

ANALYZING THE CASES OF EXCLUSION FROM REFUGEE PROTECTION

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The international protection of the refugees has been and remains a crucial issue of humanity.

In this study I intended to look at the cases of refugee exclusion from protection in order to outline an overall image of the current process of international protection of refugees.

The problem of the refugees is a current issue because of the increasingly frequent existence of those reasons which lead to the granting of refugee status. Regarding this issue, a number of international regulations were enacted during the international reunions and conferences.

Facing the increasing immigrants waves, the Western countries were forced to adopt a new policy on the status of the foreigners, defined by reducing the number of refugee assistance programs, which did not allow a clear distinction between them and the migrants.

Keywords: refugee; protection; exclusion; international regulations.

The establishment of the international refugee protection system is an important step in the development of international law and humanitarian law and therefore should be properly appreciated from the first regulations up to the advanced system based on United Nations Convention in 1951, respectively on additional and complementary regional regulations.

The UN Convention enactment in 1951 concerning the refugees represented a milestone in the process of international refugee protection, marking all the international rules codified in the matter up to that time, as well as their development by drafting new regulations. The status of fundamental international protection rule which is held in high repute by the UN Convention in 1951 could not block the enactment of other additional regulations at regional and national level.

Despite the increasing number of the countries taking part at the UN Convention in 1951, respectively the Protocol of 1967, at the international

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level there still are countries that have not committed to international refugee protection system.

It is also true that some countries host the majority of refugees without being part to international mechanisms concerning the refugees; however this does not guarantee the enforcement of all regulations from which this social group should benefit. In this respect, we can take into consideration the case of India, which although is not part of the United Nations Convention of 1951, vouched through spokesmen that India has always been generous with the refugees.

Article 1 of the Convention provides that the term of refugee applies to any person who "has been considered a refugee under the Arrangements of 12 May 1926 and 30 June of 1930 or under the Conventions of 30 October 1933 and 10 February of 1938, the Protocol of 14 September 1944 or the Constitution of International Refugee Organization", respectively who "as a result of events occurring before 1 January 1951 and owing 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."

Corroborating international regulatory texts we can say that a refugee is the person who left their country of origin under:

a. of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and is unable, or owing to such fear, is unwilling to return in his country;

b. external aggressions, occupations, foreign domination or such events that have vitally disturbed the public order in their country or a particular part of it;

c. natural disasters (such as earthquakes, natural calamity) which led to undermining of material bases of their existence.

Despite all the efforts made at international, regional, respective national level, the regulation of refugee status still encounters nowadays various deficiencies that bring out poor quality protection granted on long-term and short-term to those banished from the country of origin as a consequence of well-founded fear of persecution.

On the other hand, we can state that through the enactment of the UN Convention in 1951 an international unitary system which would allow equal access to those in need of international protection was not created as desired.

The definition given to the term “refugee”, based on well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is defective afore new flows of refugees.

Therefore, since 1980 refugee manifests have had a new cornerstone, namely civil wars, ethnic conflicts, generalized violence, which led to the inability to give proof of well founded fear, as it is regulated in art. 1 of the Convention in 1951. Furthermore, only those outside the country of origin can benefit the international protection promoted by the UN Convention in 1951, the needs of those displaced internally being ignored, needs which frequently are similar to the refugees.¹

In interpreting the provisions of the United Nations Convention in 1951 concerning the criteria a person must fulfill in order to be granted a refugee status and thus to benefit from international protection² ensues that people willingly leaving the country of origin in consequence of economic conditions, starvation or natural disasters will not be granted with such a status. Thence, while the majority of migrants move in order to improve their livelihood, education or simply to join the family members, the refugees are those who were forced to leave their country of origin for reasons of persecution of which they were subject.

The UN Convention of 1951 encompasses in art. 1 letter F express provisions, known as “exclusion warranties”, which state that certain acts considered serious can lead to the exclusion of those who committed them from acquiring international protection as refugee.

The exclusion warranties are exhaustive, their role being to deprive those who committed a crime against peace, a war crime or a crime against humanity, a serious non-political crime outside the country of refuge, respectively acts contrary to the purposes and principles of United Nations of international protection which might allow them to abuse of the asylum rights so that they will not be held accountable for their own acts.

Given that the United Nations Convention of 1951 does not include provisions defining crimes which are considered to embody the exclusion warranties, to analyze them we shall make use of different international tool which serve as guidance for that purpose.

According to art. 1 letter F(a) shall be excluded from international protection the asylum petitioner who committed a crime against peace, a war crime or a crime against humanity.

The International document which best describes the concept of crime against peace is the Charter of the International Military Tribunal of 1945,

¹ In this respect, we mention millions of people displaced as a consequence of the civil war in Sudan and in the Democratic Republic of Congo.

² See *infra* pp. 25-29.

according to which this concept includes the planning, preparation, initiation or waging a war of aggression or a war contrary to international treaties or taking part to a common or conspiratorial plan in order to accomplish the afore-mentioned³. In addition, in order to shape a detailed definition it should be also taken in consideration provisions encompassed in other international documents such as Geneva Convention of 1949, the Convention on Genocide of 1948, the Draft Code of Crimes against the Peace and Security of Mankind, the Statute of International Criminal Court.

Despite the absence at the international level of a generally accepted definition of the concept crime against peace included in article 1 letter F of UN Convention of 1951, given the character of this crime it is considered that it might be committed only by those in the position of great authority within the country or by leaders of insurgents groups⁴.

Regarding the term of war crime, the viewpoints are also divergent when approached at international level, however one can meet common viewpoints.

By interpreting the provisions included in the Geneva Convention of 1949, the provisions describing the acts that might lead to criminal liability, ensues that serious contraventions against the international provisions concerning international or non-international armed conflicts can be framed with the term of war crime included in article 1 letter F of the United Nations Convention of 1951. On these lines, provisions are enacted such as those in the Charter of International Military Tribunal which include an non-exhaustive list of the acts which defy war coutumes: ill-treatment and deportation to forced labor or for any other purpose of civilian population, slaughter or ill-treatment of the war prisoners, plunder of public or private property unnecessarily destruction of cities or villages etc⁵.

The concept of crime against mankind approached at the international level is not defined as precise as in the national criminal regulations. A "component" of crimes against mankind remains the genocide, as it was described in article 2 of the Convention on Genocide of 1948⁶, regardless of the international act which regulates these. Beyond genocide, the opinions regarding the content of crimes against mankind are not equable. Thus, there are documents such as the Statute of International Criminal Tribunal in Former Yugoslavia which decrees in art. 5 that crimes against mankind can, occur only in the course of armed conflicts. On the other hand, there are

³ Acc. art. 6 letter A of the *Chart of International Military Tribunal*.

⁴ Gilbert Geoff, *Current issues in the application of the exclusion clauses*, Geneve, 2001, p. 7

⁵ Acc art. 6 letter. B of the *Chart of International Military Tribunal*.

⁶ "Act committed with intent to destroy in whole or in part a national, ethnical, racial or religious group".

international documents such as the Statute of International Criminal Court and the Statute of International Criminal Tribunal in Rwanda which both decree in art. 7, respectively art. 3, that crimes against mankind can also occur in times of peace⁷.

Despite these differences, the only modification made by the second point of view materializes by aligning to terrorist crimes the other crimes against mankind: murder, eradication, slavery, deportation, detention, torture, assault, persecutions for reasons of politics, race, inhumanly acts.

Likewise, according to provisions art. 1 letter F(b) will be excluded from international protection the asylum petitioner that has committed a serious non-political crime outside the country of refuge. This exclusion warranty does not regard minor misdemeanor, and in order to establish if a misdemeanor is serious enough will be take into account the following parameters: the character of the deed, the damaged caused, the nature of the punishment. On this line, the crime, the assault, the armed robbery will at all times be framed in this category.

In order to invoke the exclusion warranty by the country when declining the right to asylum, the crime must have been committed outside the borders if not, the refugee being subject of the this process in the country of asylum according to art. 32 of Unite Nations Convention of 1951⁸.

Whilst pt. a and b regard specifically mentioned misdemeanor, pt. c includes on the list of exclusion warranties deed committed by the asylum petitioner which prove to be contrary to the purposes and principles of United Nations. Since a crime against peace, a war crime, a crime against mankind, a serious non-political crime outside the country of refugee can also be considered contrary to purposes and principles of UN, pt. c seeks to include in the exclusion warranties any act which is not covered by the two fore lists⁹.

Since according to art. 1 and art. 2 of the UN Charter, the purposes and principles of this organization apply to countries as member states, for a long time it has been considered that only those who had leading positions at national level could be found guilty for committing the acts included in art. 1 letter F pt. c of the UN Convention of 1951 and, therefore they could be excluded from international protection as refugees. However, in 1998 the Supreme Court of Canada decided "Although it may be difficult for a non-

⁷ Gilbert Geoff, *Current issues in the application of the exclusion clauses*, Geneve, 2001, pp. 7-8.

⁸ UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses*, Geneve, 2003, par. 16.

⁹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 2nd edition, Geneve, 1992, par. 162.

state actor to commit human rights violations in the form of persecution without the state being involved in these acts, this possibility of not should be excluded a priori"¹⁰.

Therefore, the state is obliged to protect in accordance with the provisions of UN Convention in 1951, a person who, after a full evaluation of his case, is established that does not deserve international protection, yet it might be required to provide protection under other international mechanisms such as the UN Convention against Torture of 1984.

Thus, despite the cooperation between the international, regional and national regulations in terms of international refugee protection, this issue continues to be a major area of concern for the international community.

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¹⁰ Geoff Gilbert, *Current issues in the application of the exclusion clauses*, Geneve, 2001, p. 23.