

DEFINITION OF REFUGEE IN INTERNATIONAL LAW: CHALLENGES OF THE PRESENT TIMES

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Abstract

Traditionally, a refugee in international law is a person who, owing to a 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/her nationality, and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country (according to the 1951 Convention on the refugee status). Thus, in cases challenging the status of an individual as a refugee, the reference to the above mentioned definition and the criteria it employs should be sufficient in order to determine the recognition of the specific protection.

However, at present, thousands of persons are forced to leave their country for economic reasons or because of natural disasters. These people, running from natural adversities and from poverty, exercise in fact their right to seek happiness, or in more ordinary terms, their well being. The states' response for these individuals is yet far from being positive, as they keep to the traditional definition, where criteria as poverty or natural disaster are excluded, in order to refuse them the benefit of the refugee status. Nevertheless, the international bodies, as well as states, must deal with these refugees "hors Convention" and grant them, in order to fulfill commitments in the human rights field, some form of protection. This paper intends to analyze the pressures exercised on the traditional definition, the states' reaction and the possible other forms of protection for an optimal response to the need of persons who are outside their country because of economic reasons or natural tragedies.

Key words: refugees, grounds of persecution, need of protection, objective standards.

Introduction

Traditionally, the refugee is defined, both in the United Nations High Commissioner for Refugees (UNHCR) Statute and in the 1951 Convention relating to the Status of Refugees (here after the "1951 Convention") as a 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 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".

Through practice and competent bodies guidelines, this definition, was interpreted in a broad manner, in order to permit a larger number of beneficiaries. However, the definition relies on a complex of subjective and objective factors and has an individualist approach. In real life, the large number of persons crossing an international border and founding themselves denied or without the protection of the country of origin made it difficult to verify the fulfilment of the conventional standards in order to recognise the quality of refugee or, even more painful, made this demarch useless, as the primary need for protection prevailed over other standards.

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The traditional definition of refugee

The doctrine and case-law explained and interpreted this definition, in order to identify the criteria to be fulfilled by a person in order to be granted the refugee status. It appears from this analysis that four conditions must be verified:

1. the person must have crossed an international frontier, as the 1951 Convention talks about a person who is “outside his or her country of origin”
2. the person must invoke a well-founded fear of persecution
3. the invoked ground for persecution must enter into one of the five reasons identified by the 1951 Convention: race, nationality, religion, membership of a particular social group or political opinion.
4. the person is without the protection of his or her country of origin.

1. The crossing of an international frontier

The crossing of an international frontier is a fundamental condition in order to discuss the applicability of the refugee definition, as only a person who has fled his or her country of origin can be considered as a refugee. This condition is not to be linked with the other requisites of the refugee definition, as it is not necessary that the person leaves his or her country of origin by reason of persecution¹. It is possible that a person becomes a refugee after leaving the country of origin and that the crossing of the international frontier has no connection with any fear of persecution, but it is an intrinsic part of the refugee definition this position of the person finding him or herself outside the country of origin.

2. Well-founded fear of persecution

The person aiming at obtaining the recognition of the refugee status must invoke a well-founded fear of persecution.

As the fear is concerned, every feeling is intrinsically subjective and consequently could not be quantified or expressed in precise components. The fear must however derive from conditions of general or individual character that locate the individual in a social and political context and permit to establish if the person, considering his or her particular situation, is well founded in the sentiment of fear, as he or she it is facing the risk of persecution². This sentiment makes the connection between the past – past acts of persecution, past events contributing to the picture of the general and personal situation – and the future – the risk or serious possibility of future persecution, as it is not necessary that such an act could have already taken place.

The persecution concept, not defined in the 1951 Convention, is linked by this very instrument to the violation of individual fundamental rights and freedoms, such as the right to life, the right to freedom and safety, the interdiction of torture or ill-treatment.

In states' practice and case-law, the persecution was perceived as “severe violation of basic human rights”, “systematic and discriminatory conduct”; if general acts of persecution are perpetrated because their authors see or perceive something about their victims or attributed to their victims, only the persecution for reasons of one of the five grounds identified in the Convention qualifies a person to obtain the refugee recognition.

The author of persecution was traditionally evoked as a “agent of persecution”, or the term of agent usually describes a person acting on behalf of another, so that the “agent of persecution”

¹ G. S. Goodwin-Gill, J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), 65

² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva, HCR/IP/4/Eng/REV.1 Reedited, January 1992), 43

was traditionally considered to be the agent of the state; in this way, the only persecution acts taken into consideration were the acts of state agents or, more generally, of state³.

This narrow interpretation is partially sustained by the relation the 1951 Convention establishes between the persecution and the lack of protection, as the definitions stated that the person “is unable or unwilling to avail himself or herself of the protection” of the state. However, if it is undisputed that only a state could offer protection, the developments show (as it will be detailed below) that the authors of persecution are not only state agents but also non-state actors.

3. *Reasons for persecution*

The 1951 Convention identifies five grounds of persecution, grounds that in many situations represent also grounds for discriminatory treatment of the individual. The five reasons are: race, religion, nationality, membership of a particular social group and political opinion.

a. Race

The race is defined in the Convention on the Elimination of All Forms of Racial Discrimination as “race, colour, descent, or national or ethnic origin” in the context of the racial discrimination definition. If at origins the 1951 Convention gave to this ground a narrow interpretation, the development in the world justify the reference to the Convention on elimination of Racial Discrimination, extending the notion to “ethnic origin” or to “national origin”, although the basic sense of race does not cover these aspects of a person’s identity.

b. Religion

The introduction of this ground in the text of the 1951 Convention testifies not only the will of nations to learn from the past’s lessons, but also their conviction as to the fundamental character of the freedom of thought, conscience and religion. In fact, the definition of the refugee has as premise the freedom of everyone to have, adopt and manifest a religion or belief of his or her own choice.

However, the concept of religion evolved during the last 50 years and the discussion challenges the traditional concept in order to permit the access of other beliefs that qualify as religious and philosophical convictions, determining individuals to manifest these beliefs in religious groups or associations.

c. Nationality

The notion is rather ambiguously used, as it is not to be understood as an expression of the link between the individual and the state of origin but rather as to include origins or membership to ethnic, religious, cultural, linguistic communities; this interpretation should not be reduced to minorities, although the situation of minorities is often much more sensitive. However, it is possible that a link to a majority community constitutes a ground of persecution.

d. Membership to a particular social group

A social group can be defined as people in a certain relation or sharing similarities, interests, values, aspirations, social status or activities. The essential aspects for determining a particular social group should be the factual circumstances that constitute similarities in all the members’ situation and their legal or social treatment.

³ L. Jeannin, M. Meneghini, *Le droit d’asile en Europe: étude comparée*, (Paris: L’Harmattan, 1999) 40-41

e. Political opinion

The political opinion is generally understood as an opinion a person expresses about the functioning, the decision and the measures adopted by the government or the policy makers in the state of origin.

The political opinion must be an assumed one, but it is not necessarily to have been expressed of an open manner.

As the remembrance of the political opinion in the refugee definition aims at undermining the fundamental character of another individual freedom – the freedom of expression -, the person expressing these political opinions must not be asked to cease or to moderate his or her speech, without violating the freedom of expression.

4. Lack of protection

The lack of protection refers to the protection that states must afford to people under their jurisdiction with respect to fundamental rights and freedoms. When such a protection is missing or is refused to an individual subjected to persecution or facing such a risk, then the person is entitled to seek international protection.

It follows from the definition that the international protection is a subsidiary one and it engages only if and when the state's protection is unavailable because of the state's failure or refusal to afford it.

This traditional approach is very tied to the concept of persecution for one of the five grounds recognised by the 1951 Convention. Although the doctrine and the practice tried to broaden the notion, the resistance of domestic authorities made this demarch not complete.

The concept of refugee in UNHCR practice and regional approaches

Since the adoption of the conventional definition, pressures exercised on the traditional approach by practice and case-law determined changes in the perception of a refugee. As we will see, the practice of UNHCR as well as regional tentatives to define a refugee underlined the need for a flexible approach, where the need for protection, determined by the forced character of the migration, is intended to become the principal factor to be taken into consideration in the evaluation of a person's claim to benefit from recognition of the refugee status.

This section of the paper will briefly present the two important directions for change; the practice and the regional approach.

1. The practice of UNHCR

The mandate of UNHCR defines the refugee in a similar manner as the 1951 Convention that it in fact preceeded. However, during the almost 60 years of its existence, the UNHCR was confronted with situations where, on one hand, the massive afflux of refugees made it impossible for a individual determination fo the fulfilling of criteria in orfder for a person to be recognised as a refugee and, on the other hand, the immediate need for protection for people falling outside the refugee qualification necesitated a rapid reaction irrespctive fo the fulfilment of criteria.

Thus, starting with the Chinese refugees in Hong Kong⁴ or the algerian refugees in Tunis or Marrocco⁵, the UNHCR offered protection to persons whose situation was of concern for humanity. In the beginning of ita mandate, the UNHCR assistance was reduced to a financial one, but in time the UNHCR developped programs of assistance and rapid reaction for all people who

⁴ United Nations General Assembly Resolution 1167 (XII)

⁵ United Nations General Assembly Resolution 1389 (XIV)

crossed an international frontier in seek of a form of protection, refused or inexistent from their country of origin.

2. The regional approaches

At regional level, the definition of a refugee encounters several changes, as the countries experts in that region acknowledged the need for protection of people forced by civil war or other circumstances in their country of origin to cross an international frontier or the need for a more comprehensive interepration of the traditional conventional definition.

a. The Convention governing the specific aspects of refugee problems in Africa

This convention, adopted in 1969, tried to offer a regional response to challenges put by the african refugee movements. As a result, the definition of the refugee, as retained by the Convention, after reaffirming the inclusion clauses of the 1951 Convention and stating that the term "refugee" shall mean every 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 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, enlarges the application of the conventional instrument to ever person who, 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, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The african definition introduces objective criteria in the determination of a refugee⁶; as a consequence, in case of circumstances affecting or destroying the state, the factual aspects are sufficient in order to recognise a person as a refugee and offer the benefit of an international subsidiary protection.

The objective criteria are echoed in other extraconventional documents in this field, as the Cartagena Declaration on Refugees and the Bangkok Principles Concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee. However, these documents are adopted by experts and have a limited influence of the evolution of the refugee definition.

b. The European level

At the european level, two poles of preoccupation can be remarked.

The first one is the Council of Europe. In the framework, the two major organs of the european organisation, namely the Parliamentary Assembly and the Committee of Ministers manifested concern for the situation of the de facto refugees, as being those persons that do not benefit from recognition as refugees under the 1951 Convention or have strong but different from persecution reasons to refuse the come back to the countra of origin. Although this effort did not generate the expected results, the categories of de facto refugees benefited at the national level of member states of other forms of complementary protection.

The second center of preoccupation ids the European Community, in principal starting with the Amsterdam Treaty that extended the Community competences in the field of asylum and immigration. As a result, a nes body of legislation was adopted. One of the pieces of this legislation, the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the

⁶ M. Delcea, *Protecția juridică a refugiaților în dreptul internațional*, (Timișoara, Editura Presa Universitară Română, 2002), 163

qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, provided for minimum criteria to be applied when interpreting the refugee definition contained in the 1951 Convention.

This option made by the European legislative does not recourse to objective standards and that preserves the traditional approach, excluding from its application the persons who have fled their homes for serious reasons but different from persecution fear. However, the definition englobes the benefits of 50 years of practice and specialists guidelines and offers a general view of the refugees definition present status.

After reaffirming the definition in the 1951 Convention, the Directive explains the extent of terms used in this definition, such as persecution, grounds for persecution, agent of persecution, protection.

In the European Community's approach, an act qualifies as persecution if it is sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, namely the right to life, prohibition of torture, prohibition of slavery and no punishment without law. An accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as severe violation of human rights are also considered as acts of persecution. The Directive constructs a very narrow connection between human rights and persecution, as an act of persecution constitute or contains a human rights' violation.

As to the grounds of persecution, the Directive reiterates the five reasons of the 1951 Convention, but offers a more generous interpretation, in accordance with the interpretation provided by the UNHCR and various domestic bodies involved in the national implementation of the 1951 instrument⁷.

The Directive acknowledges that the actors of persecution or serious harm include the state, but this entity is no longer considered to be the sole agent of persecution, as parties or organisations controlling the state or a substantial part of the territory of the state and non-state actors, can also apply a treatment amounting to persecution.

In the area of protection, the Directive considers the state to be the principal provider for protection, but parties or organisations, including international organisations, controlling the state or a substantial part of the territory of the state can also offer this benefit. The formal protection is not sufficient, as the normative text requires prevention of the persecution in various manners, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

The development of the refugee definition through practice, case-law and regional approaches: sketch of the challenges and progress

The development of the perception over the refugee concept was due, in our opinion, to two major kinds of factors.

The first category of factors refers to the adoption by many practitioners of broader interpretation to the five grounds of persecution identified in the 1951 Convention and the acceptance of the fact that the nominated conventional ground should not be the sole or the dominant ground for persecution.

⁷ Jane McAdam, 'The Qualification Directive: An Overview', in Karin Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, (Nijmegen: Wolf Legal Publishers, 2007) 8-9

The second set of factors valorizes the new approach of the relation between the state and the agent of persecution and, as a consequence, of the statal protection concept, that required this protection to be real, adequate and effective.

The broad interpretation of the reasons for persecution

Although reasons like race or nationality did not give rise to challenges in the interpretation an application of the 1951 Convention, concepts as religion, particular social group or political opinion benefited from revisiting the initial sense, in order to adapt the refugee definition to realities of the five decades that the 1951 convention crossed.

The first general observation when presenting the developments in the conception about the grounds of persecution is that in the determination of the objective standard of “being persecuted” it is made constant reference to international human rights standards. This way, the freedoms of religion, expression are given the sense established in international human rights law. The work of monitoring organs in human right law is often quoted by the UNHCR or the Convention refugee law practice organs.

As we showed in the previous section, the european approach considers that an act of persecution contains at least some aspects of human rights’ violation; however, the UNHCR underlines that various measurs, not in themselves amounting to severe human rights’ violation alone or in combination with other adverse factors, can give rise to a well’founded fear of persecution, making one’s life so insecure in the country of origin that the only solution for that person is to leave that country.

Thus, although in many situations persecution is equal or constitutes a violation of human rights, other possible persecutory treatments should not be excluded.

As a *first consequence* of this reference to international human rights standard, the treatment of an individual claiming the refugee recognition will take into consideration the need for respect of basic human rights in the evaluation of the risk of severe harm. Thus, the fact that a person will engage, at the return in the state of origin, in a voluntary activity that is prohibited by the domestic law or practice (homosexuality, non recognized religion) in violation of basic standards in international human rights law is to be taken into consideration in determining the risk of persecution.

However, we cannot but note with regret the opposition that the volutary but protected activities still meet at the national and even at the european level, as domestic bodies still consider that exercice of freedom of expression or religion in the state of reception is in fact a way of constructing a refugee appearance or case and sometimes sanction this use by refusing to recognise the refugee status. In this respect, the European Directive considers that “a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon *constitute the expression and continuation of convictions or orientations held in the country of origin*”. The grant of the refugee status depends on the past experience of the individual, and excludes the cases where the person, exercising his or her freedom of expression or religion decides to criticise or adopt new opinions. Moreover, the change in one’s opinion or religion, far from being considered a normal exercise of fundamental rights, is apreciated as ground for refusal of refugee status, as Member states may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

It is however true that the evolutive interpretation of some of the five grounds generated a broader approach of refugee concept.

For instance, the reason related to religion is naturally interpreted as not limited to traditional religions or to religions similar to the traditional ones; at the same time, in accordance with the international proclamations of this freedom of religion, the analysis of the refugee claim does not only take into consideration the personal, intimate ideas about the spiritual destiny of humankind, but also includes different aspects of one person's convictions, belonging to a particular group and ordinary life (distinctive clothing, dietary requirements, other practices), in conformity with the interpretation provided by the Human Rights Committee in its General Comments, that the UNHCR cited in its guides and handbooks, suggesting that the notion of religion should benefit of a broader interpretation.

At the same time, another notion used in the identification of the five grounds of persecution, the notion of "particular social group" evolved from a very narrow interpretation, referring to a group that has immutable characteristic - that is, a common past, ethnicity - to an approach that considers a social group to be a group sharing a common characteristic which make it recognizable by the rest, without needing to be cohesive. This way, groups like Chinese women who already have one child and face the risk of application of the domestic legislation on the demographic control are considered to be a group, as well as other types of groups where the gender criterion is important.

The gender-based persecution became an important part of the discriminatory acts that the application of the 1951 Convention dealt with⁸. In fact, in a very short period of time women founding themselves in a very delicate situation (rape, battery, genital mutilation, forced marriage etc.) were considered to constitute a particular social group, although they did not fit in the classic definition of this ground of persecution. The use of the gender criterion in evaluating the risk of persecution on a Convention ground is now frequent when it comes to religion and the restraints it imposes or to political opinion, in the context of women refugees punished for the political activity of their family male members.

In this respect, it is worth mentioning the provisions of the European Directive, that lists acts of a gender-specific or child-specific nature among the various forms of persecution.

As a *second consequence*, one could not reproach or advise a person claiming the refugee recognition to have a certain behaviour in order not to offend his persecutor, once he or she has return to the state of origin⁹. The requirements of discretion, self-restraint or moderation when fundamental rights and freedoms are involved in order to elude the risk of persecution are undermining the refugee protection and such an application would expose many people to a mutilation of their rights.

As a *third consequence*, one could note the fact that the refugee conventional law, at the beginning centered on the individual perspective, becomes more objective and group-oriented. This change is due to the fact that, on one hand, the ill-treatment, discriminatory acts suffered by other members of the group (family, community, political association) could offer an image about the general degree of human rights protection in the state of origin and by that state and, on the other hand, the situation of other members of the group to which the individual belongs is taken into account in the analysis of the risk of persecution.

The protection of the state of origin

The definition laid down in article 1 of the 1951 Convention permits to recognize both state and non-state actors as agents of persecution. Although traditionally, the persecution was perpetrated by the authorities of a country, it is often that authorities, without being actively

⁸ N. Kelley, "The Convention Refugee Protection Definition and Gender-Based Persecution: A Decade's Progress", *International Journal of Refugee Law* 13 (2001): 565

⁹ Rodger P.G. Haines, James C. Hathaway, and Michelle Foster, "Claims to Refugee Status based on Voluntary but Protected Actions: Discussion Paper No. 1", *International Journal of Refugee Law* 15 (2003) :430-443

involved in persecution, tolerate or are unable to offer protection against persecutory acts perpetrated by individuals. In fact, the UNHCR in its guidelines for interpreting the 1951 Convention goes a step further and considers that a persecution unrelated to a Convention ground and perpetrated by a non-state actor could nevertheless be considered from the refugee definition perspective if the failure or refusal of the state's protection is founded on one of the five grounds. Thus, the short and classic definition of a refugee as being a victim of state persecution became very soon a very restrictive one and was rejected on the ground that against the acts of a private persecutor, the state of origin in first place must offer a genuine protection.

The state's protection must not only be formally available, it should be effective and adequate, as the mere existence of a state system of protection does not, in absence of effectiveness, protect the person from a risk or present persecution. As the European Directive puts it, prevention, as well as prosecution and punishment of acts of persecution should be assured by a system that a state puts in place.

If the state's protection is ineffective or refused to the individual, he or she are looking for international protection.

However, in this analysis, an important part refers to the internal flight alternative, or the protection the state can provide in other parts of its territory. If this protection is available and the person could have access to it, even if it implies some efforts from his or her part, then the international protection of a refugee should be refused to that individual.

In this respect, the European Directive considers that technical difficulties should not be taken into account when examining the internal protection alternative. This approach is restrictive as it allows the imposition of an extraordinary burden on the individual, who is supposed to accept and assume the difficulties of the relocation, even if they impede him or her from continuing with a normal life and from enjoying the fundamental rights.

This perspective is more sensitive with the state's efforts to provide a protection, even if it is scarcely enough but not with the individual's need for genuine protection, even if we are talking about a subsidiary, international protection.

In this respect, the UNHCR's approach is the most favourable to the individual, as it focuses on the need for protection¹⁰ and on the fact that the necessity of that protection derives from the forced character of his or her leaving. This approach permits the access to international protection for individuals who, due to objective natural or social circumstances, are forced to leave their country of origin, and find refuge on another country's territory, like the economic or the ecological refugees.

Conclusions

The traditional definition of refugee, focused on the concepts of well-founded fear of persecution on the five grounds, feeds an individualist approach and does not permit the inclusion of objective circumstances that determine people to flee their homes in search of protection. Although the practice and legal personalities tried to enlarge the sphere of beneficiaries by evolutive interpretation, its scope remains narrow and refuses protection to persons in need.

Thus, the concentration on the need for protection allows to bring assistance to persons who would otherwise be excluded from the benefit of the refugee status, and is recognised by the proliferation of complementary forms of protection in the national systems. In this respect, the quest for genuine, effective protection should be the one of the reasons for recognising the refugee status.

¹⁰ Niraj Nathwani, „The purpose of Asylum”, *International Journal of Refugee Law* 12 (2000): 354