

THE NOTION OF REFUGEE. DEFINITION AND DISTINCTIONS

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Abstract: *Europe has been recently shaken by the great number of persons coming from Syria and neighbouring countries which were calling themselves “refugees”. According to the United Nations Refugee Agency, since 2015 more than 1 million refugees travelled to Greece. This paper aims to analyze the notion of “refugees” in light of international legal instruments applicable and to draw up distinctions between different categories of migrant persons and those who are really refugees and may apply for international protection under the 1951 UN Convention on refugees. The distinction regarding the use of terms is relevant for shaping the legal status of different persons who leave their country of origin.*

Keywords: refugees, international protection; safeguards; limits

JEL Classification: A1; A2

Introduction

The UN 1951 Convention is the core international legal instrument relating to the protection of refugees, also known as *Magna Carta* of international refugee law and it includes the definition of this notion and establishes the obligations for the contracting States. The Geneva Convention sets the basic standards on the legal status of refugees and their international protection to which the States parties may offer extensive rights (Fortin, 2000).

The aim of the 1951 Geneva Convention was to establish a framework of international protection for the great number of refugees resulted after the World War II. The Convention entered into force on 22 April 1954 and its provisions were amended by the 1967 Protocol which removed the geographic and temporal limits of the 1951 Convention (the initial provisions limited the refugee status to persons fleeing events prior to 1 January 1951 and within Europe).

The recent events in the Middle East reveal that a massive influx of persons seeking the status of refugees in Europe are putting the European States in great difficulty in complying with the requirements of international instruments. Moreover, some of the measures undertaken at the domestic level by some European States are inconsistent with the international contracted obligations. International law provides the rules of *non-refoulement* to persons having the status of refugees and

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also the interdiction of detaining them or to impose criminal sanctions on those who enter the State territory unlawfully (according to Articles 31 and 33 of the 1951 Geneva Convention).

At the same time there are many situations when the term *refugees* or *asylum seekers* is used as a synonym for *migrants*. The use of these terms as interchangeable favours confusion between different categories of persons who leave their country of origin on account of persecution and seek for international protection and the persons who leave their country voluntarily in search of a better life, but without a well-founded fear of persecution.

The first category of persons may receive international protection and assistance under the 1951 Geneva Convention, while the latter does not meet the requirements for such a legal status. The distinction between these two categories is of high importance from the perspective of State control and its possibility to impose restrictions on free movement.

In matters concerning migration, States enjoy an extensive degree of discretion in exercising control and restricting the entry of foreign persons (Hansen, 2014, p. 258). In other words, International Law provides the right of free movement but this right is not absolute as States may consider a ban to entry their territory for persons who represent a danger for the public order.

Migration is understood as a socio-economic phenomenon, being caused by looking for jobs, family reunification or education opportunities (Long, 2013), while lacking the element of persecution or fear of persecution. However, it is not possible to eliminate any economic interest for those who seek protection as refugees. For this reasons, in some cases, drawing a strict line between the two categories may be a difficult process.

1. Definition of refugees in the 1951 Geneva Convention

According to Article 1 A (2) of the 1951 Convention, a refugee is a person who is unable or unwilling to return to his country of origin “*owning a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*”.

Hence, refugees are defined by three main characteristics: physically they are outside their country of origin; psychologically, they are unwilling or unable to return to their country of origin due to a fear of persecution; causal element – the fear of being persecuted is based on grounds of race, religion, nationality, membership of a particular social group or political opinion.

The emphasis in this definition is on the need for protection of persons, from persecution based on politic opinion to any other forms of discrimination. The significant element of refugee's legal

regime is that they lack protection of their own country, being in an intolerable situation and the refuse of providing protection for them could have severe or even deadly consequences.

The reading of this definition reveals a gap in the causal element of the refugee's status: it does not explicitly provide this sort of international protection in case of an armed conflict. However, the legal status of refugees provided by the 1951 Geneva Convention is completed by general rules of international law, human rights law and international humanitarian law (especially the *Convention (IV) relative to the Protection of Civilian Persons in Time of War* and the *1977 additional Protocol*).

Another gap is that its provisions do not apply to persons who are persecuted not because of their political opinions, but because of their opposition to government's generally binding acts. Moreover, the definition should also concern persons who committed acts of resistance against political regimes that do not recognize public freedoms and fundamental rights (Casanovas, 2003, p. 33) and those who leave their country because of systematic violations of human rights or because of civil wars and social disorder (Aleinikoff, 1991; Casanovas, 2003, p. 33). In these cases it would be very difficult to prove the element of persecution which is necessary for granting the legal status of refugee.

As opposed to this extensive interpretation, the strict interpretation of the Convention's provisions only covers those situations when protection is absolutely necessary and thus they do not apply to economic migrants (also improperly called economic refugees) nor to persons suffering from natural disasters or civil wars.

The foundation of the international protection of refugees is Article 14 of the Universal Declaration of Human Rights which asserts that everyone has the right to seek and enjoy asylum. Although international law does not define the word "asylum", it has become a generic term that designates the protection provided by a country to persons claiming the refugee legal status on its territory. Asylum means, at the very least, basic protection - i.e. no forcible return (*refoulement*) to the frontiers of territories where the refugee's life or freedom would be at risk, with the possibility of staying in the host country until a solution outside that country can be found (IPU, 2001). States may extend the meaning of this term in their legal order.

2. The principle of non-refoulement

States parties to the 1951 Geneva Convention have the negative obligation not to return a refugee to his country of origin or territory where he would face the risk of persecution. This rule is

known as the principle of *non-refoulement* (Chetail, 2014, p. 9) and it is a part of customary international law applicable to all States. Moreover, it is considered a *jus cogens* - imperative rule of international law (Combacau and Sur, 2006).

According to Article 33 in the Convention “*No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*”

Reading this provision reveals the lack of protection from the country of origin of refugees and that States have the negative obligation in offering this element of the protection by not expelling refugees to territories where their life or freedom would be at risk.

3. The limits of the international protection provided by the 1951 Convention

The international protection of refugees has an individual character and contracting States have the obligation of recognizing this legal status and not returning refugees to their country (Casanovas, 2003, p. 33).

Granting asylum and international protection by States is greatly influenced by the exercise of State sovereignty, which may be subject only by the international commitments undertaken by States such as to cooperate in order to protect persons who objectively and subjectively lack the protection of their own countries. At the core of the refugees’ legal status is its humanitarian nature and thus it should not be seen as an unfriendly act.

A more extensive definition on the notion of refugee is given at regional level, by the *Convention Governing Specific Aspects of Refugee Problems in Africa*, adopted in 1969 within the Organization of African Unity (OAU). This added more objective consideration to the definition given by the UN 1951 Convention and is referring to refugees as *any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality*.

In 1984, the Cartagena Declaration adopted by Latin America governments added a more objectively consideration to the definition from the 1951 Convention and includes persons who flee their countries “*because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*”.

As a result of the evolution of States' approach on the legal regime of refugees and the insufficiencies of the 1951 Convention, regional legal instruments added more precise criteria for the refugee legal status, in order to be able to extend the possibility of granting international protection to persons in need.

4. Safeguards for the refugees unlawfully entering the territory of the hosting State

Taking into consideration that refugees are vulnerable persons, the 1951 Geneva Convention also protects those unlawfully in the hosting State, in Article 31 who reads as follows:

"1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

The terms used in this provision may be subject to a number of observations. Firstly, *unlawful* or *unauthorized entry* on the territory of a State may prove necessary and indispensable, because persons claiming the refugee status do not enjoy the right to freely enter and remain in a State of potential refuge. Basically, this provision shows that under the right to free movement, persons have the right to leave any country, including one whose nationality they have, but they do not enjoy a correlative right to enter the territory of another country. Article 31 contains no details as to how States qualify an entry as unlawful or unauthorized, which means that states have *prima facie* unlimited powers in defining these concepts.

Secondly, paragraph 1 of Article 31 provides that States parties are compelled not to impose criminal penalties for unauthorized entry and stay within their territory. States enjoy the possibility of applying restrictions on the movement of refugees but this is limited by the granting of refugee status or admission to another state.

Neither this text nor other provisions under the Convention does define nor provide examples of admissible restrictions to be imposed by the State in order to protect certain legitimate objectives such as that of protecting its citizens and the public order. Commonly, the notion of *penalties* may refer to prosecution, criminal penalties, criminal fines, criminal conviction, imprisonment and other restrictions on freedom of movement of the person concerned. Therefore, these concepts fall within the scope of this provision.

According to the second sentence of paragraph 1 of Article 31, in case of refusal of granting international protection as a refugee, the hosting State has the obligation to provide the asylum seeker the time and facilities necessary to ask for the recognition of that status in another state. In this regard, the provision of the Convention is again elusive as it does not set criteria for the analysis of the reasonableness of the time period allowed or the nature of the facilities which the State is required to provide for the admission of a person in another State.

Although the purpose of Article 31 appears to be protecting people who are seeking protection in the form of granting the refugee status, some States (in Europe, North America and Australia) frequently apply restrictions as the arrest and detention of persons seeking such a form of protection and these types of restrictions have serious consequences for the person concerned, similar to penalties, even if they do not have this legal nature according to domestic law (Noll, 2011, pp. 1243-1246; Goodwin-Gill, 2001).

The analysis of these provisions reveals that States enjoy an extensive margin of discretion in applying restrictions, as long as they are not qualified as being criminal penalties.

Thirdly, the scope of the first sentence of paragraph 1 of Article 31 is limited to persons coming directly from the state where they are in danger. In other words, the benefit of not applying criminal sanctions is conditioned by direct arrival in the hosting State, excluding those who come from the territory of another State, where they did not receive the refugee status.

Conclusions

The 1951 Convention is subject of criticism due to the fact that its frame of protection may be considered incomplete and outdated. However, one must take into consideration that since its conclusion and the founding of the United Nations Refugee Agency, over 50 millions of people were granted protection and were helped to restart their life.

On the other hand, we must underline that the aim of the Convention was not to control migration, but to offer protection to those who lack protection from their own country and face a well

founded risk of persecution. Although the Convention does not provide specific and detailed information on all aspects for States, in order to comply with their obligations and different States do not respect entirely its safeguards, the idea of building walls or protection fences at the border lacks any foundation from the international legal framework.

European States are trying to lessen their obligations towards refugees on reason of protecting public order and their citizens against terrorism. This kind of conduct may be interpreted as contradictory to the ideals in terms of protecting fundamental rights and freedoms and to the principles of the 1951 Convention. According to the general rules of interpretation of the 1969 Vienna Convention on the law of treaties, the provisions of the Geneva Convention should be interpreted in the sense of effectiveness of its provisions, not in the sense of limiting the extent of the States obligations.

Having in mind that the refugee phenomenon is not a new one, States should make efforts in adapting their policies to the new situations and respond to them in accordance with international obligations they have contracted. Thus, the legal framework on refugee's legal status should receive rather a dynamic interpretation and not a static one (Feller, 2001).

References

- Aleinikoff, T. A. (1991), "The Meaning of "Persecution" in United States Asylum Law", *International Journal of Refugee Law*, Vol. 3, No. 1, pp. 12-13.
- Casanovas, O. (2003), *La protection internationale des réfugiés et des personnes déplacés dans les conflits armés*, Recueil des cours de l'Académie de droit international de la Haye, Volume 306.
- Chetail, V. (2014), "Armed Conflict and Forced Migration: Systematic Approach. International Humanitarian Law, Refugee Law, And International Human Rights Law", in: Clapham A., Gaeta P. (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press.
- Combacau, J. and Sur, S. (2006), *Droit international public*, 7e edition LGDJ-Montchretien, Paris.
- Feller, E. (2001), "The Evolution of the International Refugee Protection Regime", *Journal of Law & Policy*, Vol. 5, Issue 129, pp. 129-139.

- Fortin, A. (2000), "The Meaning of `Protection` in the Refugee Definition", *International Journal of Refugee Law*, Vol. 12, Issue 4, p. 550.
- Goodwin-Gill, G. S. (2001), "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection", Paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, available at: <http://www.unhcr.org/3bcfdf164.pdf> (accessed 29 April 2016)
- Hansen, R. (2014), "State Controls: Borders, Refugees, and Citizenship", in: Fiddian-Qasmiyeh, E. Loescher, G., Long, L. and Sigonaet, N. (eds.) *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford University Press, p. 258.
- International Organization of Parliaments (IPU) (2001), "Refugee Protection: A Guide to International Refugee Law", available at: http://www.ipu.org/pdf/publications/refugee_en.pdf (accessed 29 April 2016).
- Long, K. (2013), "When refugees stopped being migrants: Movement, labour and humanitarian protection", *Migration Studies*, Vol.1, No. 1, pp. 4-26.
- Noll, G. (2011), "Article 3", in: Zimmermann A., Machts F., Dörschner, J. (eds.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford, pp. 1243- 1246.