granted 'permissive residence' status.

The second position of the Papua New Guinea government in relation to the West Irianese border crossers is reflected by the view held by Foreign Affairs officials that the border crossers are not refugees but illegal immigrants (**Post Courier** 21 March (1981 p.1). In line with this view, border crossers are often prosecuted and jailed for entering Papua New Guinea illegally. In March 1984, about seventy border crossers were jailed by the Vanimo District Court (**Post Courier** 26 March 1984, p.1-2).

The contradictory positions noted above often create problems for the Papua New Guinea government whenever there are large inflows of West Irianese. It is necessary, therefore, for the government of Papua New Guinea to devise a coherent policy on the border crossings.

(b) Policy Options.

In the main , there are two broad policy options available to Papua New Guinea on the border crossings. The first involves a position in favour of the border crossers. The second is to take a tough stand to prevent and discourage further border crossings. These two options are analysed below.

(i) A Policy in Favour of Crossers.

The first step in furtherance of this option is for Papua New Guinea to accede to the Refugee Convention, to recognise the refugee status of the border crossers and to grant them asylum, or negotiate with third countries (with the help of the United Nations High Commissioner for Refugees) to grant them asylum.

There are two attractions about a policy along these lines. In the first place, it will receive favourable domestic support in the short term, thereby enhancing the popularity of the government. Secondly, by adopting such a policy, Papua New Guinea will be showing a willingness to perform its international obligations. This will boost its international reputation.

There are at least three reasons why this type of policy may not be favoured by officials in Papua New Guinea.

In the first place, it is possible that Papua New Guinea's accession to the Refugee Convention and a subsequent grant of asylum to the refugees will be interpreted by Indonesia as unfriendly acts by Papua New Guinea, implying a condemnation of the take-over of West Irian and tacit support for the OPM. It is likely that some West Irianese who are granted asylum in Papua New Guinea will engage in hostile acts in the nature of propaganda or violence against Indonesia, either within Papua New Guinea or across the border. Such developments may be seen by Indonesia as a violation of the Border Agreement with Papua New Guinea. The Agreement in article 7(1) enjoins each party to discourage the use of border crossings for purposes inimical to the security of either party.

> In a spirit of good will and mutual understanding and in order to maintain and strengthen the existing good neighbourly and friendly relations, the two Governments shall continue to actively co-operate with one another in order to prevent the use of their respective territories in or in the vicinity of the Border Area as sanctuary, staging areas, bases or routes for any kind of hostile or illegal activities against the other...

Papua New Guinea may not be willing to pursue any policy that will adversely affect her relations with Indonesia. That Indonesia will resort to self help, (thereby violating Papua New Guinea territory)

with the objective of destroying OPM bases in Papua New Guinea cannot be disputed. This has already happened (see Hansard: 22-34).

Secondly, third states may not be willing to accept the West Irianese. Generally, third states have shown unwillingness to grant asylum to refugees, particularly when small numbers of people are involved.

Thirdly, there are domestic political and socio-economic implications of pursuing this first option. A policy of this nature is likely to generate a pull effect. Large numbers of West Irianese may be induced to flee into Papua New Guinea by evoking fear of persecution, resulting in serious problems for Papua New Guinea. As Nyamekye and Premdas correctly point out:

> A stream of refugees would entail competition with Papua New Guinea citizens for jobs and services. Already some of this has been experienced. The Papua New Guinea Government has an ongoing interest in uplifting the material well-being of its own citizens before distributing its scarce resources to its 'Melanesian Brothers'... [The] growth of refugee population may eventually lead to a backlash against the present policy makers who must solve unemployment difficulties concentrated most heavily among Papua New Guinea school-leavers and urban migrants (Nyamekye & Premda: 73-4).

(ii) Get Tough on Crossers.

The second policy option open to Papua New Guinea is to take tough measures to discourage border crossings. This will involve formalising the present practice of prosecuting the border crossers for illegally entering Papua New Guinea and sending border crossers back to Indonesia. This type of policy will not only achieve the co-operation of Indonesia but also serve as deterrence to the border crossers.

Although a policy of this nature will improve relations between Papua New Guinea and Indonesia, it has likely international and municipal legal implications.

Firstly the return of West Irianese border crossers to Indonesia against their will may amount to a violation of the customary international law which prohibits the refoulement of refugees (as argued above). This will damage Papua New Guinea's international reputation.

Secondly, there is a strong case for arguing that returning West Irianese border crossers to Indonesia, if this results in their persecution by the Indonesian authorities, will violate section 41 of the Constitution of Papua New Guinea. This section

makes it unlawful to do any act which, in the particular case, (a) is harsh or oppressive, (b) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or case and (c) is not reasonably justified in a democratic society which has a proper regard for the rights and dignity of mankind.

VII CONCLUSION.

This article has exposed the various factors influencing the exodus of West Irianese into Papua New Guinea. It has been shown that internal factors, mainly hostilities between the OPM and Indonesia, have contributed greatly to the border crossings. Against this background, it has been argued that some categories of border crossers qualify as refugees. The report of the Australian section of the International Commission of Jurists on the border crossers confirms this conclusion.

> ... this large number of people are either refugees within the terms of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, or are people clearly in a refugee-like situation within the mandate of the United Nations High Commissioner for Refugees... (ICJ:5).

That the international source of refugee law is basically conventional is a fact that cannot be ignored. That a treaty is binding only upon a party to it, is also beyond dispute. Despite these points, it has been shown that the obligations of states towards refugees transcend conventional undertakings. This means that, in relation to the West Irianese, Papua New Guinea, although it has not acceded to the Refugee Convention, may nevertheless incur some obligations towards the refugees by virtue of its membership of the United Nations. It will therefore, be incumbent on Papua New Guinea to devise policies on the border crossers that are consonant with its international obligations. Accession to the Refugee Convention may be considered as a first step. It is difficult to see how accession to a convention of such respectability can be seen by Indonesia as 'unfriendly act'. Given the obvious problems that would beset Papua New Guinea by an uncontrolled influx of refugees, it is necessary for the government to formulate clear policies that take into account the limited resources of the country, Papua New Guinea's relations with Indonesia and also the human rights of the refugees.

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