

CHAPTER III

TOWARDS AN UNDERSTANDING OF THE PROBLEM OF REFUGEES AND OTHER UPROOTED PEOPLE

The problem of 'refugees' is essentially a social and humanitarian problem by its nature. In the words of the Delegate of India to the Eighth (Bangkok, 1966) Session of the Asian-African Legal Consultative Committee: "The treatment of refugees is basically a humanitarian question. The attempts to give the refugees a legal status is only to ensure that a person who is a victim of unfortunate circumstances arising from persecution or reasonable apprehension thereof has a definite protection not only in the asylum State but also in other countries which have accepted their legal obligations in respect of refugees."¹ The Delegate of Jordan to the Tenth (Karachi, 1969) Session of the Committee was of the view that "We can hardly lose sight of the fact that this is predominantly and basically and fundamentally a human problem. There may be undercurrents of political and legal questions, but I submit to you that this is basically a human problem."² The Delegate of Japan to the Tenth (Karachi, 1969) Session of the Committee stated that "in view of the importance of the problem of refugees, not only for humanitarian reasons but also political reasons of world peace, this problem should be tackled with patience and persistence so as to alleviate the tragic plight of those people. Being a Consul-

1. See "Verbatim Record of Discussions held at the Eighth (Bangkok, 1966) Session on the subject of Refugees", at pp. 17, 18.

2. See "Verbatim Record of Discussions held at the Tenth (Karachi, 1969) Session on the subject of Refugees", for the Meeting of 23 January 1969, at p. 25.

tative Committee of a legal character, we think we must concentrate on finding out and working out the improvement of our Bangkok Report as a legal matter. But in doing so we must take always into consideration, as I have said, the problems which are involved. The legal aspect is one small aspect only of this important problem of refugees"³ The Delegate of Pakistan expressed the opinion that legal and technical objections must not stand in the way of settlement of such a grave problem in which the right of human beings to life, liberty and security as described in Article 3 of the Universal Declaration of Human Rights was involved.⁴

The humanitarian character of the refugee problem has also been recognized in the U.N. Convention relating to the Status of Refugees, 1951;⁵ the U.N. Declaration on Territorial Asylum, 1967⁶; and the O.A.U. Convention relating to the Status of Refugees in Africa.⁷

The term "refugee" as defined in international instruments does not attempt to cover all categories of uprooted people. At the Tenth (Karachi, 1969) Session of the Committee, the Delegate of Ghana brought out the distinction between the popular concept of refugees and the international concept.⁸ The Delegate of Japan thought it necessary to distinguish refugees from the displaced persons, and suggested that a new clause dealing with the case of displaced persons be formulated.⁹ The observer for the office of the United Nations

3. *Ibid.*, p. 14.

4. *Ibid.*, for the Meeting held on 25 January 1969.

5. In the fifth Preambular paragraph.

6. In the first paragraph of the Declaration, adopted by the U.N. General Assembly by Resolution No. 2312 (XXII) of 14 December 1967.

7. In the second Preambular paragraph.

8. See Verbatim Record of Discussions on the subject, held at the Tenth Session.

9. *Ibid.*, at the Meeting held on 28 January 1969.

High Commissioner for Refugees referred to the various refugee situations which exist, which are very different from each other and which make it difficult to establish common principles covering all of them.¹⁰ He dealt with the following refugee situations : (i) Exchanges of populations, where persons have been fleeing or have been expelled to a country with which they have close ethnic, cultural or religious links and where refugees are given the full rights of citizens. In such situations, there exist problems of economic integration and legal problems are of lesser importance ; (ii) Refugees fleeing from one country to another for fear of persecution by reasons of their belonging to political, religious or ethnic minorities in their country of origin. Their stay in the country of asylum is not necessarily of long duration. The problem in regard to those refugees is that of their economic integration in the country of asylum and that of their legal status until such time as a refugee can safely return home or when he becomes completely integrated in the country of asylum by acquisition of its nationality ; (iii) Refugees from countries under colonial domination or under a minority regime. Since these refugees usually desire to return to their country after its liberation, the problem with regard to them is to find temporary solutions which enable them to live in dignity and to prepare them for the time when their country is liberated, so that they may actively participate in the political, economic and cultural reconstruction of their country ; (iv) People expelled from their home country by an occupying power and now awaiting the return to their homes. With regard to this group, the problem is primarily one of ensuring implementation of the right of return and that of compensation.¹¹

A methodical treatment of the question of definition of "refugee" makes it necessary to examine the possibility of having different sets of principles for different situations which

10. *Ibid.*, at the Meeting held on 28 January 1969.

11. *Ibid.*, at the Meeting held on 23 January 1969.

bring about uprooting of people from their homeland. These persons can be broadly classified in three categories :

Firstly, those who are refugees in the strict sense of the term, i. e., as defined in the U.N. Convention on Refugees of 1951 as modified by the Protocol of 1967. Those in this category should enjoy their rights and be subject to their obligations as refugees only for such a duration of time as their peculiar circumstances make it necessary.

Secondly, people expelled from their homeland by an occupying power. This would cover the case of Palestinian refugees and people similarly situated. The set of principles governing these people would have to be based on the distinction as to whether these persons, as a result of an illegal occupation of their homeland by an alien power, flee to another country, or they, on an illegal foreign occupation of a part of their country where their homeland is situated, flee to the other part of the same country remaining unoccupied. In the latter case the principles should provide for their right of return to their homeland and their right to compensation enforceable against the occupying power.

Thirdly, other types of uprooted people, such as victims of civil war, refugee seamen and others not covered in any of the aforesaid categories. Different sets of principles have to be formulated for the different types of these persons considering the circumstances peculiar to each of these types.

Refugees in the first category can be distinguished from uprooted persons in the second category in regard to (a) the difference in the situation leading to their uprooting whereas, in the case of refugees in the first category the circumstances leading to their uprooting are those pointed out in points (i), (ii) and (iii) in the above mentioned statement of the Observer for the Office of the UNHCR, the circumstances leading to uprooting of people in the second category are those pointed out in point (iv) of his statement ;

(b) The primary factor, which in the case of refugees in the first category, is that of the fear of persecution, and which in the case of uprooted persons in the second category is merely the fact of illegal occupation of their homeland by a foreign power ; and

(c) The meaning of "homeland", which in case of the first category, invariably refers to their country of origin, and which, in the case of the second category, refers either to the whole, or to a part, of their country of origin, depending upon (i) whether the whole or only a part of their country of origin, where their homeland is situated, falls under the illegal occupation of the alien power, and (ii) whether the persons in the said category move to another country, or only flee from the occupied part, to the unoccupied part of their country of origin.

CHAPTER IV

DEFINITION OF "REFUGEE"

1. The definition as contained in the Bangkok Principles

In the "Principles concerning Treatment of Refugees" adopted by the Asian-African Legal Consultative Committee, the term "refugee" has been defined as follows :

Article 1

Definition of the term "Refugee"

A refugee is a person who, owing to persecution or well founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group :

- a) leaves the State of which he is a national, or the country of his nationality, or if he has no nationality, the State or country of which he is a habitual resident ; or
- b) being outside such State or country, is unable or unwilling to return to it or to avail himself of its protection.

Exceptions

- (1) A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any State or country of which he is a national.
- (2) A person who prior to his admission into the country of refuge, has committed a crime against peace, a war crime, or a crime against humanity or a serious

non-political crime or has committed acts contrary to the purposes and principles of the United Nations shall not be a refugee.

Explanation : The dependants of a refugee shall be deemed to be refugees.

Explanation : The expression "leaves" includes voluntary as well as involuntary leaving.

Article II

1. Loss of Status as Refugee

1. A refugee shall lose his status as refugee if—

- i) he voluntarily returns permanently to the State of which he was a national or the country of his nationality, or if he has no nationality to the State or the country of which he was a habitual resident ; or
- ii) he has voluntarily re-availed himself of the protection of the State or country of his nationality ; or
- iii) he voluntarily acquires the nationality of another State or country and is entitled to the protection of that State or country.

2. A refugee shall lose his status as a refugee if he does not return to the State of which he is a national, or to the country of his nationality, or if he has no nationality, to the State or country of which he was a habitual resident, or if he fails to avail himself of the protection of such State or country after the circumstances in which he became a refugee have ceased to exist.¹

1. See Proceedings of the Eighth Session of the Asian-African Legal Consultative Committee, held at Bangkok in 1966.

2. Proposals for amendment of the said definition

(i) The Delegates of Iraq, Pakistan and the United Arab Republic had expressed the view even at the Bangkok Session that, in their opinion, the definition of the term "refugee" should include a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such State, wholly or partially, by an alien with a view to occupying the State. The expression "illegal act" in the said proposal, according to the Delegation of Iraq, meant "aggressive act by another State or another people from outside the State."²

(ii) The Government of Pakistan, in their letter of 5 January 1968 addressed to the Secretary of the Asian-African Legal Consultative Committee, suggested that the term "refugee" should be enlarged by adding the following new clause (c) after clause (b) in Article I :

"(c) Leaves or being outside is unable or unwilling to return to his homeland, the sovereignty over which or the international status of which is disputed by two or more States and hostilities have taken place."

Consequential amendment of Article II, in the light of the amendment of the definition of refugee in Article I, was also suggested.³

At the Tenth (Karachi, 1969) Session of the Committee, the Government of Pakistan in response to the views expressed by certain other Member Governments, agreed to substitute the words "in dispute" for the words "disputed by two or more States and hostilities have taken place" in the said proposal.

2. See Proceedings of the Eighth (Bangkok, 1966) Session.

3. See Brief of Documents on "Rights of Refugees", prepared by the Secretariat of the Committee for its Tenth (Karachi, 1969) Session at p. 29.

Certain consequential amendments of Articles IV and V of the Bangkok Principles were also proposed by the said Government. Explaining his proposal, the Delegate of Pakistan stated that, in the particular case, the persons concerned do not seek refuge in any place outside their country of origin or nationality, but merely flee to another part of the same country.⁴

Commenting upon the above proposal, the Delegates of Japan and Iraq expressed the view that, in order to cover the said category of persons, it may be necessary to have a proviso or a new clause concerning "displaced persons", as distinguished from "refugees" in proper sense of the term. The Delegate of Japan felt that it may be necessary to have a separate set of rights and obligations in respect of these persons.⁵

The Observer for the Office of the UNHCR stated that, in regard to these persons, the problem was primarily one of ensuring the implementation of the right of return and that of compensation.⁶

3. A comparison between the definitions of "refugee" as contained in the Bangkok Principles (1966) adopted by the Committee, the U.N. Refugee Convention of 1951 as extended by the Protocol of 1967, and the OAU Convention concerning Refugees (September 1969)

The definition of "refugee" as contained in Article 1 of the U. N. Convention on Refugees of 1951⁷ is as follows :

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who :

4. See Verbatim Record of Discussions on the subject at the Tenth (Karachi, 1969) Session of the Committee.

5. *Ibid.*

6. *Ibid.*

7. 189 UNTS, p. 150 at p. 152.

- (1) Has been considered a refugee under the Arrangement 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 Organization;

Decisions of non-eligibility taken by the International Refugee Organization 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;

- (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.

In the case of a 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.

B. (1) For the purposes of this Convention the words "events occurring before 1 January 1951" in Article 1, section A, shall be understood to mean either :

- (a) "events occurring in Europe before 1 January 1951"; or