

HUMAN RIGHTS AND REFUGEES¹

by Paul Weis

I. Introduction

Wherever the United Nations Charter refers to promoting and encouraging respect for human rights and for fundamental freedoms, it refers to human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Within a State one distinguishes normally between nationals and aliens. But among the aliens there is a particular group—the refugees—whose position in traditional customary international law is especially precarious. This is due to the fact that in classic international law nationality is considered as the link between the individual and international law. In later editions of Oppenheim's leading textbook on International Law it is called the principal link.²

In the case of the refugee, this link is not effective; it has been broken. One speaks also of *de facto* and *de jure* stateless persons, but this terminology is, in the opinion of the present writer, not quite exact. The definition of refugee which we find with certain variations in relevant international instruments is that of "any person who is outside the country of his nationality or, if he has no nationality, the country of his former habitual residence, owing to well-founded fear of being persecuted by reason of his race, religion, nationality

¹ Speech delivered at Geneva on 26 November 1971 on the occasion of the presentation of the Golden Nansen Ring to Mr. J. F. Thomas, Director of the Intergovernmental Committee for European Migration, based on an article by the speaker, published in the *Israel Yearbook on Human Rights* vol. 1. pp. 35-50.

² 6th ed. edited by Lauterpacht p. 588.

or political opinion, and is unable or, because of such fear, is unwilling to avail himself of the protection of the country of his nationality, or if he has no nationality, to return to the country of his former habitual residence".³

Refugees may be stateless or not. It is not their nationality status but the absence of protection by a State which is a determining element of their refugee character. It would, therefore, in the case of refugees and stateless persons who have been called "flotsam", "*res nullius*",⁴ "a vessel on the open sea not sailing under any flag",⁵ be more proper to speak of *de facto* and *de jure* unprotected persons. Owing to this lack of protection, their situation in customary international law is anomalous.

While the refugee problem is as old as history, international action for refugees started only after the First World War when the Russian Revolution brought in its train a problem of refugees numbering approximately 1,500,000 persons. They were devoid of passports and this created also a legal problem where their movement was concerned. The League of Nations dealt with this problem in two ways: by the creation of international agencies for the protection of refugees and by the establishment of international arrangements, agreements and conventions, first for the issuance of travel documents for refugees and then for the regularisation of their status in general. Many of these agreements were adopted at the initiative of the international agency for refugees. The first such agency—created thanks to the initiative of the International Committee of the Red Cross—was the League of Nations High Commissioner for Russian Refugees and the first High Commissioner was the great Norwegian explorer and humanitarian, Dr. Fridtjof Nansen, who was appointed on 27 June 1921. The travel document issued to refugees in lieu of a passport has become known as the "Nansen Passport". Since that time there has been an unbroken chain of intergovernmental agencies for the protection of refugees: the mandate of the League's High Commissioner was extended to further groups of refugees—Armenian, Assyrian, Assyro-Chaldaean

³ Statute of the UN High Commissioner for Refugees, Sec. 6.

⁴ See Schwarzenberger *International Law* vol. I, p. 171.

⁵ See Oppenheim *International Law* (6th ed.) vol. I, p. 611.

refugees, refugees from the Saar territory and others. In 1930, after Dr. Nansen's death, the legal and political protection of Russian and assimilated refugees was assured by the regular organs of the League, and the "Nansen International Office" was created, under the authority of the League, for the discharge of the relief activities for refugees. On Hitler's coming into power, a special "High Commissioner for Refugees from Germany" was appointed. Both the Nansen International Office and the Office of the High Commissioner for Refugees from Germany were liquidated in 1938 and replaced by the Office of the High Commissioner for all refugees under the protection of the League of Nations.

Thus, the League dealt with specific categories of refugees as they arose. When the problem of refugees, particularly of Jewish refugees, from Nazi Germany and Austria assumed great proportions, an intergovernmental conference held at Evian, France, in 1938, at the initiative of President Franklin D. Roosevelt, created a new international agency, the Intergovernmental Committee for Refugees. During the Second World War, both the League of Nations High Commissioner for Refugees and the Intergovernmental Committee for Refugees had their seat in London where they used the same premises. By the fact that Sir Herbert Emerson was both League of Nations High Commissioner for Refugees and Director of the Intergovernmental Committee, close coordination of the activities of both agencies was ensured.

II. United Nations Action

The newly created United Nations had from its inception to deal with the refugee problem. The Second World War and the political and territorial changes which it brought about created a vast problem of refugees and displaced persons. One of the first actions of the United Nations was the creation of a new specialized agency, the International Refugee Organization (IRO), to assist those persons not only where their protection was concerned but also with care and maintenance, repatriation and resettlement. It was a vast operational agency, but short-lived; it went into liquidation in 1951.

It is significant that most of the work of the United Nations for refugees in the legal field emanated from the Commission on Human

Rights, which as early as 1947 adopted a Resolution that “early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any Government, in particular the acquisition of nationality, as regards their legal status and social protection and their documentation.”⁶

In the course of the work following this initiative, the Secretary-General of the United Nations, pursuant to a resolution of the Economic and Social Council, prepared a study of the existing situation regarding the protection of stateless persons and refugees and of national legislation and international agreements and conventions relating to the subject, and submitted recommendations on both questions to the Council.⁷ The Secretary-General recommended the conclusion of international conventions concerning the legal status of stateless persons, whether *de jure* or *de facto*, and the creation of an international organ for their protection.

This led to the creation by the General Assembly of the United Nations, by Resolution 428 (V) of 14th December 1950, of the Office of the United Nations High Commissioner for Refugees (UNHCR) as from 1 January 1951 to take over the protection function from the IRO, and to the establishment of a Convention relating to the Status of Refugees⁸, adopted by a Conference of Plenipotentiaries on 28 July 1951 at Geneva and of a Convention relating to the Status of Stateless Persons, adopted by a Conference of Plenipotentiaries on 24 September 1954 in New York.⁹ It can thus be seen that the United Nations followed the tradition of the League in establishing agencies for the protection of refugees and treaties regulating their status. There are, however, important differences: both the Statute of the Office of the United Nations High Commissioner for Refugees and the 1951 Convention contain a general definition of refugees, not only a definition by categories as was the case during the time of the League. Moreover, the Convention establishes a formal link between the agency created by a Resolution of the General Assembly and the Convention. The Contracting States

⁶ U.N. doc. E/600 para 46.

⁷ *A Study of Statelessness*, U.N. Publications Sales No. 1949, XIV.2.

⁸ U.N. *Treaty Series* vol. 189, p. 137.

⁹ U.N. *Treaty Series* vol. 360, p. 130.

undertake to co-operate with the Office of the United Nations High Commissioner for Refugees or any United Nations body which may succeed it, in the exercise of its functions, in particular in its task of supervising the application of the provisions of the Convention (art. 35 of the Convention). Thus, a contractual link has been established and States parties to the Convention undertake as a legal duty what, as a result of a General Assembly Resolution, is only a recommendation and therefore based on sufferance: the co-operation of States with the High Commissioner's Office in the exercise of its protection function and the supervision of the application of the treaty by the international body for the protection of refugees.

III. The Right of Asylum

The first need of the refugee is to be admitted to a country and to receive asylum; the right to asylum is for him a corollary to the right to life. On this matter, as is known, the Universal Declaration of Human Rights provides in Article 14: "Everyone has the right to seek and to enjoy in other countries asylum from persecution". Originally this provision read in the Draft Declaration: "Everyone has the right to seek and to be granted asylum in other countries from persecution". But this wording was objected to by some States on the ground that it implied an individual right to asylum while asylum was granted by States in the exercise of their sovereignty. The present text was called "artificial to the point of flippancy" by Sir Hersch Lauterpacht.¹⁰ The Human Rights Commission of the United Nations resolved in 1947 "to examine at an early opportunity the question of the inclusion of the right of asylum of refugees from persecution in the International Bill of Human Rights or in a special Convention for the purpose".¹¹ However, efforts to have a provision on asylum incorporated in the Covenant on Civil and Political Rights failed; none of the proposals received a majority.

In this situation the representative of France, Professor René Cassin, proposed in the Human Rights Commission in 1957 a Draft Declaration on the Right of Asylum. The Commission adopted such

¹⁰ "The Universal Declaration of Human Rights" in *British Yearbook of International Law* (1948) p. 374.

¹¹ U.N. Doc. E/600 para 48.

a draft Declaration in 1960 and it was transmitted to the General Assembly through the Economic and Social Council. The Third Committee of the Assembly adopted in 1962 the Preamble and Article 1. The work on the Declaration was then transferred to the Sixth Committee which dealt with it from 1965 till 1967; on 14th December 1967 the General Assembly adopted a Declaration on Territorial Asylum. As can be seen the name was changed: the word "right" was deleted in order not to give the impression that there is an individual right to asylum, and the word "territorial" was added in order to distinguish it from diplomatic asylum, with which the Declaration does not deal. The text of the Declaration as adopted unanimously by the General Assembly by Resolution 2312 (XXII) reads: ¹²

DECLARATION ON TERRITORIAL ASYLUM

Noting that the purposes proclaimed in the Charter of the United Nations are to maintain international peace and security, to develop friendly relations among all nations, and to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion,

Mindful of the Universal Declaration of Human Rights which declares in article 14 that " (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution; (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations ",

Recalling also paragraph 2 of article 13 of the Universal Declaration of Human Rights which states " Everyone has the right to leave any country, including his own, and to return to his country ",

Recognizing that the grant of asylum by a State to persons entitled to invoke article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act and that as such it cannot be regarded as unfriendly by any other State,

Recommends that, without prejudice to existing instruments, dealing with asylum and the status of refugees and stateless persons, States should

¹² Cf. the author's article " The U.N. Declaration on Territorial Asylum " in *Canadian Yearbook of International Law* 1969, pp. 92-149.

base themselves in their practices relating to territorial asylum on the following principles:

ARTICLE 1

1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a warcrime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.

ARTICLE 2

1. The situation of persons referred to in article 1, paragraph 1, is, without prejudice to the sovereignty of States and the purposes and principles of the United Nations, of concern to the international community.

2. Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.

ARTICLE 3

1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

ARTICLE 4

States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.

It may be useful to add a few remarks regarding the interpretation of this text. The first Article stresses again that asylum is granted in the exercise of sovereignty, or more exactly in the exercise of territorial supremacy; that it shall be respected by all other States is already a principle of international law. The third paragraph states the so-called principle of unilateral qualification. This also follows *a contrario* from the *obiter dictum* of the International Court of Justice in the Asylum Case which, as is known, concerned diplomatic asylum, where it was held that the State granting diplomatic asylum does not have the right of unilateral qualification, *inter alia* on the ground that diplomatic asylum involved a derogation from the sovereignty of the territorial State.¹⁸

Article 2 states a principle which can also be found, for instance, in General Assembly Resolution 8 (I) of 12 February 1946 where it is said that the refugee problem is "international in scope and nature". Already the founding fathers, Grotius, Suarez and Wolff, considered that asylum was granted in pursuance of an international humanitarian duty. It follows that the individual State granting asylum acts as an agent of the international community; where the burden on a State by the granting of asylum proves too heavy, that State may expect that the international community will assist in relieving it from the burden.

Article 3, perhaps the most important, states the so-called principle of *non-refoulement*. This principle can also be found in the 1951 Convention in Article 33, which is one of the fundamental provisions to which no reservations may be made. It reads there:

"1. No Contracting State shall expel or return ("refouler") a refugee 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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. "

¹⁸ I.C.J. Reports (1950), pp. 274, 275.

The principle is perhaps more limited in the Convention since the Convention does not deal with admission itself, and the provision is therefore, at least according to the prevailing interpretation, considered to relate to persons who are already in the territory; but Article 3 of the Declaration refers also to persons presenting themselves at the frontier, who should not be rejected if such rejection would compel them to remain in or return to the territory of a State where they would be subject to persecution.

The Declaration, as a Resolution of the General Assembly of the United Nations, is, of course, not legally binding. It incorporates, however, a number of generally recognised principles. As to the principle of *non-refoulement*, it is difficult to assess its precise legal character.

It has been incorporated in the Convention governing the Specific Aspects of the Problem of Refugees in Africa, adopted by the Organization of African Unity on 10th September 1969, and in the American Convention on Human Rights, adopted on 22 November 1969 by the Organization of American States.¹⁴ It has been affirmed by the Teheran Conference on Human Rights in 1968 and the Resolution on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe on 29th June 1967. The European Commission on Human Rights has consistently held that expulsion or extradition to a country in which basic human rights, as guaranteed by the European Convention on Human Rights, might be either grossly violated or entirely suppressed, constitutes inhuman treatment—which is prohibited by Article 3 of the Convention. The Conference on the Status of Stateless Persons, held in New York in 1954, stated in its Final Act¹⁵ that it had not been found necessary to incorporate an article equivalent to Article 33 of the Refugee Convention in the Convention relating to the Status of Stateless Persons because that Article was the expression of a “generally accepted principle”.¹⁶

Provisions relating to asylum have been embodied in the Constitutions or aliens legislation of a considerable number of States,

¹⁴ OAS Official Records OEA/Ser.EK/XVI/1.1.

¹⁵ U.N. doc. E/Conf.17/5/Rev.1.

¹⁶ Cf. the author's article “Recent Developments in the Law of Territorial Asylum” in *Human Rights Journal* (1968), pp. 378-396.

thereby in many cases conferring upon the individual a subjective right to asylum under municipal law.

The principle of *non-refoulement* in its wider sense, including rejection at the frontier, can certainly be regarded as usage. In view of its widespread acceptance in treaties and municipal legislation it may by now, at least in its narrow sense—that is to say, in relation to persons within the territory of the State—have acquired the character of a rule of international law. At least one author has considered it as a peremptory norm of international law.¹⁷

On the whole it would seem to be the meaning of the Declaration that while asylum is still a right of States accorded in the exercise of their sovereignty rather than a right of the individual, this sovereignty should not be exercised in such a way as to refuse a person admission, at least temporary admission, if such refusal would subject him to persecution.

(To be continued)

Paul WEIS

Dr. jur., Ph. D.

Former Director of the Legal Division of the
Office of the United Nations High Commis-
sioner for Refugees

¹⁷ F. Berber *Lehrbuch des Völkerrechts* vol. I, p. 388.