

Admission of Refugees: Draft Convention on Territorial Asylum

RICHARD PLENDER*

The definition of the word refugee in the 1951 Convention and 1967 Protocol on the Status of Refugees extends to no more than half of the world's displaced people. Although the remainder are often eligible for the protection afforded by the High Commissioner's good offices, their exclusion from that definition remains a matter of concern. A proposed new Convention on Territorial Asylum, the subject of a recent Geneva Conference designed to overcome some of the shortcomings of the 1951 Convention and 1967 Protocol, is itself open to objections. This Article discusses the limitations of the term refugee and recommends that the emphasis of the new Convention be altered so as to deal more effectively with fugitives who presently do not qualify as refugees.

INTRODUCTION

Since the end of the second World War the number of refugees in the world has not fallen below 5,000,000.¹ Of these, about 2,300,000

* Barrister-at-Law (of the English bar); Lecturer in Law, King's College, University of London. B.A., Cambridge University, 1967; LL.B., 1968; LL.M., University of Illinois, 1971; M.A., Cambridge University, 1971; Ph.D., Sheffield University, 1971; J.S.D., University of Illinois, 1972. Sometime Legal Adviser to the Representative in the United Kingdom of the United Nations High Commissioner for Refugees. Author of R. PLENDER, INTERNATIONAL MIGRATION LAW (1972). The author acknowledges with thanks the benefit of the comments on the first draft of this Article of Dr. Paul Weis, sometime Legal Adviser to the United Nations High Commissioner for Refugees. The views expressed in this Article are those of the author and do not necessarily coincide with those of Dr. Weis or of the UNHCR.

1. The minimum figure of 5,000,000 or 6,000,000 was given by Frank Kellogg, United States Undersecretary of State for Migration Affairs, in an unpublished

are "of concern" to the office of the United Nations High Commissioner for Refugees (UNHCR).² This figure of 2,300,000 embraces those who are eligible to receive the High Commissioner's protection, whether or not they have been granted asylum in the territory of a State which is a party to either of the two principal international instruments governing the admission of refugees to countries of asylum—the 1951 Convention relating to the Status of Refugees and its Protocol of 1967.³ If these figures are fairly accurate, it may be inferred that the High Commissioner's competence extends to no more than about half of the world's refugees.⁴

Indeed, even this calculation may overstate the proportion of the world's refugees who fall within the competence of the United Nations High Commissioner. It does not take into account the fact that only sixty-nine states, representing about one quarter of the world's population, have ratified either the 1951 Convention or the 1967 Protocol.⁵ Moreover this calculation fails to take into account international crises which may swell the ranks of those refugees outside of the High Commissioner's mandate to numbers in excess of 5,000,000—crises such as we have seen in recent years in Cyprus, the Lebanon, and Rhodesia (Zimbabwe).

speech at Cambridge University (1975). The estimate is compatible with that of A. BOUSCAREN, *INTERNATIONAL MIGRATIONS SINCE 1945* at 21 (1963).

2. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE REFUGEE PROBLEM ISN'T HOPELESS UNLESS YOU THINK SO* 9 (1975).

3. The United Nations Convention Relating to the Status of Refugees, Geneva, July 28, 1951, is based (with certain amendments) on G.A. Res. 429, 5 U.N. GAOR, Supp. (No. 20) 48, U.N. Doc. A/1775 (1950). The Protocol Relating to the Status of Refugees, New York, January 31, 1967, is based on G.A. Res. 2198, 21 U.N. GAOR, Supp. (No. 16) 48, U.N. Doc. A/6316 (1966).

4. In his Note on International Protection submitted to the Executive Committee on 4th September, (1975), ¶¶ 1, 2, (U.N. Doc. A/A.C. 96/518 (1975)), the High Commissioner stated:

The number of *de facto* refugees is much smaller than was thought . . . The existing legal instruments relating to the status of refugees, and in particular the 1951 Convention and 1967 Protocol and, hopefully at a subsequent stage, the draft Convention on Territorial Asylum, constitute an adequate basis for the international protection of refugees, provided that they are fully implemented in a liberal manner.

It seems, however, that in this passage—which presupposes acceptance of the Draft Convention—the High Commissioner used the term *de facto refugees* to connote those who qualify within the mandate but are not recognized by the authorities of the States in which they live. The context appears to exclude the alternative meaning of the term, *viz*: those who do not qualify within the mandate but are fugitives from persecution.

5. The following 60 States are parties to both the Convention and the Protocol: Algeria, Argentina, Australia, Austria, Belgium, Benin, Botswana, Brazil, Burundi, Cameroon, Canada, Central African Republic, Chile, People's Republic of the Congo, Cyprus, Denmark, Ecuador, Ethiopia, Federal Republic of Germany, Fiji, Finland, France, Gabon, Gambia, Ghana, Greece, Guinea, Guinea-Bissau, Holy See, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Liech-

It is not to be presumed that those fugitives from persecution who do not fall within the mandate of the United Nations High Commissioner are in all instances deprived of international protection. The High Commissioner is frequently authorized by the General Assembly to undertake responsibilities for particular groups of displaced persons who do not fall within his or her statutory competence.⁶ In addition, there exist many other international organizations, public and private, with functions complementary to those of the UNHCR, the largest being the Intergovernmental Committee for European Migration (ICEM). Even so, the exclusion of some fifty per cent of the world's refugees from the mandate of the international community's principal functionary charged with refugees' protection is a matter of some concern. This fact is particularly disturbing because a good number of the States which are parties to the 1951 Convention and 1967 Protocol have based parts of their immigration laws precisely upon those instruments, so that for a displaced person to qualify for admission to such a country as a refugee, he or she must first qualify under the international instruments.⁷ Among the States which have based parts of their immigration laws on the Convention of 1951 and Protocol of 1967 are the United Kingdom⁸ and, subject to several reservations, the United States⁹ (with consequences which will be

tenstein, Luxembourg, Mali, Malta, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Paraguay, Portugal, Senegal, Sudan, Sweden, Switzerland, Tanzania, Togo, Tunisia, Turkey, United Kingdom, Uruguay, Yugoslavia, Zaire, and Zambia. The following are parties to the Convention only: Colombia, Jamaica, Kenya, Liberia, Malagasy Republic, Monaco, and Peru. The United States of America and Swaziland are parties to the Protocol only. The estimated combined populations of these countries is 1,130,000,000, or 912,000,000 after the deduction of the populations of the United States and Swaziland. THE WORLD ALMANAC AND BOOK OF FACTS, 601-02, 497-588 (G. Delury ed. 1977).

6. This is done in pursuance of the so-called "good offices" resolutions; e.g.: G.A. Res. 1784, 17 U.N. GAOR, Supp. (No. 20) 34, U.N. Doc. A/5217 (1962).

7. The definition of *refugee*, contained in Article 1 of the Convention of 1951 and in the Protocol of 1967, has been incorporated into the following domestic laws: Denmark: Act No. 224 of 7th June, 1952, Regarding the Admission of Foreigners, ¶ 2; France: Law No. 52-893 of 25th July, 1952, and Presidential Decree No. 54-1055 of 14th October, 1954, 1954 D.432; Germany: Asylum Ordinance, 1953 BGBI 3; Norway: Aliens' Act of 27th June, 1956, 2; Sweden: Foreigners Law of 30th April, 1954, art. 2.

8. Statement of Immigration Rules for Control on Entry: Commonwealth Citizens, H.C. 79, § 54 (1973); Statement of Immigration Rules for Control After Entry: EEC and Other Non-Commonwealth Nationals, H.C. 81, ¶ 55 (1973); Statement of Immigration Rules for Control After Entry: EEC and Other Non-Commonwealth Nationals, H.C. 82, ¶¶ 28 & 57 (1973).

9. Immigration and Nationality Act § 203(a)(7), 8 U.S.C.A. § 1153(a)(7) (West Supp. 1977).

examined subsequently¹⁰).

Thus, in an attempt to rectify some of the shortcomings of the 1951 Convention and the 1967 Protocol, delegates of ninety-two countries met at a conference in Geneva in 1977, convened with the object of considering a proposed new Convention on Territorial Asylum. The proposed new Convention, and the conference, were concerned more with increasing the degree of protection afforded to those falling within the existing definition of a *refugee* than with broadening the definition to include more of those fugitives who are currently excluded from the purview of the High Commissioner.¹¹ Moreover, the various delegations failed to reach agreement on the basis of the text before them and deferred further consideration of the proposed new Convention to an indefinite date.¹² This Article suggests that better prospects may exist for agreement at the reconvened conference and calls for the realization of substantial benefits from the Convention that may be adopted there if its emphasis were altered to deal more effectively with fugitives from persecution who presently do not qualify as refugees.

RULES OF INTERNATIONAL LAW CURRENTLY GOVERNING THE DEFINITION AND ADMISSION OF REFUGEES

The general rule of customary international law that no individual may assert a right to enter a State of which he or she is not a national is normally acknowledged to apply to refugees as well as to other migrants.¹³ Thus, the so-called *right of asylum*—or *Droit d'asile*—is

10. See text accompanying notes 40-41 *infra*.

11. The High Commissioner's mandate is based not on the Convention of 1951 and Protocol of 1967 but on the Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, 5 U.N. GAOR, Supp. (No. 20) 46, U.N. Doc. A/1775 (1950). The definition of the High Commissioner's competence, in Article 6 of that Statute, corresponds, but does not precisely coincide, with the definition of refugees in Article 1 of the Convention of 1951, as modified by the Protocol of 1967. For the prolongation of the Office of the United Nations High Commissioner for Refugees, see G.A. Res. 2957, 27 U.N. GAOR, Supp. (No. 12) 65, U.N. Doc. A/8712 (1972); G.A. Res. 2294, 22 U.N. GAOR, Supp. (No. 16) 38, U.N. Doc. A/6717 (1967); G.A. Res. 1783, 17 U.N. GAOR, Supp. (No. 17) 33, U.N. Doc. A/5217 (1962); G.A. Res. 1039, 12 U.N. GAOR, Supp. (No. 18) 18, U.N. Doc. A/3572 and Corrigenda 1, at x (1957); G.A. Res. 727, 8 U.N. GAOR, Supp. (No. 20) 15, U.N. Doc. A/2361 (1953).

12. For the materials and proceedings of the Conference, see U.N. Doc. A/10177 (1975); U.N. Doc. A/Conf. 78/DC 2-5 (1977); U.N. Doc. A/Conf. 78/DC/R.1 (1977); U.N. Doc. A/Conf. 78/C.1/L.104/Add. 1-7 (1977); U.N. Doc. A/Conf. 78/C.1/SR1-28 (1977); and Corrigenda; U.N. Doc. A/Conf. 78/SR 1-9 (1977) and Corrigenda.

13. D. O'CONNELL, 2 INTERNATIONAL LAW 695-96, 740 (1970); 1 L. OPPENHEIM, INTERNATIONAL LAW 616 (7th ed. H. Lauterpacht 1952).

usually admitted to appertain not to the refugee but to the State, which enjoys—subject to any limitations that might be imposed by conventions—a discretion to grant or withhold asylum.¹⁴ This principle has been accepted in both domestic¹⁵ and international¹⁶ judicial proceedings. Nothing in the Universal Declaration of Human Rights,¹⁷ in the American Declaration of the Rights and Duties of Man¹⁸ or in European law¹⁹ displaces it, nor does the Geneva Convention or the Protocol do so.

14. C. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 223 (1953); F. Morgenstern, *The Right of Asylum*, 26 *BRIT. Y.B. INT'L L.* 327, 335 (1949); P. Weis, *Legal Aspects of the Convention of 25th July, 1951 Relating to the Status of Refugees*, 30 *BRIT. Y.B. INT'L L.* 478, 481 (1953). For further references and contrary opinions, see R. PLENDER, *INTERNATIONAL MIGRATION LAW*, 217-18 (1972).

15. *Ker v. Illinois*, 119 U.S. 436, 442 (1886); *Chandler v. United States*, 171 F.2d 921, 935 (1st Cir. 1948); *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934). For further cases, see R. PLENDER, *INTERNATIONAL MIGRATION LAW* 237-39 (1972).

16. *The Asylum Case (Columbia v. Peru)*, [1950] I.C.J. 266, 282, 284, 297 (judgment on merits).

17. Article 14(1) declares that "everyone has the right to seek and enjoy in other countries asylum from persecution." *Universal Declaration of Human Rights*, U.N.Y.B. 535 (1948-49). This represents a change from the original unadopted text which envisaged a right "to seek and be granted . . . asylum." U.N. Doc A/C 3/285 Rev. 1 (1948). See also Morgenstern, *The Right of Asylum*, 26 *BRIT. Y.B. INT'L L.* 327, 337 (1949).

18. Article 27 proclaims that "every person has the right to seek and receive asylum" but only "in accordance with the laws of each country and with international agreements." 43 *AM. J. INT'L L. Supp.* 133 (1949) (Resolution XXX, Final Act, 9th International Conference of American States, Bogota, Columbia, Mar. 30-May 9, 1948 (Pan American Union 1948) at 38).

19. Migrant workers in the European Economic Community (E.E.C.), irrespective of any claim they may have to refugee status, enjoy freedom of movement pursuant to Article 48 of the E.E.C. Treaty, if, *inter alia*, they are nationals of a member State of the E.E.C. working or seeking to work in another such State. E.E.C. Council Reg. 1612/68, E.E.C. Council Directive 68/360, and E.E.C. Council Directive 68/359 of 15th October, 1968; E.E.C. Commission Regulation 1251/70 of 29th June, 1970. Less extensive rights of a similar nature are now accorded to Turkish nationals in pursuance of the Article 12 of the Association Agreement of 12th September, 1963, and E.E.C./Turkey Council of Association Decision 2/76 of 20th December, 1976. The only specific mention of refugees in the E.E.C.'s law governing freedom of movement is in E.E.C. Council Regulation 1408/71 of 14th June, 1971, dealing with social security of migrant workers. This incorporates in Article 1(d) the definition contained in the 1951 Convention.

See also the Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, E.T.S. 61, and the European Agreement on the Abolition of Visas for Refugees, 376 U.N.T.S. 85. The E.E.C. Council was pressed by the Economic and Social Committee to extend freedom of movement to refugees residing in any Member State. But the Governments of the Member States, meeting in Council, merely made a Declaration that they would regard with particular favor any unilateral measure by a Member State to extend that

Contracting Parties to the Geneva Convention of 1951 did not go so far as to surrender, with respect to each other, their discretionary power to grant or to withhold asylum to refugees arriving at their ports. They made more limited concessions. In particular, they agreed not to expel or return a refugee to the frontiers of a country where his or her life or freedom would be threatened because of race, religion, nationality, social group or political opinion.²⁰ In addition, they conferred upon refugees privileges regarding expulsion to countries other than countries of persecution²¹ and privileges regarding such matters as religion,²² personal status,²³ property,²⁴ freedom of association,²⁵ gainful occupation,²⁶ welfare,²⁷ and administrative measures.²⁸ In lieu of national passports, they also agreed to issue travel documents to refugees lawfully within their territories.²⁹ For all of these purposes the Contracting Parties were required to define the term *refugee*.

The definition is to be found in Article 1 of the Convention of 1951. The article begins by providing that the term *refugee* shall embrace any person who has been considered as such under certain anterior treaties, including the Constitution of the International Refugee Organization.³⁰ There follows the crucial paragraph stipulating that the expression also extends to any person who

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 his country of 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 . . . is unable or, owing to such fear, is unwilling to return to it.³¹

This form of words follows the language of the Statute of the High Commissioner's Office, subject to two major differences (and to more

freedom to such refugees. Declaration of 25th March, 1964, J.O. 1964 No. 78 at 1225.

20. Geneva Convention of 1951, art. 33.

21. *Id.*, art. 32.

22. *Id.*, art. 4.

23. *Id.*, art. 12.

24. *Id.*, arts. 13, 14.

25. *Id.*, art. 15.

26. *Id.*, arts. 17-19.

27. *Id.*, arts. 20-24.

28. *Id.*, arts. 25-27, 29, 31, 34.

29. *Id.*, art. 23, schedule and annex.

30. The International Refugee Organization, which existed from 1946 to 1952, dealt with some 630,000 post-war refugees, the majority of whom emigrated to the United States, Israel, and Australia. See R. HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION: A SPECIALIZED AGENCY OF THE U.N.* (1956); Ristelhueber, *The International Refugee Organization*, 470 *INT'L CONCILIATION* 167 (1951).

31. Geneva Convention of 1951, art. 1A, ¶ 2.

subtle distinctions to which we shall return). The first major difference is that in order to qualify as a refugee within the Convention, an asylum-seeker must not only satisfy the criteria in the foregoing extract, but must, in addition, show that the fear of returning to his or her own country, or his or her inability to do so, is a result of events occurring before 1951. Parties to the Protocol of 1967, however, undertake to apply the substance of the 1951 Convention to any person who comes within the definition of Article 1 of the Convention as if the Convention omitted any qualification respecting the date of the events resulting in the asylum-seeker's expatriation.

The second major difference between the 1951 Convention and the designation of the High Commissioner's competence in the foregoing extract from his Statute lies in a provision for the territorial limitation of the former. On signing, ratifying or acceding to the Convention, each party must make a declaration of the territorial application of the Convention so far as that party is concerned. In particular the party may declare that it will be bound to apply the Convention with regard only to asylum-seekers expatriated as a result of events occurring *in Europe* before the beginning of 1951.³²

All but seven of the parties to the 1951 Convention, with a combined population of some 48,000,000, have ratified the Protocol, thus dispensing with the limitation of time. However, nine States, with a combined population of about 252,500,000, have made declarations limiting the application of the Convention to those who have fled from their homelands as a result of events occurring in Europe.

The definition of the word *refugee* in the Convention and Protocol, and the designation of the High Commissioner's competence in the Statute, are modified by rules governing the circumstances in which an individual may forfeit the protection of both instruments. Fugitives lose that protection (1) if they avail themselves voluntarily of the protection of their country of nationality; or (2) if, having lost their nationality, they voluntarily reacquire it; or (3) if, having acquired a new nationality, they enjoy the protection of the country of that nationality; or (4) if they re-establish themselves voluntarily in the country which they left or outside which they remained owing to fear of persecution; or (5) if they are able to return to their country of

32. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, 5 U.N. GAOR, Supp. (No. 20) 46, U.N. Doc. A/1775 (1950).

nationality or former habitual residence following a change of circumstances.³³

SOME DEFECTS IN THE CONVENTIONAL DEFINITION OF *REFUGEE*

It is in the more subtle differences between the language of the Convention and that of the Statute that one discerns the hallmark of compromise: ambiguity.³⁴ The Statute embraces not only those who are outside their countries of nationality or former habitual residence owing to fear of persecution there, but also embraces those who are outside those countries "for reasons other than personal convenience." This vague phrase—which might or might not cover persons such as draft evaders or those who emigrate to avoid racial prejudice—was omitted from the Convention. Instead, the Convention introduced an expression of comparable imprecision. Whereas the Statute refers only to persecution for reasons of "race, religion, nationality or political opinion," the Convention adds to this catalogue a fifth category: "membership of a particular social group."

The addition was intended to ensure that the Convention would embrace those—particularly in Eastern Europe during the Cold War—who were persecuted because of their social origins. The language in the Convention is, however, more expansive than would have been necessary to achieve that objective; and although the leading textbooks tell us that the phrase has to be construed generously,³⁵ they give little, if any, guidance as to the perimeters of the expression. The difficulty is not imaginary. It is not uncommon for fugitives belonging to groups other than those listed in the Statute to claim the status of refugees.³⁶ In such cases, the court or tribunal may be obliged to determine whether the group in question is or is not a *social group*. The tribunal may be tempted to conclude that members

33. Geneva Convention of 1951, art. 1C; Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, 5 U.N. GAOR, art. 6A (proviso), Supp. (No. 20) 46, U.N. Doc. A/1775 (1950).

34. For alternative definitions of the word *refugee* see ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE, THE RIGHTS OF REFUGEES: REPORT OF THE COMMITTEE AND BACKGROUND MATERIALS 23-32 (1966).

35. M. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 151 (1956); I. A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 219 (1966); S. SINHA, ASYLUM AND INTERNATIONAL LAW 103 (1971); J. VERNANT, THE REFUGEE IN THE POST-WAR WORLD 7 (1953); P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 13-16 (1956). The expression receives no comment in R. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME 93, 158 (1956) or L. KOZIEBRODZKI, LE DROIT D'ASILE 161 (1962).

36. For example, in two distinct legal proceedings in England in 1976, claims to asylum were made by individuals asserting that as homosexuals they were members of a social group persecuted in their countries of origin. TH/14720/75; TH/10736/75. Identification withheld. Researchers refer to clerk to the Chief Adjudicator, Thanet House, Strand, London.

of any sector of society constitute a social group, and that those who are persecuted in any society ipso facto constitute a sector of it.³⁷ Such a conclusion appears to ascribe to the Convention's definition of a *refugee* much the same meaning as that definition would have if "for reasons of race, religion, nationality, membership of a particular social group or political opinion" were omitted. In this respect the imprecision with which the Convention defines the word *refugee* has, at least potentially, the merit of broadening its significance.

The definition in the Convention contains, however, a number of expressions that have been interpreted as restricting the ambit of the word *refugee* in a manner that has occasionally become contentious. Asylum-seekers, in order to qualify, must show that they have reason to fear nothing less than *persecution*, and that this persecution is such as to make them unwilling to avail themselves of the protection of their country of nationality (or, if they are stateless, the country of their former habitual residence). From this definition it is often inferred that the persecution from which asylum-seekers have fled must be liable to occur throughout that country, not just in the part from which they have fled. In addition, it is sometimes maintained that asylum-seekers qualify only if their persecution is engendered by their condition (race, religion, nationality, and so on) rather than by activities in which they have engaged by reason of that condition.

The word *persecution* is generally taken to exclude individuals who face discrimination or maltreatment other than of a very serious kind. For instance, in the United Kingdom³⁸ the Chief Adjudicator found that the principal appellant, a member of a racial minority in his country of origin, might in the event of his return home have to face prosecution for currency offences entailing "a more severe sentence than any that would be meted out to a member of the [racial majority]". The Chief Adjudicator continued: "[T]hat racial discrimination against minority groups in [the country] occurs is notorious knowledge but whether such discrimination is practised by the [local] courts is not at all clear. If it were, however, it could hardly be termed persecution." The distinction drawn by the Chief Adjudicator

37. See Ansbach Court in Case 2531 II/56, 15th January, 1957; Case 3008 II/57, 25th November, 1957; Case II/57, 15th October, 1957. Identification withheld. Researchers refer to Federal Office for Recognition of Foreign Refugees, Zirndorf, Federal Republic of Germany.

38. TH/12950/75. Identification withheld. Researchers refer to Clerk to the Chief Adjudicator, Thanet House, Strand, London W.C. 2.

between persecution and prosecution is by no means novel. Indeed, in one case the (British) Immigration Appeals Tribunal went so far as to add that prosecution for breach of a country's laws cannot amount to persecution.³⁹ This comment is even more remarkable because the laws in question were of a political character, in as much as they imposed penalties for degrading or scoffing at the State, its system or its public organs, for extolling Fascism, and for disseminating false information injurious to the State. Although it is not suggested that persecution and prosecution are coterminous, it is suggested that they are by no means mutually exclusive; and it is noteworthy that the distinction made by the adjudicator and Tribunal in the United Kingdom has gained little credence in the United States, where the courts have had occasion more than once to construe the word *persecution*.⁴⁰

Even if it were more widely accepted that the distinction between persecution and prosecution is apt to mislead, and if one were to accept as proper that the appellation *refugee* is withheld from those who have reason to fear discrimination or other maltreatment short of persecution, one might still be justified in expressing surprise at the fact that the Convention and Protocol, and thus several domestic laws, designate as *refugees* only those who have fled from persecution and exclude fugitives from natural disasters⁴¹ and from civil and international war. This limitation on the definition of *refugee* owes its origin to the fact that the refugee is designated as a person who stands in need of international protection because he or she is deprived of that in his or her own country. Such reasoning and definition may well be appropriate for the purpose of determining whether an individual should receive an international travel document and should be eligible for the diplomatic protection afforded by the High Commissioner's representatives; however, it appears inappropriate for the purpose of determining whether an applicant qualifies for admission to a country of asylum and to freedom from refoolment.⁴² The compassionate claim of a fugitive from persecution may, after

39. TH/5911/75. Identification withheld. Researchers refer to Clerk to the Tribunal Immigration Appeals, Thanet House, Strand, London W.C. 2.

40. In *Cheng Fu Sheng v. Barber*, 269 F.2d 497 (9th Cir. 1959), the court interpreted the phrase "in fear of persecution" as it appeared in the Refugee Relief Act of 1953 and concluded that the test was essentially a subjective one. In *Shubash v. INS*, 450 F.2d 345 (9th Cir. 1971), the appellate court found no evidence of persecution. See also *Shen v. Esperdy*, 428 F.2d 293 (2d Cir. 1970); *Leong Leun Do v. Esperdy*, 197 F. Supp. 604 (S.D.N.Y. 1961), *rev'd on other grounds*, 309 F.2d 467 (2d Cir. 1962).

41. *But see* Immigration & Nationality Act § 203(a)(7), 8 U.S.C.A. § 1153(a)(7) (West Supp. 1977).

42. See Geneva Convention of 1951, art. 33.

all, be no greater than that of a person displaced by an earthquake⁴³ or a civil war.⁴⁴

The requirement that refugees should be unwilling or unable to avail themselves of the protection of their own countries may likewise prove more appropriate to the question of documentation and protection than to that of resettlement. Persons displaced by the changes of government in Angola and Mozambique, eligible to claim or maintain Portuguese nationality, do not qualify as refugees if willing to seek Portuguese protection. In the event of their emigration to Portugal, they are designated as *returnees*, though they may never have been in Portugal and may not be of Portuguese descent. Fugitives from Rhodesia are seldom eligible to benefit from the Convention and Protocol because in most cases they are nationals of the United Kingdom, willing and able to avail themselves of British protection, although ineligible for admission to the United Kingdom under current immigration law.⁴⁵

The Convention and Protocol do not expressly state that a fugitive, in order to qualify, must have reason to fear persecution throughout his or her country of origin, but the Office of the United Nations High Commissioner has on occasion, given this interpretation to it. Thus, Greeks or Turkish Cypriots fail to qualify, though they show that in the event of their returning to their villages they risk persecution by compatriots of different ethnic extraction. The same argument applies, *mutatis mutandis*, to Christians or Moslems from the Lebanon.

43. As this Article goes to press, fugitives from earthquakes in the Comoros and Oman had received emergency relief from outside their countries of origin. It is understood that many such fugitives were unwilling to return to their homelands, and it is unlikely that in the event of their so doing they would be able to reestablish themselves successfully.

44. Recent examples of disorders which have displaced persons failing to qualify as refugees include those in the Lebanon and in Vietnam prior to the fall of Saigon.

45. The authorities actually in power in Rhodesia are of the view that those whose national status depended upon their connections with the colony of Southern Rhodesia ceased to be nationals of the United Kingdom upon the Unilateral Declaration of Independence on November 11, 1965. The same authorities have adopted a Citizenship of Rhodesia Act (1970). Her Majesty's Government in the United Kingdom is of the view that there remains in force in relation to Rhodesia the Citizenship of Southern Rhodesia and British Nationality Act of 1949 (as amended by the Citizenship of Southern Rhodesia and British Nationality Act of 1963) and that an individual who is a citizen of Southern Rhodesia by virtue of the Act of 1949 (as amended) is a national of the United Kingdom. Not all such nationals are free to enter the United Kingdom without let or hindrance, for the "right of abode" is enjoyed only by those who qualify as "patrials" of the United Kingdom by virtue of their associations with the Kingdom itself, rather than associations with a colony. Immigration Act of 1971, § 2.

In distinguishing between persecution for religious or political opinion and persecution for activities undertaken in consequence of these opinions, a tribunal is apt to reflect a moral dilemma in a terminological one. Fugitives whose religious convictions have induced them to refuse to engage in military service,⁴⁶ or whose political convictions have induced them to attempt regicide,⁴⁷ may be met with the argument that the punishment that they can anticipate in their country of origin, even if so condign as to constitute persecution, is not persecution for reason of religious or political opinion but rather for reason of activities undertaken contrary to the law of the land. The distinction, although superficially attractive, has the consequence of excluding from the definition of *refugee* many groups for whose benefit the Convention and Protocol appear designed. It is seldom the mere possession of an opinion that attracts persecution; rather it is its expression. It can scarcely be argued that the Convention and Protocol fail to extend to a person persecuted for worshipping according to Jewish rites, for the principle relied upon holds that it is one thing to adhere to a faith and another to manifest it. It seems that at present, the correct test is to determine whether the punishment that the fugitive can expect in consequence of his crime is any greater than that which would be meted out to an individual of different political or religious opinion who has committed a similar offence in the same country and at the same time. The Draft Convention on Territorial Asylum, if adopted in its present form, would substitute that test with one encompassing a wider category of fugitives from prosecution.

THE DRAFT CONVENTION ON TERRITORIAL ASYLUM

The Draft Convention on Territorial Asylum is written with the object, among others, of disposing several of the foregoing limitations on the 1951 Convention and 1967 Protocol. It begins, and has hitherto attracted the most widespread attention, with an article designed to qualify the right of Contracting Parties to grant or with-

46. For example, see TH/1239/75 (appeal pending). Identification withheld. Researchers refer to Clerk to the Tribunal, Immigration Appeals, Thanet House, Strand, London W.C. 2.

47. Lt. Col. Amerikrane of the Moroccan Air Force arrived in Gibraltar immediately after an unsuccessful attempt had been made on the life of the King of Morocco. He asked for political asylum but was returned to Morocco on the next day at the request of the Moroccan authorities and was there executed. His widow introduced an application to the European Commission on Human Rights, alleging various infringements of the European Convention on Human Rights and Fundamental Freedoms. The case was concluded by friendly settlement: the Government of the United Kingdom agreeing to pay the applicant an *ex gratia* sum of £ 37,500 (about \$65,000.00). 1 COUNCIL OF EUROPE PRESS COMMUNIQUE C 29 (1974); F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 32 (1975).

hold asylum at their discretion. The article is couched in tentative language: "[E]ach Contracting State, acting in the exercise of its sovereignty, shall endeavor in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention." At the Conference in Geneva in 1977 delegates voted to effect a slight change of wording in that sentence and to add a new paragraph stating that asylum should not be refused on the ground only that it could be sought in another State. The new paragraph was, however, qualified by a proviso stating that the fugitive may be required first to seek asylum in another State with which he or she has connections, if it appears fair to do so. The reference to sovereignty is reinforced by Article 9 of the Draft: "Qualification of the grounds for granting asylum or applying the provisions of this Convention appertains to the Contracting State whose territory the person concerned has entered or seeks to enter and seeks asylum." This, in turn, contains an echo of the Declaration on Territorial Asylum,⁴⁸ but it is more conservative than the latter because it preserves the discretionary power of the State not only in the case of the grant of asylum but also in the cases of refoulement, provisional stay, international cooperation, voluntary repatriation, and cooperation with the United Nations to the extent that these are regulated by the Draft Convention. Draft Article 9, moreover, speaks not of evaluation but of qualification of the right, which seems to preserve for each Contracting Party a right to qualify or limit the application of the Draft Convention as a whole.⁴⁹

Article 2(1) of the Draft Convention sets out the circumstances in which a person is eligible for the benefits of the instrument. It is to be noted that in revising the Draft, the Group of Experts substituted the word *eligible* in this context for the word *entitled*. Subject to two exceptions, and to an immaterial change of syntax, Draft Article 2(1) corresponds with the definition of *refugee* in the Convention of 1951, as modified by the Protocol of 1967.

The first exception is that in the Draft there is to be inserted after the words "persecution for reasons of . . . political opinion" the phrase "including the struggle against colonialization and apart-

48. G.A. Res. 2312, 22 U.N. GAOR, Supp. (No. 16) 81, U.N. Doc. A/6716 (1968), art. 1(3): "It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."

49. It now seems to be acknowledged that the wording of Article 9 is at fault. See 30 U.N. GAOR 93, U.N. Doc. A/10177 (1975) (¶ 125).

heid." The second is that under the Draft Convention a fugitive is to be eligible if he or she is unable or unwilling to return to his or her country owing to a well-founded fear of "persecution, prosecution or punishment for acts directly related to the persecution as set forth" in the preceding subparagraph. The Draft thus envisages that a fugitive will qualify as a refugee if he or she has fled to escape prosecution for an act undertaken in pursuance of a political opinion, including opposition to colonialism and apartheid. The language in which the article is expressed is more generous than would be required in order to protect freedom fighters and guerillas. Thus, one who for purely mercenary reasons assists a refugee to flee from his or her country of origin qualifies under the Draft provision if he or she risks punishment for some breach of the emigration law of the refugee's own country. The same presumably applies to a mercenary who, under instructions from politically motivated employers, commits a common offence, unless that offence falls within Article 2(2) of the Draft.⁵⁰

Under Article 2(2), the provisions of the preceding paragraph are not to apply to anyone suspected of committing a crime against peace, a war crime, a crime against humanity as defined in relevant international instruments, a serious common offence⁵¹ under the laws and regulations of the Contracting State granting asylum, or acts contrary to the purposes and principles of the United Nations. In this context the expression "serious common offence under the laws . . . of the . . . State granting asylum" denotes an act triable as an offence in the country of asylum and not an act which would be so triable if done there or a genus of serious offence known to the laws of the country of asylum.

Under Article 3, Contracting States would agree not to return an individual entitled to the benefits of the Draft Convention to a country where he or she would be persecuted.⁵² It is noteworthy that in this Draft Article alone there appears the word *entitled*. Presumably the words *entitled to* will now be altered to read *eligible for*, for it is improbable that the Draft Convention will be reamended so as to confer any entitlement. In its original form, the second part of Article 3 dealt with the fugitive who presents himself or herself at the frontier of a Contracting State, but may still be within the territory

50. An amendment excluding mercenaries was tabled at the Conference and did not receive further consideration.

51. Cf. Geneva Convention of 1951, art. 1 F(b), which speaks of a "serious nonpolitical offence."

52. The text of the Draft Convention on Territorial Asylum reads: "persecution, prosecution or punishment for any of the reasons cited in Article 1." This seems to be an error. The reference is to Article 2.

of his or her own State and hence is unable to qualify as a refugee.⁵³ In such cases the original form of the Draft Convention envisaged, with a qualified hesitancy characteristic of the whole instrument, that a Contracting State would "use its best endeavours" to ensure that the fugitive is not rejected at the frontier "if there are well-founded reasons for believing that such rejection would subject him to persecution, prosecution or punishment" for the reasons stated previously. The discrepancy as regards refolement between persons in the country and those at the borders was, however, removed when the second part of the Draft Article was revised by the Committee of the Whole.

Under Article 4 of the Draft Convention, individuals seeking asylum are to be granted provisional admission pending the determination of their requests. The article is silent on the question of distinguishing between applicants genuinely seeking asylum and applicants abusing the process for the purpose of gaining temporary admission.

There are four additional articles with which we need not now be concerned, as they bear only indirectly upon national laws governing the admission of refugees. At their meeting in the spring of 1975, the Group of Experts recommended adding to these four articles a new article to specify that Contracting States may grant asylum to people eligible for the benefits of the proposed Convention on terms more favorable than those set out therein, or might grant asylum to people other than those set out therein, it being understood that in the latter case the provisions of the proposed Convention should not apply. The additional Draft Article is designed only to clarify, and not to alter, the effect of the preceding ones. Indeed, in the case of the Convention of 1951 it was assumed, in the absence of any such article as the Group has composed, that Contracting States remain free to grant to people not qualifying as refugees within its definition the treatment for which it provides. It was in view of this assumption that the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons adopted Recommendation E, expressing the hope that the 1951 Convention would have value as an example exceeding its contractual scope.

At its twenty-first meeting, on 31st January, 1977, the Committee of the Whole proposed the incorporation within the Draft Conven-

53. The requirement that the refugee should be outside his country of origin, expressed in Article 1 of the Geneva Convention of 1951, is implied in Article 2 of the Draft Convention on Territorial Asylum.

tion of a new article on family reunion. This would impose on Contracting States the duty of facilitating the admission to their territories of spouses and minor children of people to whom they have granted the benefits of the Convention. The proposed new article would not oblige Contracting States absolutely to admit such spouses or children. It does not deal with the problems of public, and particularly private, international law that are likely to arise in interpreting the words *spouse* and *minor*.

CONCLUSIONS

The definition of a *refugee* contained in the 1951 Convention, modified by the 1967 Protocol, and reconsidered in the Draft Convention on Territorial Asylum, has significance not only for international agencies and relations but also for the drafting and interpretation of domestic immigration laws. In the United Kingdom, the immigration rules not only quote and purport to be in accord with the definition contained in the Convention,⁵⁴ but must be interpreted in light of that international instrument.⁵⁵ In the United States, which occupies the rare but not unique position of being a party to the 1967 Protocol but not to the 1951 Convention,⁵⁶ the Immigration and Nationality Act of 1952 adopts in part the language of the Constitution of the International Refugee Organization, of which the United States *was* a member and from which the definition contained in the 1951 Convention was derived. The Refugee Relief Act of 1953 uses language originating from the same source.⁵⁷ It is apparent, then, that deficiencies in the language of the international instruments, resulting from compromise, may be transmitted to domestic immigration law and policy. The conclusion of an international agreement having the effect of modifying the Conventional definition of a *refugee* is thus a matter of domestic as well as international interest. It may be of particular interest in the United States if it leads to a reconsideration of United States policy respecting adherence to the 1951 Convention and 1967 Protocol.

At the Geneva Conference in 1977 there appears to have been widespread acceptance of the humanitarian argument in favor of

54. See authority cited note 8 *supra*. Footnotes to the cited immigration rules read: "The criterion for the grant of asylum is in accordance with Article 1 of the Convention Relating to the Status of Refugees."

55. For the interpretation of immigration rules in the light of international conventions, see *Birdi v. Secretary of State for Home Affairs*, *The Times* L.R., 12th February, 1975; *R. v. Secretary of State for Home Affairs ex parte Phansopkar* [1975] 3 ALL E.R. 497 (Ch.); *R. v. Secretary of State for Home Affairs ex parte Akhtar* [1975] 1 W.L.R. 1717 (C.A.).

56. See note 5 *supra*.

57. 3 C.J.S. *Aliens* § 92 (1973).

extending the definition of *refugee*—although not on the perimeters of the new definition. This being so, the failure of that conference to reach agreement constitutes no objection to a renewed effort to redefine the term. There would be something to be gained, and little lost, by extending the Conventional definition, in the pattern of the Walter-McCarran Act, to include refugees from natural disasters. It is appreciated that the view is widely held that fugitives from natural disasters, although standing in need of the assistance of the United Nations High Commissioner, are not in need of his protection, as they continue to enjoy the diplomatic protection of the Governments of their own countries. To raise this observation as an objection to including refugees from natural disasters within the Conventional definition of *refugee* is, however, to misinterpret the object of the amendment. The amendment here proposed would extend to such fugitives, in the territories of Contracting Parties, the right to benefit from the provisions in the 1951 Convention governing civil rights and obligations, juridical status, employment, welfare, and administrative measures, save that parties to the new Convention would probably wish to reserve Convention Travel Documents for refugees from persecution alone. The move might also be expected to have the result of assuring the preferential treatment of refugees from natural disasters in the event of their seeking admission to the territories of States basing their immigration laws upon their international undertakings.

There would also be merit in a proposal to extend the definition of *refugee* to cover fugitives from civil war, unable or unwilling by reason of the hostilities, or consequences of hostilities, to return to their countries of origin. Refugees in this category might also be considered ineligible to receive Convention Travel Documents; but this need in no way diminish their claim to preferential admission and to the benefits of the provisions governing the treatment of refugees within the territories of Contracting Parties.

Finally, there is much to be said in favor of the subparagraph, contained in the Draft Convention, which would extend protection to fugitives from prosecution or punishment for acts directly related to persecution for reasons of race, religion, nationality, or membership of a particular social group or political opinion. It is a measure which, in the case of Contracting Parties, would achieve the disposition of the misleading distinction between persecution for an opinion and persecution for its expression, and would discard the proposition

that prosecution and persecution are mutually exclusive. To meet this purpose, however, and to command acceptance, the subparagraph requires two alterations: one of drafting and one of greater substance. The former is a change of wording so as to limit protection only to activities motivated by political or religious opinion, race, nationality or membership of a social group and not to encompass all activities *directly related* to those qualities. The latter is a designation of the activities which would attract the protection of the Convention. It is a moral issue which needs to be faced squarely by the Contracting Parties, for if this is not done the Draft Convention can aspire to do no more than to conceal the strong differences between them.