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THE RIGHT OF ASYLUM

An extraordinary meeting of the Austrian section of the European Association for the Study of the Refugee Problem (AER) and of the Association for the Study of the World Refugee Problem (AWR), which are established respectively at Strasburg and Vaduz, took place at Salzburg on May 4 and 5, 1962, to commemorate the Tenth anniversary of that section's foundation. On that occasion, Mr. Henri Coursier, who presides the two organizations, whose fusion is expected shortly under the auspices of the Prince Francis-Joseph of Liechtenstein Foundation, submitted a report which we think may be of interest to our readers.

“ One should treat the disarmed stranger as a brother when he asks for hospitality. His person is sacred. The whole structure of society depends on the recognition of the right of hospitality or asylum, that same right which we have inherited from Abraham. Now the policy of all armies and organizations is to deny the principle of the right of asylum.” This pessimistic observation, as well as the generous thoughts preceding it, were expressed by Mr. Louis Massignon, Honorary Professor at the Collège de France, during a series of international studies organized by the World Veterans Federation at the University of Aarhus (Denmark) in August 1959.

Since then not one provision in positive international law has been laid down to fulfil Professor Massignon's wish. This idea has however continued to be an object of study for the situation to be remedied and a number of pointers lead one to believe that the international community, under its influence is considering taking up a position on this important problem which is the chief concern of our two organizations.

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I would here like briefly to recall the main stages in this continuous effort and the principal elements in the evolutions of governmental opinion within the United Nations.

In the first place, for the sake of clarity, I think it would be helpful to define once again, in a few words, the essentials of this problem.

Generally speaking, before the events which have shaken the world for two generations, the law took the supremacy of the State into account, requiring at the same time the individual's rights to be respected. It was considered, in fact, that if the State is sovereign and independent, its very reason of existence implies the rule of justice ; now this seemed at the time to be undeniably inseparable from the respect of human values. Thus in 1888 the Institute of International Law declared : " Each Sovereign State can in principle regulate the admission of foreigners in the way it considers advisable ", but several years later it followed this up by stating that : " Humanity and justice oblige States only to exercise territorial sovereignty by respecting, to an extent compatible with their own security, the right and freedom of foreigners wishing to enter their territory."

International law thus respected the rights of man as such, always provided, however, that the exercising of these rights were not a threat to security. Without doubt the State remained judge of security requirements, but apart from the case of stateless persons, foreigners were guaranteed protection against arbitrary action by the fact that they presented themselves as nationals of another State and that the reciprocal need for maintaining good international relations kept the exigences of their reception within reasonable limits.

It is obvious that events singularly compromised this legal balance.

It was then that the United Nations Organization, which had been created for the purpose of remedying these evils by re-establishing human rights, solemnly adopted the " Universal Declaration of Human Rights ". Article 14 of this Declaration in particular states that " everyone has the right to seek and to enjoy in other countries asylum from prosecution ".

This was an important step towards restoring the state of law on traditional lines. The universal Declaration is not, however, properly speaking an act of law. It represents an ideal to be reached, but the implementing of the principles which it affirmed still requires the drawing up of conventions of application to be signed and ratified by the various Powers. Now there was not even a reference to the right of asylum in the two Conventions of application negotiated by the competent commission of the United Nations Organization. If this caused surprise to some delegations, other government representatives maintained that the right of asylum could be considered as State law and not as private law. Consequently, it could not be included in a convention relating to the exercise of human rights. A similar reservation was made by the Commission of international law. This Commission, after having agreed, on the suggestion of the Secretary-General of the United Nations Organization, to place the question of the rights of asylum on its agenda, in fact postponed year after year from undertaking its study and has done nothing to enlighten the public about this important problem.

Doubtless one can understand the reasons which have made Governments hesitate to give effect to the principles in the Universal Declaration relating to the right of asylum.

The number of persons to benefit from such a right is virtually very large. There would have been a danger of the economic balance in some of the receiving countries being upset, of their labour market being swamped and their standard of living lowered as a result of a great influx of refugees. One should not therefore be surprised, if only looking at the problem from the economic point of view, that States have sought to keep intact their discretionary powers concerning the individual.

But as has been so well shown by many publicists, several of whom are members of our working parties, the question also presents a humanitarian aspect, and as such it is so important that humanity owes it to itself to give it the consideration it deserves.

The report of the 44th meeting of the Institute of international law (Bath, September 5-12, 1950) published in the review *Die Friedens-Warte* (1951, No. 3), by Mr. Paul Berthoud, supplies

interesting information of the discussions of that Institute, in which leading personalities in the international legal world took part.

Mr. Berthoud recalled that the question of asylum in public international law was included in the Institute's programme in the period preceding the Second World War. It was to have been brought up at Neuchâtel in 1939, but war interrupted these studies.

Resumed in 1948 and 1949 in Brussels and at Bath they resulted in the following proposal being adopted:

" Any State, granting asylum on its own territory in the fulfilment of its humanitarian duties, incurs no international responsibility thereby."

Still without establishing the " right " of the individual, this proposal has at least the advantage of explicitly mentioning the State's " duty " of acting humanely.

Mr. Berthoud moreover stressed that one could not fail to observe that the question raised was related to that of Human Rights and that several members declared themselves prepared to bring up the principle of the State's obligation to receive the person seeking asylum on its territory as a corollary to the right of the individual to obtain such asylum. He added: " The question of this right was moreover very frequently raised during the debates, and the Institute finally adopted a resolution by which it drew its Office's attention to the interest there would be in making a study of all problems connected with an international agreement on the rights of asylum within the framework of the protection of the fundamental rights of man."

At our Congress at Helsinki in 1955, Professor H. Rogge drew our attention to the many expulsions (deportations) and to the legal aspect of these events.

He reminded you that at this same Congress, the legal commission and the commission charged with the study of the international Conventions concerning refugees, under the guidance of Professor Schätzel and Professor Folberth, had passed a resolution inviting States to accept for the children of stateless persons, born on their territory, the rule of *jus soli* (always on condition that these were prepared to submit themselves to the same obligations as the rest of the national population) a recommendation which, if taken into

account in the countries of *jus sanguinis*, would eliminate statelessness as from the second generation.

Professor Schätzel took up the matter at the general assembly held in Berlin in 1959 and in the following year we heard Dr. Veiter's very eloquent and detailed pleading at Weggis for an extension of the provisions of the Convention signed at Geneva on July 28, 1951 establishing the status of refugees and creating a veritable international law of asylum.

Our last Congress in Athens gave Dr. Veiter and Dr. Rabl the opportunity of submitting a thorough study, due especially to the latter, on the right of domicile, a study which was confirmed by the legal commission presided over by Professor Constantopoulos in succession to Professor Schätzel.

In order to complete the picture, mention should be made of many other studies on the subject. It is only necessary here to recall our own work in outline and our contribution towards establishing an international doctrine on the right of asylum.

As regards the progress which has been made within the framework of the United Nations, I would recall that in April 1957, at its 13th session, the Commission of Human Rights pointed out that Article 14 of the Universal Declaration, the article relative to the right of asylum, was not included in the draft Covenants relative to human rights, although the practical realization of the right of asylum always continued to remain a "pressing necessity". This Commission then took note of a preliminary draft declaration submitted by the representative of France and decided to keep the question of the right of asylum on its agenda.

This concern of the Human Rights Commission was expressed in the adoption of a draft declaration at its session in March 1960 for transmission to the United Nations General Assembly, which consisted in particular of Article 3 as follows :

No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for overriding reasons of national security or safeguarding of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is wellfounded fear of persecution endangering his life, physical integrity or liberty in that territory.

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In cases where a State decides to apply any of the above-mentioned measures, it should consider the possibility of the grant of provisional asylum under such conditions as it may deem appropriate, to enable the persons thus endangered to seek asylum in another country.

If such a declaration were to be accepted by the United Nations Assembly, it would not bind States any more than does the Universal Declaration of Human Rights, since it would not either by itself have any obligatory force. It would at least be the expression of a principle whose application could be included in national legislation, and it would assist in the interpretation of article 33 of the Statute of Refugees. It would in fact introduce this important notion of granting a provisional welcome even to those to whom definite asylum is refused, permitting them to seek asylum in some other country in which they would not fear the same refusal.

This declaration was submitted to the Assembly by the Economic and Social Council in 1960.

The Third Commission of the General Assembly when reviewing its programme on December 6, 1961, decided to bring forward the study of the problem at its session in 1962, recommending however that priority be given to such study. On December 8, 1961, the General Assembly in plenary session adopted a resolution to that effect.

As Mr. Schnyder, who is closely following this matter, explained (Information Note of the United Nations High Commissioner for Refugees, January 1962), this draft declaration on the right of asylum has been prepared since in many countries: Austria, Belgium, Canada, Denmark, France, German Federal Republic, Great Britain, Greece, Iceland, Ireland, Portugal, Spain, Sweden, Switzerland, Turkey, United States; it was considered that article 14 of the Universal Declaration of Human Rights did not sufficiently recognize the right to benefit from asylum. It would appear that the declaration should affirm that the granting of the right of asylum should be a prerogative of sovereignty and be respected by other States, that the question of a person asking to benefit from the right of asylum should be of interest to the international community and that no one should be constrained to remain or to return to a country in which he risks persecution.

These facts are of capital importance and it is to be hoped that the General Assembly of the United Nations adopts, at its next session next November, this declaration, and consequently the principles thus set forth by the High Commissioner.

The declaration of principles is always a first step on the path of establishing international law. For this reason the preamble of international Conventions often contains most useful elements for the interpretation and development of these Conventions. We would therefore greatly welcome the adoption of this declaration within the next few months.

It is to be hoped that it could be in a certain measure the preamble of a real international Convention on the right of asylum following the pattern of the Geneva Conventions on international humanitarian law, that is to say in the form of a multilateral agreement open to the accession of all the Powers.

I have already had occasion to say how I consider the framework of such a Convention could be outlined¹; I think it is worthwhile recalling the following points :

- 1) The right of asylum would be affirmed as a human right according to the wording of article 14 of the Universal Declaration and eventually completed by the provisions of the forthcoming declaration of the General Assembly of the United Nations ;
- 2) The duties of those seeking asylum would then be defined on the bases of article 10 of the European Convention of Human Rights ;
- 3) The right of expulsion of which the State disposes for the infringement of these rights should be made the subject of clauses based on article 32 of the Statute for Refugees. Expulsion could not be made except for reasons of security and public order. It could take place only by execution of a decision made in conformity with due process of the law. The person seeking asylum would benefit from a reasonable time-limit to enable him to be admitted in another country in a regular manner and the contracting States could apply during that period any measure

¹ I refer especially to an article in the review *Intégration* (No. 1, 1957) and to my course at the Academy of international law at The Hague in 1960.

of internal order which they might deem necessary. If a question of internment were involved this could be dealt with according to the appropriate articles of the Fourth Geneva Convention of August 12, 1949. It would be advisable to state, as does the British Aliens Act, that indigence could not be given as a reason of public order to justify the expulsion of the person seeking asylum ;

- 4) Finally, it would be a question of reserving the set of extradition Conventions for the repression of crime by specifying (as suggested by Mr. Alfaro, Mr. Scelle and Mr. Yepes when studying the draft Declaration on the rights and duties of States) that " each State has the right of granting asylum to persons seeking it following on persecution for offences which the State granting asylum judges to be of a political nature ". One would thus avoid the position of extradition treaties running counter to political refugees accused of offences qualified as being under common law by the State which is claiming them. For obvious humanitarian reasons, the qualification of an offence should not be left to the decision of the State demanding the person's return.

Whilst playing its part in the law of the State, this decision would illustrate the personal idea of legal order. Recalling the sense of sacredness at the origin of the right of asylum, it would affirm once more that the state of law coincides with the respect for human values and in the troubled times in which we live, such an affirmation would have a highly civilizing significance.
