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## I. GENERAL REMARKS

## (A) The refugee problem as the subject-matter of international legal instruments

1. Already in antiquity the world was beset by the problem of persons fleeing from their homes in fear of persecution. In more recent times, it has come to be accepted that the refugee problem is one calling not only for humanitarian measures, but also for measures in the legal sphere and particularly in the international legal sphere. As from the end of the first World War international legal instruments were adopted in order to regulate various matters connected with new refugee problems as and when they arose. At the same time, international agencies were established for the legal protection of refugees. The basic international instruments relating to refugees at the present time are the Convention relating to the Status of Refugees of 28 July 1951 and the Statute of the Office of the United Nations High Commissioner for Refugees annexed to General Assembly Resolution 428 (V) of 14 December 1950. The international legal instruments relating to refugees adopted between the two World Wars will be described in greater detail below.<sup>1</sup> To the extent to which they form part of a general development in the field of refugee law, however, they call for the following comments: *Ratione materiae* these instruments were originally limited to specific matters, such as the issue to refugees of certificates of identity in lieu of passports (later known as "Nansen passports") to enable them to travel abroad. In the course of time the material scope of these instruments gradually became wider. The most comprehensive instrument relating to the legal status of refugees is now the 1951 Convention which lays down minimum standards for the treatment of refugees as regards a variety of matters. *Ratione personae* the pre-War instruments

1. Post paras. 26-31.

were confined to a specific category or categories of refugees. The first instrument related to Russian refugees and later instruments were concluded for the benefit of Armenian, Turkish, Assyro-Chaldean and assimilated refugees and refugees from Germany and Austria. The 1951 Convention also marks a development as compared with the pre-War instruments in that it contains the elements of a general definition of the term "refugee". Thus in addition to persons who have been considered as refugees under the pre-War instruments, the term "refugee" for the purposes of the Convention, applies to any person who is outside the country of his nationality or, if he has no nationality, the country of his former habitual residence, because of well-founded fear of persecution.<sup>2</sup> The definition in the Convention, however, contains a limiting factor in that it only applies to persons who fear persecution as a result of "events occurring before 1 January, 1951". Moreover, the Contracting Parties are given the option, at the time of signature, ratification or accession, of limiting the words "events occurring before 1 January 1951" to "events occurring in Europe" prior to that date.

2. Parallel to the widening of the material and personal scope of international instruments relating to refugees there went a corresponding widening of the competence *ratione personae* of the international agencies established for their protection. The first League of Nations High Commissioner for Refugees was competent only for Russian refugees. This competence,—and that of the international agencies which succeeded him,—was gradually expended to include the other categories of refugees for whom provision had been made by the respective international instruments.<sup>3</sup> At present the competence of the United Nations High Commissioner for

2. The definition of the term "refugee" in the 1951 Convention and in the statute of the Office of UNHCR will be analysed in detail below, paras. 21-25.

3. For details regarding the international agencies established for the legal protection of refugees prior to the establishment of the Office of UNHCR, see "Study of Statelessness", pp. 35-41.

Refugees extends to all persons falling within the scope of the 1951 Convention. His competence is, however, wider in that it is not limited to persons who have become refugees as a result of events occurring before 1 January 1951. The assistance afforded by the High Commissioner in the exercise of his "good offices" function will be referred to later.<sup>4</sup>

3. Subject to the existence of the dateline in the 1951 Convention, there may thus be said to have been a development in international legal instruments relating to refugees from the specific and limited to the more comprehensive general and universal. This development in the legal sphere may be regarded as a reflection of a wider development in the attitude of States towards refugee problems characterized by a growing humanitarian understanding and an increased desire to adopt a generous asylum practice in accordance with an international humanitarian duty. Thus the right of asylum, the most vital need for the refugee, has gradually been embodied in the municipal law of various States, and has been given expression in some form in certain international instruments, e.g. the "Universal Declaration of Human Rights" (Art. 14), the 1928, 1933 and 1954 Conventions on Asylum adopted within the framework of the Organisation of American States and various extradition treaties. In connection with this development, mention should be made of the discussion of the question of the right of asylum in the United Nations Commission on Human Rights and the General Assembly. These bodies have elaborated a draft "Declaration on the Right of Asylum" aimed at the establishment of universal standards of conduct *vis-a-vis* asylum seeking refugees short of a legal obligation to grant asylum. The consideration of the draft Declaration by the General Assembly has not yet been completed.

**(B) Problems arising in connexion with the personal scope of the 1951 Convention**

4. At the time when the Convention was adopted, the fact that the definition of the term "refugee" was limited by

4. See post paras. 14, 96-103.

the date-line of 1 January 1951 did not give rise to any special problem, since the definition applied to all known groups of refugees. These were in the main (a) refugees covered by the pre-War international legal instruments and (b) persons who became refugees as a result of events occurring during or immediately after the second World War.

5. With the passage of time, however, new refugee situations arose which in certain cases could be covered by the Convention, thanks to the willingness of governments to recognize the existence of a casual link between the plight of persons who left their home countries after 1 January 1951 and events occurring prior to that date. Thus the refugees who came from Hungary as a result of the Revolution in 1956 were generally considered to be refugees covered by the 1951 Convention, and a similar view has recently been adopted by the Swiss Government with regard to refugees from Tibet.<sup>5</sup>

6. However, as new refugee problems arise subsequent to 1951, it may become increasingly difficult for governments to recognize the existence of such a long-term historical causal link. This seems to be especially true in new refugee situations, like those which have now arisen in Africa. Thus the High Commissioner has in the last few years had to interest himself, *inter alios*, in the following new groups of refugees: Algerian refugees, Rwandese refugees, Sudanese refugees, refugees from Angola and from Portuguese Guinea. In addition, he has had to interest himself in Tibetan refugees, Chinese refugees and refugees from Cuba. It is clear that some of these new refugee situations may have no, or very little, connexion with events occurring before 1 January 1951.

5. It will be seen that already at the date when the Convention was adopted, the definition was intended to exclude events occurring after 1 January 1951 but not persons who might become refugees at a later date as a result of events occurring prior thereto or as a result of after-effects of such events occurring at a later date. See post para. 25.

7. There may thus be an increasing number of refugees who, not being covered by the Convention, are unable to take advantage of the minimum standards of treatment for which the Convention provides.

8. The Conference of Plenipotentiaries which adopted the 1951 Convention was already aware that this problem might arise in the future and therefore adopted as part of the Final Act, Recommendation E, worded as follows:

“The Conference,

“Expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.”

9. As will be seen later, whenever, it is doubtful whether this Recommendation can provide a generally satisfactory solution for the problem of post-dateline refugees. It may thus be difficult for the Governments of certain States to apply, on the basis of a mere recommendation, the provisions of a Convention which if applied in the normal way, might involve a modification of the *jus cogens* relating to matters such as personal status, social security or public assistance. On the international level, measures adopted on the basis of a mere recommendation, whereby the treatment accorded to post-dateline refugees is assimilated to that accorded to Convention refugees may not necessarily have extra-territorial effect.<sup>6</sup>

10. Thus, as frequently in the past, new refugee groups have come into existence for whom no appropriate legal instrument exists in the field of international treaty law. The present problem, however, presents certain aspects which dist-

6. See post paras. 51-54/118-124/127.

inguish it from similar problems which have arisen in the past; namely the broader definition of the term "refugee" in the Statute of UNHCR as compared with the definition in the Convention; the relationship between these two definitions; and the widening by various General Assembly Resolutions of the tasks and competence entrusted to the High Commissioner under his original mandate. It is necessary to examine these specific aspects in order to obtain a complete picture of the present problem.

**(C) Competence of the United Nations High Commissioner for Refugees under the Statute of his Office in relation to the personal scope of the 1951 Convention**

11. The Statute of UNHCR annexed to General Assembly Resolution 428 (V) of 14 December 1950, contains a definition of the term "refugee" which substantially coincides with the definition in the 1951 Convention with the important difference that it is not limited by the dateline of 1 January 1951. Under his Statute, the High Commissioner is therefore, competent for post-dateline refugees even though they are not covered by the Convention. The fact that the Convention, unlike the Statute, contained a dateline and might optionally be limited to Europe, was not, however, of any great significance when the two instruments were adopted. At that time their personal scope was *in practice* identical and a certain equilibrium was maintained by the fact that the mandate of UNHCR was originally limited to three years. (It has in the meantime been periodically extended, at present until the end of 1968).

The groups covered by both instruments were in the main refugees from Eastern Europe, refugees of ethnic German origin in Austria (not in Germany due to the special status granted to them there), Spanish refugees and refugees covered by pre-War instruments, such as white Russian and American refugees and refugees from Germany and Austria.

12. With the passage of time and the emergence of new refugee problems, however, there is a growing discrepancy between those refugees covered by the Convention and those for whom the High Commissioner is competent under his Statute. This problem of the increasing discrepancy between those refugees covered by the Convention and those for whom the High Commissioner is competent under his Statute is emphasized by the adoption of certain resolutions by the United Nations General Assembly extending the scope of the High Commissioner's tasks and functions. The Statute and these later General Assembly Resolutions form an integral legal basis for the activities of UNHCR, the original mandate being thus adapted to changing needs.

**(D) Functions of UNHCR—Legal protection and "good offices" functions**

13. The basic function of UNHCR according to the Statute is the international legal protection of refugees which is essentially aimed at safeguarding their legitimate rights and interests, mainly *vis-a-vis* their countries of asylum. When the Office of UNHCR was established in 1950, the main emphasis was placed on this basic function of international legal protection. However, the original mandate already envisaged certain activities in the social field. Thus in addition to providing international protection the High Commissioner was required to seek permanent solutions for the refugee problem by assisting governments and, with the approval of the governments concerned, private organisations to facilitate the voluntary repatriation of refugees or their assimilation within new national communities.

14. It will be seen later that the material scope of the High Commissioner's activities in the social field was subsequently extended by various General Assembly Resolutions. These Resolutions gave the High Commissioner a general authorization to appeal for funds, firstly for the grant of emergency relief and later for undertaking material assistance

programmes in order to bring about permanent solutions for refugees under his mandate.<sup>7</sup>

15. There have also been certain developments, resulting from various General Assembly Resolutions, regarding the scope of the competence of UNHCR *ratione personae* to deal with refugee problems in the social field as distinguished from the field of international legal protection. By virtue of these Resolutions which will be referred to in more detail later the High Commissioner is enabled to assist new groups of refugees by extending his "good offices". This has made it possible to extend and to strengthen substantially the part which the High Commissioner, under the guidance of his Executive Committee, has been able to play in the social field as an intermediary of international goodwill and solidarity in arranging for the grant of material assistance and in promoting permanent solutions. Even if, in its essence, the High Commissioner's interest has not gone beyond the scope of his functions as hitherto defined, the fact that, when he lends his "good offices", no formal eligibility determination is necessary, has been of considerable significance. It has facilitated a wider understanding of the purely humanitarian nature of the High Commissioner's work, as has been most apparent in the attitude recently adopted even by countries of origin of refugees, especially in Africa.

(E) **The problem summarized**

16. From the above it will be seen that a problem has arisen due to the existence of an increasing number of refugees who are not covered by the 1951 Convention and to the growing discrepancy between the categories of refugees covered by the Convention and those for whom the High Commissioner is competent under his Statute. This discrepancy which, as stated above, is emphasized by more recent developments as regards the High Commissioner's functions in the social field

7. See post paras. 96-103.

or "good offices" functions, is particularly significant as far as his function of international protection is concerned. The High Commissioner has encountered no difficulty *vis-a-vis* governments (whether parties to the 1951 Convention or not) as regards the *formal* recognition of his international protection. This function can, however, only have *material* content to the extent to which it has its counterpart in corresponding obligations of governments. In the field of international law, such obligations can be found in the 1951 Convention, in various other international legal instruments relating to or containing provisions regarding refugees and in general international law. In the case of refugees not covered by the 1951 Convention, however, such material content is reduced which, as far as these refugees are concerned, limits the effectiveness of the international protection function exercised by the High Commissioner on their behalf.

17. There would thus seem to be a general recognition of the need to extend the personal scope of the 1951 Convention, a need the existence of which has also been recognized on the international level. Thus the question of the personal scope of the 1951 Convention has been raised by several delegations represented on the Executive Committee of the High Commissioner's Programme at its Second Special Session in 1964 and at its 12th Session in 1965. At its 12th Session, the Committee "noted that the High Commissioner was studying ways and means by which the personal scope of the Refugee Convention of 1951 might be liberalized".<sup>8</sup> An examination of the historical development of the definition of the term "refugee" in the 1951 Convention will, however, show<sup>9</sup> that the dateline of 1 January 1951 and the possibility of optionally limiting the Convention to Europe were introduced because of the desire of certain Contracting States to protect themselves against possible future unforeseen

8. Report of the Twelfth Session of the Executive Committee of the High Commissioner's Programme, Document A/AC. 96/260, p. 7.

9. Post paras. 36-42.

obligations. When considering the present problem it should be born in mind that Governments may still not be prepared to assume future obligations whose extent they cannot foresee, or to broaden their obligations to existing new groups of refugees without any limitation. A means should, therefore, be found to enable Governments, by the adoption of suitable legal techniques, to assume the requisite international legal obligations without sacrificing their freedom of action in the case of new refugee situations, beyond the limits of what they would consider acceptable.

18. It is appreciated that in proposing an appropriate legal solution, account may have to be taken of historical developments, e.g. the difference between the present new refugee groups and those originally covered by the Statute and the Convention and the difference between the factual conditions in the light of which these instruments were adopted and those pertaining at the present time.<sup>10</sup>

19. The problem under consideration bears some resemblance to problems which have arisen in the past when the existence of new refugee situations called for appropriate measures on the international level. It is, therefore, proposed to examine these earlier precedents. In so doing, special consideration will be given to the legal techniques considered or adopted. It is also proposed to examine certain legal techniques adopted in other fields which may be of relevance to the matter under discussion.

20. It is hoped that the background information contained in the present paper will be of assistance to the Colloquium in proposing an appropriate solution for the present problem.

10. For an account of the factual conditions pertaining to the refugee problem in the post-war period see Elfan Rees: "Century of the Homeless Man", *International Conciliation*, No. 515 November, 1957, and James Read: "The United Nations and Refugees-Changing Concepts," No. 537 March 1962, both published by the Carnegie Endowment for International Peace.

## II. BACKGROUND INFORMATION

### (A) Analysis of the definition of the term "refugee" in the Convention relating to the Status of Refugees of 28 July 1951 and in the Statute of UNHCR (Annex to General Assembly Resolution 428(v) of 14 December, 1950.)

21. For the purposes of the Refugee Convention of 1951, the term "refugee" is defined by Article I A as "any person who :

"(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organisation.<sup>11</sup>

"(2) As a result of events occurring before 1 January 1951 and owing to 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 events, is unable or, owing to such fear, is unwilling to return to it.<sup>12</sup>

11. Decisions of non-eligibility taken by the International Refugee Organisation during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section."

12. In the case of person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

22. According to Article 1 B (1) the words "events occurring before 1 January 1951" shall be understood to mean either (a) "events occurring in Europe before 1 January 1951" or (b) "events occurring in Europe or elsewhere before 1 January 1951". Each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligation under the Convention. Moreover, according to Article 1 B (2) a Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.<sup>13</sup>

23. As regards the UNHCR Statute, paragraph 6 A (i) contains an identical provision to Article 1 A (1) of the Convention defining *pre-War refugees*. As regards later categories, the provision is substantially similar although there is a slight difference in wording: Thus in addition to pre-War refugees the competence of the High Commissioner shall, according to paragraph 6 A (ii) extend to:

"Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not

13. Of the 47 States which are at present parties to the Convention 16 have adopted alternative (a): Argentina, Australia, Brazil, Congo (Brazzaville), Dahomey, Ecuador, France, Italy, Ivory Coast, Luxembourg, Monaco, Niger, Peru, Portugal, Senegal, Turkey. Article 1 of the Refugee Convention of the corresponding provisions in the UNHCR Statute, also indicate the circumstances under which a person ceases to be a refugee (so-called "cessation clauses") or is excluded from the benefits of the Convention (so-called "exclusion clauses") Convention, Article 1, paragraphs (A) to (E) and Statute, paragraph 6 A; (a) to (f) and paragraph (7). These provisions will not be examined and they are not material for present purposes.

having a nationality and being outside the country of his former habitual residence, is unable or owing to such fear or for reasons other than personal convenience, is unwilling to return to it."

24. The definition in the Statute does not contain a qualification similar to that in Article 1 B of the Convention regarding "events occurring in Europe" and "events occurring in Europe and elsewhere". Moreover, paragraph 6 B of the Statute contains an additional provision according to which the competence of the High Commissioner shall extend to:

"Any other person (*i.e.* irrespective of whether or not as a result of events occurring before 1 January 1951) who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."

25. The scope of the Statute is, therefore, wider than that of the convention in that there is no possibility of imposing a geographical limitation and the definition is not bound to the dateline to be found in the Convention referring "events occurring before 1 January 1951." The latter expression in its earlier formulation "as a result of events in Europe after 3 September 1939 and before 1 January 1951" was the subject of comment during the preparation of the Convention. The expression was "intended to apply to happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution in this period which are the after-effects of earlier changes. The second date, 1 January 1951, excludes events which happen after that date but does not exclude persons who might become refugees at a later date as a