

THE PROTECTION OF REFUGEES

BY

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1. INTRODUCTION

Though refugees have always existed, mankind has never been faced with refugee problems of such formidable dimensions as during the present century. As a consequence of the Russian Revolution millions of people were compelled to leave their home country; during the first decades of the century Armenians and Assyrians were persecuted in Turkey; Hitler's "Machtübernahme" started off an implacable persecution of Jews and political dissidents in Germany; after the Second World War millions of refugees from East European states sought asylum in Western countries and, in the sixties, the new states in Africa had to deal with refugee problems of enormous proportions.

It has been affirmed in various contexts that the refugee problem is international in scope and character and that the responsibility for the international protection of refugees rests with the international community.¹ International bodies have been established for the purpose of providing material and legal assistance to refugees.² The legal protection has been complemented through treaties concerning the status of refugees.³

¹ See, *inter alia*, United Nations, General Assembly Resolution 319 (IV), 3 December 1949; Convention of 1951 Relating to the Status of Refugees (Preamble).

² The first international body dealing with refugee questions was the High Commission for Refugees, which operated between 1921 and 1930. It has been followed by the Nansen International Office (1930-38), the High Commissioner's Office for Refugees from Germany (1933-38), the High Commissioner's Office for all Refugees (1938-46), the Inter-Governmental Committee on Refugees (1938-47), the United Nations Relief and Rehabilitation Administration (1943-46), the International Refugee Organization (1946-51), and finally the United Nations High Commissioner for Refugees, whose activities started in 1951.

³ The previous international agreements were: Arrangement of 1922 with Regard to the Issue of Certificates of Identity to Russian Refugees (13 *League of Nations Treaty Series* 237); Plan for the Issue of a Certificate of Identity to Armenian Refugees (League of Nations, Document C.L. 72 (a), 1924); Arrangement of 1926 relating to the Issue of Identity Certificates to Russian

At the end of the Second World War the situation of the refugees was one of the most serious problems facing the Allies. So-called "displaced persons" and refugees numbered more than six million. It is true that most of these persons were repatriated already in 1945 through the combined efforts of the *United Nations Relief and Rehabilitation Administration* (UNRRA) and the armies of occupation, but for political reasons almost one million refused to return to their country of origin.⁴ Most of these people came from countries which had been annexed or were occupied by the Soviet Union. There was an urgent need for a new international body which could help the refugees. The General Assembly of the United Nations decided to establish the *International Refugee Organization* (IRO).⁵

At the time it was not envisaged that the IRO would be a permanent organization. Its activities were started on a temporary basis—as those of all the pre-war organs had been. The General Assembly assumed that a final solution of the refugee problem could be reached within a limited period. This proved impossible, however, as there was a continuous stream of new refugees needing international protection.

When the time for the liquidation of the IRO drew near, the United Nations was informed of the continuing need for legal and political protection of refugees. Consequently, in 1949 the General Assembly decided to replace the IRO by a new body, viz. the *Office of the United Nations High Commissioner for Refugees* (UNHCR), which was to take over the responsibilities of the IRO. Its activities were to start on January 1, 1951.⁶

Two years earlier—in 1947—the Commission on Human Rights had proposed that the question of the legal status of

and Armenian Refugees (89 *League of Nations Treaty Series* 47); Convention of 1933 Relating to the Status of Refugees (159 *League of Nations Treaty Series* 199); Provisional Arrangement of 1936 concerning the Status of Refugees coming from Germany (171 *League of Nations Treaty Series* 75); Convention of 1938 concerning the Status of Refugees coming from Germany (192 *League of Nations Treaty Series* 59); London Agreement of 1946 relating to the Issue of a Travel Document to Refugees who are the Concern of the Inter-Governmental Committee on Refugees (11 *United Nations Treaty Series* 73).

⁴ Ristelhueber, "The International Refugee Organization", *International Conciliation* 1951, p. 186.

⁵ United Nations, General Assembly Resolution 62 (I), 20 December 1946.

⁶ United Nations, General Assembly Resolution 319 (IV), 3 December 1949.

persons not enjoying the protection of any government should be investigated.⁷ In August 1949 the Economic and Social Council appointed an *ad hoc Committee* and requested this committee to

consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention.⁸

It was not surprising that the *ad hoc Committee* found it desirable to lay down rules for the legal status of refugees. In such circumstances it was quite natural to link the drafting of a new refugee convention with the drafting of statutes for a new refugee body. In practical terms this meant that the term "refugee" should be defined in the same way in the Statute of the Office of the UNHCR as in the refugee convention. Unfortunately, it was necessary to insert a time limit in the Refugee Convention—viz. January 1, 1951. The events which lay behind the persecution must have taken place before 1951. As a further limitation the meaning of the word "event" could be restricted to connote "events occurring in Europe". The idea of a complete harmony between the two documents was abandoned.⁹

In order to reach maximum conformity, the Third Committee of the General Assembly suggested the insertion of two definitions of the term "refugee" in the Statute of the Office of the UNHCR. The first of these definitions corresponded as far as possible to the one in the Draft Refugee Convention, while the second contained the same criteria, but without stating a time limit.¹ The General Assembly accepted the draft resolution as proposed by the Third Committee and adopted the Statute of the Office of the UNHCR.² On July 28, 1951, the *Convention Relating to the Status of Refugees* was adopted.³ Thus, while the High Commis-

⁷ United Nations, Economic and Social Council, Third Year, Sixth session, Supplement No. 1, pp. 13 f.

⁸ United Nations, Economic and Social Council Resolution 248 B (IX), 8 August 1949.

⁹ Cf. Weis-Jahn, "Die Vereinten Nationen und die Flüchtlinge", *Handbuch des internationalen Flüchtlingsrechts*, Vienna 1960, p. 259.

¹ United Nations Documents A/C. 3/L. 137 and A/1632 Annex.

² United Nations, General Assembly Resolution 428 (V), 14 December 1950.

³ 189 *United Nations Treaty Series* 137.

sioner's Office is responsible not only for already existing but also for future groups of refugees, the Refugee Convention is limited to persons who became refugees as a result of events which occurred prior to January 1, 1951, regardless of the actual date on which they left their country and became refugees.⁴ Thus, persons who became refugees as a result of events subsequent to 1950 are not covered by the Convention. However, the term "events" has been interpreted by Contracting States in such a way as to include so-called "after-effects" of earlier historical events.⁵

When in the sixties new refugee problems arose, it was impossible to consider the refugees concerned to be within the 1951 Convention. The time limit was felt to be a serious obstacle to the providing of international protection for refugees. Accordingly, a new international agreement was adopted, viz. the 1967 *Protocol Relating to the Status of Refugees*,⁶ an instrument which can be seen as an amendment to the 1951 Convention by which the time limit in the definition of the term "refugee" has been deleted. In consequence, the correspondence between the term "refugee" in the Statute of the Office of the UNHCR and in the agreements which regulate the status of refugees has become closer.

Parallel with the efforts to strengthen the position of refugees, provisions on asylum have been formulated. The *Universal Declaration on Human Rights* contains the following article on this subject (art. 14):

Everyone has the right to seek and to enjoy asylum from persecution.

When in 1967 the General Assembly adopted the *Declaration on Territorial Asylum*,⁷ this event must be seen as a development of the asylum provision in the Universal Declaration. Unfortunately, it has yet not been possible to lay down a rule on asylum in a legally binding instrument. However,

⁴ Weis, "The Office of the United Nations High Commissioner for Refugees and Human Rights", *Human Rights Journal* 1968, p. 247.

⁵ Weis, *ibid.*

⁶ United Nations, General Assembly Resolution 2198 (XXI), 16 December 1966. 606 *United Nations Treaty Series* 267.

⁷ United Nations, General Assembly Resolution 2312 (XXII), 14 December 1967.

a Draft Convention on Territorial Asylum lies before the General Assembly.⁸

In all the international agreements mentioned, the term "refugee" has been defined in more or less the same way. A refugee is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country. The same criteria apply to persons entitled to asylum.

However, it is doubtful if such a description of a refugee/asylum-seeker is what is needed today. As will be shown, it is necessary to broaden the definition and to enlarge the group of persons entitled to international protection.

2. REFUGEES WITHIN THE MANDATE OF THE UNHCR AND THE REFUGEE CONVENTION

The activities of the Office of the UNHCR are based on the definition of the term "refugee" which is found in art. 6 of the Statute. This definition outlines the extent of the Office's activities. A prerequisite for entitlement to international protection under the Refugee Convention/Protocol is that the person in question can be considered to be a refugee as defined in art. 1.

The Statute and the Convention/Protocol distinguish between two categories of refugees. The first category, which is mentioned in art. 6 A (i) of the Statute and art. 1 A.1 of the Convention, comprises so-called statutory refugees. A statutory refugee is a person who was a refugee under the previous international agreements, i.e. Russian and Armenian refugees, refugees from Germany, etc.⁹

The second category is mentioned in art. 6 B of the Statute and art. 1 A.2 of the Convention. Today this category is the more important of the two. The definition in the Refugee Convention refers to any person who:

⁸ United Nations Document E/5138/Add. 1.

⁹ For the relevant agreements, see *supra*, p. 153, footnote 3.

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.

While it is not intended here to make a thorough analysis of the term "refugee", a few observations will be made on one important aspect.

According to the definition, a person wishing to be recognized as a refugee must have a well-founded fear of persecution in his country of origin. This persecution must be founded on certain reasons mentioned in the article. But what does a well-founded fear of persecution imply?

The criterion contains both a subjective and an objective element. The subjective element means that the fear must be well-founded in the sense of not being feigned or imaginary. It must be sincere and reasonable. The objective element, on the other hand, means that there must be a plausible danger of persecution for political reasons, a danger of arbitrary measures against a person's life or liberty. Consequently, it is necessary to make an objective appraisal of the circumstances which have been invoked.¹

Prior to recognizing a person as a refugee, the Office of the UNHCR or the country of asylum must decide whether the relevant person has grounds for a well-founded fear of persecution in his country of origin. This implies that the Office or the country of asylum is obliged to make an evaluation of the political conditions in the person's country of origin. By recognizing him as a mandate refugee, the Office has acknowledged that the conditions in the country of origin are such that the authorities there would persecute him if he returned to his country.

A more exact analysis of the criterion "well-founded fear of persecution" is a delicate matter and is not called for in

¹ United Nations High Commissioner for Refugees, *Eligibility*, p. 69; Heuven Goedhardt, "The Problem of Refugees", *Recueil* 1953, vol. I, p. 270.

this paper. However, it can be said that one is not likely to find any state willing to admit that the relevant internal conditions are such that a person might fear persecution. The evaluation of the political conditions in the country of origin, which is linked up with the criterion "well-founded fear of persecution", might lead to political complications between the country of origin and the Office of the UNHCR or the country of asylum. It may also happen that a presumptive country of asylum feels obliged, for political considerations, to take the view that a person does not have a well-founded fear of persecution in his country of origin. In practice this is not unusual. The result of this will be that he or she cannot be recognized as a refugee, even though all criteria in the definition are fulfilled. Rather than expose itself to the disapproval of the country of origin, a government may deny a person the status of refugee.

The practical application of the definition has been as follows. In the first place, refugees from Eastern Europe have been recognized as proper mandate refugees and Convention refugees. As regards these countries, the political evaluation is well established. Secondly—and more specifically in Africa—there is no obstacle to recognizing a person as a refugee if he comes from territories under Portuguese administration or from Rhodesia or from South Africa. The United Nations has strongly condemned the regimes in these countries and, consequently, there is no obstacle to recognizing a person from these countries as a refugee.

Thus, the criterion "well-founded fear of persecution" makes necessary an evaluation of the political conditions in the relevant country of origin. It is strange that a definition of the term refugee has made necessary such an evaluation. The explanation lies, however, in the historical background of the criterion "well-founded fear of persecution".

The very first definition of the term "refugee" which contained a criterion of "persecution" can be found in the 1938 Convention on the Status of Refugees coming from Germany.² According to this Convention a person did not qualify for assistance if he had left Germany for "reasons of purely personal convenience". Undoubtedly, the intention of this wording was to insert a requirement of persecution. As a

² 192 *League of Nations Treaty Series* 59.

logical consequence of what has been said earlier, this wording must have implied a condemnation of German policies at that time. From the summary records of the Inter-Governmental Conference of 1938, which adopted the Convention, it is quite clear that such a condemnation was exactly what the Conference wanted to make.³ It was not necessary for governments taking part in the Conference to take into account any political considerations. The relations between Germany and participating states were then anything but good.

Since 1938 there has always been a criterion of "persecution" in international definitions of the term "refugee". It is found in the definition adopted in 1943 by the Inter-Governmental Committee for Refugees,⁴ and it is also found in the definition contained in the Constitution of the IRO.⁵

Returning to the definition in the Statute of the Office of the UNHCR and in the 1951 Refugee Convention, it is necessary, for a better understanding of the criterion "well-founded fear of persecution", to recall the conditions under which these definitions were made and to bear in mind which refugees the drafters wished to protect.

The definitions were worked out in the period 1949–51, i.e. at a time when the cold war between East and West had reached its height and when in fact the Eastern Bloc boycotted the United Nations. The Korean War started during this period. It was mainly in Europe that refugee problems existed and the refugees emanated almost exclusively from East European states.

Owing to the boycotting by the East European states of the organs of the United Nations, the Statute of the Office of the UNHCR and the Refugee Convention were drafted by Western states only. It was quite natural to claim persecution in the country of origin. All the refugees emanated from East European states. Countries of asylum, i.e. Western states, were not obliged to take any political considerations into account. The relations between Eastern and Western states at that time could hardly have been worse.

It has already been said that the mandate of the Office of the UNHCR contains a definition of the term "refugee" which takes into account not only existing but also future

³ League of Nations, Document Conf. C.S.R.A./P.V. 4., p. 10.

⁴ United Nations, *A Study of Statelessness*, New York 1949, p. 38.

⁵ IRO Constitution, Annex I, Part I, Section C.

groups of refugees. However, this is hardly a correct description. What we have got is a definition of the term "refugee" which is applicable when political considerations do not prevent states from recognizing a person, i.e. a definition containing the criterion that the conditions in the country of origin are such that persons are liable to be persecuted there. The political element in the criterion "well-founded fear of persecution" has been an inhibiting factor in the activities of the UNHCR. It is also one of several reasons for instituting what has been called the High Commissioner's "good offices procedure".

3. THE GOOD OFFICES PROCEDURE OF THE UNHCR

The Statute of the UNHCR presupposes—as do the Refugee Convention and the Protocol—that the question whether or not a person is eligible under the definition of the term "refugee" must be solved on an individual basis.

An eligibility procedure—however devised—is inevitably very time-consuming. When the Statute of the Office of the UNHCR and the Convention were adopted it was quite possible to recognize refugees on an individual basis.

Since 1951, however, there have been occasions when new refugee problems have arisen and the number of refugees involved has been so large as to make it impossible to recognize persons on an individual basis. In several resolutions of the General Assembly of the United Nations, the High Commissioner has been authorized to assist refugees without having to decide on an individual basis whether the persons in question were mandate refugees. The High Commissioner has—to use the official terminology—been authorized to lend his good offices to persons in need of assistance.

After the Hungarian revolution in October–November 1956, a practice of "collective" eligibility decisions was used for the first time. The result of the Soviet intervention was that about 200 000 Hungarians left their country of nationality; they were refugees in immediate need of assistance. At the Emergency Session of the General Assembly in November 1956, the Assembly adopted a resolution in which it

requests the Secretary General to call upon the United Nations High Commissioner for Refugees to consult with other appropriate international agencies and interested Governments with a view to making speedy and effective arrangements for emergency assistance to refugees from Hungary.⁶

The question whether or not the Hungarian refugees were refugees within the mandate of the High Commissioner will not be discussed here. The quoted resolution of the General Assembly only serves to stress the fact that it implied that the Hungarian refugees were in a "collective" way declared mandate refugees.⁷

The next occasion on which the General Assembly used the same method of "collective" recognition was in the case of the Chinese Refugees in Hong Kong. The situation of these refugees had been discussed within different organs of the United Nations at various times since January 1952. Their status as mandate refugees was doubtful, inasmuch as they could be said to enjoy the protection of the government of their country of nationality, i.e. if by their country of nationality is meant the Republic of China.⁸ After discussing this question for several years, the General Assembly finally decided in resolution 1167 (XII) in November 1957 to authorize the High Commissioner

to use his good offices to encourage arrangements for contributions.⁹

In this resolution the term "good offices" was used for the first time. On the basis of resolution 1167 (XII), the High Commissioner could assist the Chinese refugees in Hong Kong. The authorization to assist those refugees was confirmed in 1962, when the Assembly

⁶ United Nations, General Assembly Resolution 1006 (ES-II), 9 November 1956.

⁷ Such a course was also taken in asylum states, *inter alia* in the Federal Republic of Germany, where an ordinance was issued according to which all refugees from Hungary were provisionally to be recognized as Convention refugees.

⁸ Hambro, *The Problems of Chinese Refugees in Hong Kong*, Leyden 1955, pp. 29 ff.

⁹ United Nations, General Assembly Resolution 1167 (XII), 26 November 1957.

requests the United Nations High Commissioner for Refugees to use his good offices, in agreement with the Governments of the countries concerned, to provide assistance to Chinese refugees in Hong Kong.¹

The Liberation War in Algeria in the late fifties gave rise to new and serious refugee problems. In order to escape the effects of the war a considerable number of persons were compelled to leave their homes and take refuge in neighbouring countries, above all Tunisia and Morocco. Following an appeal from the Tunisian and the Moroccan Governments, the High Commissioner assisted these refugees.² The High Commissioner's assistance was later endorsed by the General Assembly in resolution 1286 (XIII) 1958.³

In the discussions of the report of the High Commissioner to the Third Committee at the fourteenth session of the General Assembly in 1959, there was submitted a draft resolution proposing that the High Commissioner should be authorized to use his good offices in the transmission of contributions intended for refugees who did not come within the competence of the United Nations.⁴ The draft resolution was motivated by the fact that General Assembly resolution 1167 (XII) already constituted a precedent for taking such a course, which would make it possible to provide assistance for a larger number of refugees, without setting up any new organs.⁵ The General Assembly adopted the draft resolution, number 1388 (XIV), in which the Assembly

authorizes the High Commissioner, in respect of refugees who do not come within the competence of the United Nations, to use his offices in the transmission of contributions designed to provide assistance to these refugees.⁶

This resolution is interesting in that its wording does not

¹ United Nations, General Assembly Resolution 1784 (XVII), 7 December 1962.

² United Nations, General Assembly, Thirteenth session, Supplement No. 11, Report of the United Nations High Commissioner for Refugees, p. 6.

³ United Nations, General Assembly Resolution 1286 (XIII), 5 December 1958.

⁴ United Nations, Document A/C. 3/L. 780.

⁵ United Nations, Document A/C. 3/SR. 943, para. 26.

⁶ United Nations, General Assembly Resolution 1388 (XIV), 20 November 1959.

mention any special group of refugees. Nevertheless, the resolution was adopted with concrete refugee problems in mind.⁷

When presenting his report to the Third Committee at the fifteenth session of the General Assembly in 1960, the High Commissioner expressed the opinion that, provided there was no new influx of refugees, a solution to the problem in Europe was in sight. Without directly referring to concrete refugee problems, the High Commissioner stated that there were refugees outside his mandate who were in need of assistance. In the debate that followed it was said that, pursuant to General Assembly resolutions 1167 (XII) and 1388 (XIV), increasing attention was being paid by governments and by non-governmental organizations to the problem of refugees not falling under the competence of the United Nations. It was pointed out that some countries had made their standard of admission more flexible. Now, the problem of refugees not falling under the competence of the United Nations was of particular concern.⁸ However, the number of refugees belonging to this category was not so large.

At its fifteenth session, the General Assembly adopted resolution 1499 (XV), by which it

invites State Members of the United Nations and members of the specialized agencies to continue to devote attention to refugee problems still awaiting solution;

- (d) By continuing to consult with the High Commissioner in respect of measures of assistance to groups of refugees who do not come within the competence of the United Nations.⁹

At this period—the beginning of the sixties—the situation of European refugees appeared rather favourable. World Refugee Year had just ended and the results of this encouraged a certain optimism about a final solution of the refugee problems. The High Commissioner had, however, acquired new tasks after the adoption of the resolutions concerning the Chinese refugees in Hong Kong and the Algerian refugees in Tunisia and Morocco and after the adoption of resolutions 1388 (XIV)

⁷ Cf. United Nations, Document A/C. 3/SR. 999, para. 44.

⁸ United Nations, Document A/C. 3/SR. 1004, paras. 4–6.

⁹ United Nations, General Assembly Resolution 1499 (XV), 5 December 1960.

and 1499 (XV). The question was raised whether it was necessary to extend the High Commissioner's mandate when it expired in 1963. Resolutions 1388 (XIV) and 1499 (XV) did not seem to be very important. However, the situation was to change very soon.

The year 1961 marks a turning point in the history of the Office of the UNHCR. In January of that year the Cambodian Government appealed to the High Commissioner for assistance to refugees in Cambodia. Later in 1961 the Republic of the Congo (Kinshasa) asked for assistance to refugees who had come from "neighbouring areas, as a result of disturbances there".¹

At the fifth session of the Executive Committee of the High Commissioner's Programme in May 1961, the High Commissioner stated that it was outside Europe that UNHCR action on behalf of refugees not within the mandate was destined to develop further in the future.² At the same session the High Commissioner pointed out that the General Assembly, by authorizing him to lend his good offices to refugees, was thinking first and foremost of the financial, economic and social needs of other groups of refugees. The international protection should still be reserved for mandate refugees.³

At the sixteenth session in 1961, the General Assembly adopted resolution 1673 (XVI), in which the Assembly

requests the United Nations High Commissioner for Refugees to pursue his activities on behalf of the refugees within his mandate or those for whom he extends his good offices.⁴

From 1961 onwards, the Office of the UNHCR changed its policy. The term "refugee" in the Statute took care of so-called statutory refugees and of refugees resulting from the Second World War. In Europe only mandate refugees were entitled to assistance, both as regards material aid and inter-

¹ Report on the fifth session of the Executive Committee of the High Commissioner's Programme, in United Nations, General Assembly, Sixteenth session, Supplement No. 11, Report of the United Nations High Commissioner for Refugees, p. 35.

² *Op. cit.*, p. 33.

³ *Op. cit.*, p. 35.

⁴ United Nations, General Assembly Resolution 1673 (XVI), 18 December 1961.

national protection. The so-called "good offices resolutions" were not to be used in favour of refugees in Europe.

Outside Europe, the UNHCR was, in the first place, to act on the basis of the good offices resolutions, but the activities were to be restricted to material aid. Refugees outside Europe were excluded from international protection, unless they were, at the same time, recognized as mandate refugees.

Since the adoption of resolution 1673 (XVI), the High Commissioner's good offices procedure can be regarded as well established. At the next session of the Executive Committee of the UNHCR in February 1962, the High Commissioner stated that

the good offices procedure, now part of UNHCR's normal activities, has introduced into the already long-established structure of the mandate an element of flexibility and dynamism which meets the requirements of the present situation.⁵

The possibilities of giving assistance to refugees through the High Commissioner's good offices have since been extended to more and more groups of refugees. For the time being, practically all refugees outside Europe are assisted under the good offices procedure.

4. ANALYSIS OF "THE GOOD OFFICES PROCEDURE"

Three prerequisites must be fulfilled if the High Commissioner is to be able to lend his good offices to refugees.⁶ First, the High Commissioner "shall be in a position to play a useful role in contributing to a solution". However, this does not seem to be a condition which is specific for so-called good offices refugees. In connection with every refugee problem—irrespective of whether the relevant persons are mandate re-

⁵ Report of the seventh session of the Executive Committee of the High Commissioner's Programme, in United Nations, General Assembly, Seventeenth session, Supplement No. 11, Report of the United Nations High Commissioner for Refugees, p. 32.

⁶ United Nations, General Assembly, Eighteenth session, Supplement No. 11, Report of the United Nations High Commissioner for Refugees, p. 8.

fugees or convention refugees—the High Commissioner must consider whether his activities can lead to a definite result.

Secondly, the High Commissioner's action must be in line with the views and wishes of the Governments of the country of asylum. This prerequisite does not seem to apply specifically to good offices refugees alone. It applies to mandate refugees also. An action taken by the High Commissioner that is contrary to the interests of the country of asylum might be considered to be an intervention in matters which are essentially within the domestic jurisdiction of the state and so to conflict with the Charter of the United Nations, art. 2, para. 7.

Thirdly, "the scope and character of the refugee problem must justify special action by the international community". The difference between mandate refugees and good offices refugees is to be found in this prerequisite.

Within the Office of the UNHCR "the good offices function" has been defined as follows:

Functions whereby UNHCR transmits funds for assistance to refugees and/or assists them by acting as intermediary and co-ordinator where new refugee groups are concerned, in respect of whose members no eligibility decisions have been taken.⁷

It has been said that by means of the good offices procedure it is possible to find practical solutions to humanitarian problems without looking at the underlying causes.⁸ It is quite clear from the given definition of the good offices function that an individual eligibility decision is not necessary. It would, however, be an exaggeration to claim that one can disregard completely the underlying causes of a refugee problem. Some kind of eligibility procedure is necessary; this is effected by means of an investigation of the entire refugee situation. This situation is made the object of a consideration and an evaluation. It is impossible to say anything about "the scope and character of a refugee problem" without looking at the underlying causes. It is, however, not necessary to investigate the causes of the

⁷ United Nations, Document HCR/RS/25/Rev. 2. Glossary of terms in use by the UNHCR.

⁸ Report of the ninth session of the Executive Committee of the High Commissioner's Programme, in United Nations, General Assembly, Eighteenth session, Supplement No. 11, Report of the United Nations High Commissioner for Refugees, pp. 26 and 37. Cf. Cuénod, "The Problem of Rwandese and Sudanese Refugees", *Refugee Problems in Africa*, Uppsala 1967, p. 46.

refuge-seeking in each individual case. In this respect the good offices procedure differs from the ordinary eligibility procedure which is applicable to mandate refugees.

Briefly, it can be said that three criteria must be fulfilled if a person wishes to be recognized as a mandate refugee. He must be outside his country of origin; he must be unable or unwilling to avail himself of the protection of his country of origin; he must have a well-founded fear of persecution in his country of origin on account of his race, nationality, religion or political opinions. When applying these criteria to refugees who, so far, have been assisted as good offices refugees, it is found that these three criteria are not fulfilled in all cases.

There are examples where the Office of the UNHCR has assisted refugees in their country of origin (so-called national refugees). In a few cases it has been claimed that refugees were able "to avail themselves of the protection of their country of nationality", *inter alia* in the case concerning the Chinese refugees in Hong Kong. In most cases, however, the High Commissioner has lent his good offices to refugees when the criterion "well-founded fear of persecution" was either not fulfilled or not investigated. In the case of African refugees, the latter alternative is relevant in almost all situations.

It has been said earlier that the criterion "well-founded fear of persecution" implies that the Office of the UNHCR or the country of asylum must make an evaluation of the political conditions in the refugee's country of origin. This is not the case with good offices refugees. The former High Commissioner, Mr Schnyder, has said that the absence of political considerations is all the more conspicuous in that, with respect to "other" refugees, the General Assembly did not lay down any definition connecting a given group of refugees with some particular political event. By the good offices procedure, the United Nations has created an apolitical instrument for coordinating international action on behalf of new groups of refugees.⁹ The good offices function of the Office of the UNHCR has made it possible for the Office to assist refugees without making an evaluation of the political conditions in the country of origin.

⁹ Report of the fifth session of the Executive Committee of the High Commissioner's Programme, in United Nations, General Assembly, Sixteenth session, Supplement No. 11, Report of the United Nations High Commissioner for Refugees, p. 35.

In the *Convention Governing the Specific Aspects of the Refugee Problems in Africa*, adopted by the Organization of African Unity in 1969 (the OAU Convention),¹ an attempt is made to describe in legal terms the refugees assisted through the good offices of the UNHCR. Art. I, para. 2, says:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Those fulfilling the conditions of this definition could in a simpler way be described as persons who, in consequence of political events, are compelled to leave their country of origin because of a danger to life or liberty.

5. THE PROTECTION OF REFUGEES IN SWEDEN²

Sweden is a party to the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees. In national legislation the rights of refugees are laid down in the Aliens Act of April 30, 1954.

A political refugee has a right to be granted asylum in Sweden, provided that he is in need of it and that there are no special reasons for denying him such asylum (sec. 2, subsec. 1). This provision does not imply that the aliens authority (*The National Swedish Immigration and Naturalization Board*) must decide whether or not a person is to be regarded as a political refugee. When a foreigner asks for political asylum in Sweden, the Board just referred to has only to decide whether he is to be allowed to stay in Sweden; if this question is answered in the affirmative, the foreigner will, as a rule, be granted the same status as other foreigners in Sweden. Thus only a "summary examination" of the refugee status is made, without the taking of a final decision on whether the foreigner

¹ Organization of African Unity, Document CM/267/Rev. 1.

² The present writer has discussed this question in *Flyktingar och asyl*, Stockholm 1972, and in *Asyl, S.O.U.* 1972: 85.

should be considered to be a refugee. Neither the National Swedish Immigration and Naturalization Board nor the refugees—and there are undoubtedly a large number of these in Sweden—know, as a rule, who is or is not a refugee. It is not correct to state that a refugee “has been granted asylum” in Sweden. He has merely been granted permission to stay in the country.

Sec. 2, subsec. 2, of the Aliens Act contains the following definition of the term “political refugee”:

For the purpose of this Act a political refugee is an alien who, in his country of origin, fears political persecution. Political persecution implies that a person because of his origin, membership of a particular social group, religious or political opinion or otherwise because of political conditions fears persecution which constitutes a danger to his life or freedom or otherwise is of a serious nature, or that he fears a severe punishment for a political offence.

There are a few discrepancies between the definition given in the Swedish Aliens Act and that contained in the Refugee Convention.

1. The Swedish definition uses the words “political refugee”, but the Convention only used the word “refugee”. This difference is of no significance. Today it is, as a matter of fact, common to speak of “political refugees” within the United Nations in connection with mandate or Convention refugees, as apart from good offices refugees.³

2. The Swedish definition does not mention statutory refugees. Even if in a few cases this may have led to a statutory refugee being denied protection, this difference probably has no significance today.

3. The Aliens Act does not mention the words “unable or, — — — unwilling to avail himself of the protection of that country”. In earlier Swedish practice it was required that the condition that the person concerned should be “unable to avail himself of the protection of that country” was added, but an asylum-seeker was not able to *refuse* such protection. In practical terms this has implied that a person holding a valid passport issued by the authorities of his country of origin could not be regarded as a refugee. Recently the Immigration and Naturalization Board has changed its practice and today a valid

³ United Nations, Document A/C. 3/SR. 1000, p. 95.

passport of the country of origin does not constitute an obstacle to refugee status.

4. The words "well-founded fear of persecution" are replaced by "fears persecution which constitutes a danger to his life or freedom or otherwise is of a serious nature". Consequently, the criterion "persecution" is defined in the Swedish definition. This difference, however, is of no significance in practice.

5. In the Swedish definition the words "race" and "nationality" are replaced by the word "origin". This difference is unimportant.

6. The Aliens Act mentions "political conditions" as a ground for persecution. Furthermore a person who fears a punishment for a political offence is to be regarded as a political refugee. Although the Swedish definition contains elements which have a wider implication than does the definition given in the Refugee Convention, there is no marked difference in practice in comparison with other states bound by the Refugee Convention.

7. The words "the country of nationality --- or not having a nationality and being outside the country of his former habitual residence" are replaced by the words "country of origin" in the Swedish definition. This difference seems to be only of a technical nature.

8. There has never been a time limit in the Swedish definition.

It is interesting to note that Swedish decisions show that the appraisal of the risk of persecution which the refugee is likely to encounter in his country of origin is not made solely on objective grounds. The appraisal of this criterion varies considerably, depending on which countries the foreigners/refugees come from. It is, for example, easier for refugees from East European countries to make credible a fear of persecution than it is for citizens from West European democracies. This difference can partly be explained by the evaluation made of the political situation in the foreigner's country of origin, which is connected with the objective element in the criterion "fear of persecution".⁴

As has been mentioned, Sweden does not apply such an eligibility procedure as has been carried into effect in the majority

⁴ *Supra*, p. 158.

of Central European countries (Austria, Federal Republic of Germany, France, Italy, etc.). The implication of the regulation in the Aliens Act, sec. 2, would, in connection with the so-called *general aliens control* (i.e. measures for controlling the influx of foreigners in the light of the situation on the labour and housing markets, the supply position, etc.) seem to be that the refugees are allowed to stay in Sweden without being informed of any decision concerning expulsion or return. In connection with the *individual aliens control* (i.e. measures taken to protect the country against foreigners who, as individuals, are considered undesirable) due consideration is paid to objections by persons claiming the status of political refugee in those cases where the Immigration and Naturalization Board has to announce the decisions on return and expulsion. Courts which sentence persons to expulsion in connection with penalties for criminal offence seem sometimes to decide on expulsion without taking into consideration objections claiming for the individual the status of political refugee. This course of action seems, however, scarcely to be consistent with the principles underlying the Aliens Act.

The consequence of such sentences of expulsion delivered without due consideration having been paid to objections claiming for the individual the status of political refugee is that the National Immigration and Naturalization Board is forced to grant the foreigner a delay in the execution of the expulsion decision, provided he fulfils the criteria of a political refugee. This follows from sec. 53 of the Aliens Act, according to which a political refugee cannot be returned or expelled to a country where he fears persecution (the so-called principle of *non-refoulement*).

According to the Refugee Convention, it is in certain cases possible to expel a refugee to a country where he fears persecution. Such a course is permissible, if there are "reasonable grounds for regarding the refugee as a danger to the security of the country in which he is, or if he, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country" (art. 33, para. 2).

Sec. 54 of the Aliens Act contains a similar regulation with only one deviation: instead of the criterion "a particularly serious crime", the Swedish law text uses the words "particularly serious criminality". This had the consequence that

during the years 1954–60 sec. 54 was in practice applied in a manner conflicting with the Refugee Convention in so far as repeated criminality was ranked equal with “a particularly serious crime”. It can also be said that the aliens authority has balanced the “risk” for Sweden which the foreigner’s stay constitutes against the risk of persecution which the refugee is threatened with in his country of origin. Such balancing has no support in the Aliens Act or in the Refugee Convention. Recent practice indicates, however, that sec. 54 of the Aliens Act is now being interpreted in a way which corresponds better to the Refugee Convention.

In 1972 a governmental committee published a report on Swedish refugee policy which included a draft of a proposed revision of the Aliens Act.⁵ The most important proposals are as follows.

The committee suggests a change in the definition of the term “political refugee” and distinguishes between two groups of what may be called “unprotected persons”. The first group—named “refugees” (not “political refugees”)—corresponds more rigidly to the term in the Refugee Convention than does the present definition. That means, *inter alia*, that the criteria “persecution because of political conditions” and “severe punishment for a political offence” are deleted. Here the intention is to arrive at a better correspondence between the Swedish definition and the term “refugee” in the Refugee Convention.

It is suggested that a Convention refugee should be entitled to asylum if he is in need of it and if there are no special reasons for denying him asylum. Moreover, he will have a right to be recognized as a refugee if he wants to. Such a decision will be irrevocable.

A Convention refugee cannot be returned or expelled to a country in which he fears persecution. The committee concludes that it is on the whole impossible to take a decision in that direction provided there are no special reasons therefor. This means that in the future a decision to return or expel a refugee will only be possible if the criteria laid down in sec. 54 of the Aliens Act are fulfilled. Consequently, such a decision will only be taken when it can be executed. However, the committee foresees that in certain cases an expulsion order can be

⁵ *Flyktingskap*, S.O.U. 1972: 84.

issued in spite of these guarantees (*inter alia*, where a person invokes refugee status when a decision on expulsion has already been taken). To cover such cases, the committee suggests that an expulsion order should lapse if it is not executed two years after the execution was possible.

With reference to the discrepancy between sec. 54 of the Aliens Act and art. 33, para. 2, of the Refugee Convention, the committee suggests an amendment whereby the words "particularly serious criminality" would be replaced by the words "a particularly serious crime".

If the committee's proposal is carried through, this will undoubtedly strengthen the position of Convention refugees in Sweden.

The committee suggests that a new subsection should be added to sec. 2 of the Aliens Act, to read as follows:

An alien not recognized as a refugee shall not be refused residence in Sweden, if he refuses to return to his country of origin because of political conditions there, unless there are compelling reasons.

This provision will give special protection to a second group of persons. From the report it is evident that the committee had three categories of persons in mind when drafting the provision.⁶

First, the committee takes into consideration cases where a person in his country of origin fears punishment for unauthorized departure or absence from the home country.⁷ However, it must be stressed that at present most persons belonging to this category are in practice recognized as refugees within the meaning of the 1951 Convention.⁸

Secondly, the committee mentions persons fearing severe punishment for a political offence. This does not mean that such a person is denied refugee status as a Convention refugee, provided he fulfils the criteria laid down in the Convention. It only covers those cases where a person has committed a

⁶ S.O.U. 1972: 84, pp. 138 ff.

⁷ In most East European states, legislation is passed for the purpose of exercising tight political control over the populace. A typical example is sec. 109 of the Czech Penal Code, according to which a person is liable to imprisonment for a term between six months and five years for unauthorized departure or absence from Czechoslovakia.

⁸ S.O.U. 1972: 85, p. 45.

political offence without being a Convention refugee. The committee has tried to create a correspondence between the Aliens Act and the Extradition Act of 1957. If a political criminal cannot be extradited, he should not be expelled by use of the Aliens Act.

Thirdly, persons who refuse to perform military service and deserters will be entitled to special protection, provided they fear to be sent to a theatre of war. To give special protection to this category is in line with directives issued by the King in Council to the Immigration and Naturalization Board in February 1969.⁹ It should be emphasized that aliens belonging to this category cannot be recognized as Convention refugees simply by virtue of their refusal to perform military service or of their desertion.

No other category of persons is expressly mentioned by the committee in connection with the second group of persons entitled to special protection. However, it is expressly stated that the enumeration is not exhaustive: the committee has only exemplified a few cases of categories in need of special protection.¹

The good offices refugees are not mentioned by the committee as a special group entitled to protection. This is remarkable, since the committee is well aware of the existence of this category.² The criteria laid down in the definition of the second group seems, however, to satisfy the recent development of the term "refugee", i.e. the wording of the drafted subsection does not exclude the good offices refugees as persons entitled to special protection. This question is left to the judicial authorities.

Persons belonging to the second category will not be entitled to the same legal status as Convention refugees. Such a person has no right to be granted asylum or even a right to be recognized as a person entitled to special protection. The draft provision only means that it will be illegal to refuse residence in Sweden in view of the situation on the labour market or the housing market or of some other public interest, i.e. reasons which normally are determinative for the immigration policy.

⁹ The directives were given by the King in Council in connection with an individual case on February 21, 1969. For the full text, see *S.O.U.* 1972: 84, p. 150.

¹ *S.O.U.* 1972: 84, p. 153.

² *Op. cit.*, p. 157.

Consequently a person falling within this group cannot be denied residence in Sweden in connection with the general aliens control (as opposed to the individual aliens control).

The principle of *non-refoulement* is not applied consistently to this group. It is limited to a draft provision to the effect that an alien cannot be returned or expelled to a country in which he fears persecution on account of political conditions, or in which he fears punishment for a political offence, provided extradition is impossible according to the Extradition Act of 1957.

There is a discrepancy between the definition of the second group and the category of persons who—apart from Convention refugees—are protected through the principle of *non-refoulement*. This discrepancy is deliberate. The committee has only been concerned not to weaken the position of any persons at present enjoying protection. Those who now are to be considered as political refugees, when applying the criteria “persecution because of political conditions” or “severe punishment for a political offence”, will continue to be entitled to special protection, but the committee is not prepared to extend the principle of *non-refoulement* to new categories.

The committee presupposes that it is possible to draw a sharp dividing line between the general aliens control and the individual aliens control. It is doubtful whether this is a realistic point of view. In many cases it will be possible to refuse entry on individual grounds.

It is difficult to understand the restrictiveness of the committee concerning the second group. It would have been more logical and reasonable to guarantee the second group the same status as is suggested for Convention refugees, i.e. a right to asylum, a right to be recognized as “a protected person”, and a right to be entitled to protection under the principle of *non-refoulement* to the same extent as Convention refugees. It must be stressed that the right to asylum—both in the present and in the draft provision—contains possibilities of refusing asylum, if special reasons exist. Such “special reasons” would, e.g., exist if Sweden were to be threatened by a mass influx of refugees.³

³ S.O.U. 1951: 42, p. 181.

6. CONCLUSIONS

As has been shown above, it is possible today to distinguish between at least two groups of refugees: political refugees and what may be called good offices refugees.⁴

The criteria for a political refugee can be briefly summarized as follows: a person who is outside his country of origin because of a well-founded fear of persecution on account of his race, religion or political opinions.

To be recognized as a good offices refugee, the following criteria must be satisfied. The person must be outside his country of origin. He must have been compelled to leave that country because he feared persecution which was a danger to his life or liberty. The persecution must be a consequence of political events which have taken place in the country of origin. Thus, the definition can be summarized in the following way: a person who, owing to political events, has been compelled to leave his country of origin because of danger to his life or liberty.

It is striking that this definition of a good offices refugee has a resemblance to the definitions of the term "refugee" which were worked out between the two world wars.⁵ This is not a coincidence. There are several resemblances between pre-war refugees and good offices refugees. In both cases it is typical that the country of asylum is suddenly faced by a situation in which a large number of persons are asking for asylum and are in need of assistance. It is only seldom that these people have planned their flight well in advance. They have usually been compelled to leave their country of origin in haste. Those who have left have in many cases been driven away because of political events. Moreover, the existence of a refugee problem seldom in itself creates political antagonism between the country of asylum and the country of origin.

In one respect there is a decisive difference between pre-war refugees and good offices refugees. An important element in the provision of assistance to refugees is the granting to them of legal protection. In the pre-war period several agreements were worked out to fulfil this purpose, and international bodies

⁴ Other categories of refugees (political dissidents, draft evaders and deserters, etc.), which may exist today, are not discussed in this paper.

⁵ *Annuaire de l'Institut de droit international*, 1936, vol. II, p. 294; Holborn, "The Legal Status of Political Refugees", *American Journal of International Law* 1938, p. 680; Simpson, *The Refugee Problem*, London 1939, p. 3.

were empowered to assist the refugees in legal matters. Such efforts to strengthen the position of refugees have been further elaborated since the Second World War, but they have been limited to political refugees.

The good offices refugees are neglected when it comes to granting them a legal status. The fact that this category has no right to international protection is all the more tragic in that states very often assign to this group persons who rightly ought to be regarded as Convention refugees. In other words contracting states, finding it inconvenient to state outright that a person is a refugee (which in certain cases can cause political complications between the country of asylum and the country of origin), get round the difficulty by giving him material assistance as a good offices refugee on the same footing as other foreigners in the country.

The resolutions by which the Office of the UNHCR is empowered to assist the good offices refugees are limited in their contents to material assistance. The category is not mentioned in international agreements on the status of refugees or on territorial asylum—with the exception of the OAU Convention. It is typical of the situation that, when a Draft Convention on Territorial Asylum lies before the General Assembly, the good offices refugees are forgotten. It is symptomatic that they are not mentioned in national legislation, a fact which can be exemplified by reference to the Swedish draft legislation.

The need to grant this category a legal status is growing day by day, and it seems to be of the utmost importance that this group should be taken care of in national legislation and international agreements.