

THE STATUS OF REFUGEE AND THE SITUATIONS THAT EXCLUDE ITS ACQUIREMENT

Oana Elena GĂLĂȚEANU¹³

Abstract:

At present, the refugees are broadly seen as persons that leave their country of origin due to pervasive violence or to serious social disorders or following to torture, inhuman or degrading treatments to which they are exposed to. As opposed to other persons that leave their country of origin due to their own decisions, the refugees are forced to leave the country they are citizens of because their lives and fundamental rights are threatened. They benefit from a special legal status, their rights and obligations being governed by the international law and especially by the United Nations' Convention related to the Status of the Refugees from 1951. The same Convention includes also provisions regarding a number of persons that, although they satisfy the characteristics of the refugees as they are mentioned in its articles, are removed from receiving the status of refugee, being considered unworthy, due to their conduct and to extremely serious crimes sanctioned at international level, which they have perpetrated. This study presents the deeds for which a person will be excluded from the right to obtain the status of refugee.

Keywords: refugee, status, benefits, exclusion, crimes

I. What is a refugee?

The refugee problem took on a real interest at international level at the beginning of the 20th century, when the states started to involve themselves in defending and monitoring the refugees.

In fact, the refugees are people that were forced to leave their country of origin due to the persecution to which they were subject. The international community considers them as a special category of

*Ph.D., Lecturer, Faculty of Juridical, Social and Political Sciences, "Dunarea de Jos" University of Galati

migrants, having a unique legal status. Their rights and obligations are governed by the international law and especially by the United Nations' 1951 Convention related to the Status of Refugees and by the 1967 Additional Protocol¹⁴.

At international level, the refugees benefit from:

- 1) a *special status* - determined by the circumstances in which they were forced to leave their country (of origin or of permanent residence) and by the special needs determined by the forced exile.
- 2) an *institutional protection* - in a framework established at international level and represented by:
 - (1) the States, which hold the main responsibility for their protection.

(2) the Office of the United Nations High Commissioner for Refugees (UNHCR), the only international organization with a role in protecting the refugees at global level. It is mandated to ensure that the governments take all necessary actions for protecting the refugees, the ones who seek asylum and other persons in need of international protection who are on their territory or who ask admission to their territory.

The States are required to cooperate with the Office of the United Nations High Commissioner for Refugees in order to ensure their protection.

At present, the refugees are broadly seen as persons that leave their country of origin because of pervasive violence, or serious social disorders, or following torture, inhuman or degrading treatments to which they are exposed.

In conclusion, as opposed to other persons that leave their country of origin of their own will, the refugees are forced to leave

¹⁴Convention which Romania ratified in 1991

the country they are citizens of because their lives and fundamental rights are threatened.

II. Effects of acquiring the status of refugee

Once a person has obtained a form of protection as a refugee in a certain state (for instance, Romania), his/her personal statute will be governed from that moment on by the law of the respective state (in our case, the Romanian law)¹⁵.

The status of refugee can be granted at request also to the husband/wife of the one who benefits from the form of protection, as well as to his/her underage children in his/her keep, on the condition the children are not married and no matter if they come from marriage or outside it, or they are adopted.

Among the rights of the beneficiaries of the status of refugee, the following are included:

- to remain on the territory of the required state and to obtain the documents necessary for proving their identity and for passing through the state border;
- to choose the place of residence;
- to circulate freely, under the conditions established by law for foreigners;
- to be employed by natural or legal persons, to have liberal professions, to perform legal acts;
- to enjoy intellectual property protection, under the conditions of law;

¹⁵As it is also provided by Law no. 46/1991 regarding Romania's adherence to the Geneva Convention on the status of refugees.

- to enjoy favourable treatment provided by law for foreigners in what concerns obtaining real property and movable property;
- to enjoy social protection and health insurance under the same conditions as the citizens of the state;
- to have access to all forms of education, like any other citizen;
- to have personal data protected;
- to enjoy free access to justice;
- at request, to participate in programs of integration and to be accommodated in the special centres for immigrants, under legal conditions.

The obligations of the beneficiaries, along the rights obtained, are the following:

- to comply with the laws of the state which granted the benefits;
- to comply with the measures established by the competent state organisms in what concerns the refugees;
- to comply with the internal regulations from the centres of the State Immigration Office – if accommodated in such a centre;
- if he/she received help under the conditions of the law, the obligation would be to return the incomes received.

III. Which are the situations in which a person cannot acquire the refugee status?

At international and European level, there have been established certain categories of persons which, even though they fulfil the cumulative elements necessary in what concerns the

personal situation that impose granting the status of refugee, they cannot benefit from this form of protection.

Art. 1, sections D, E, F, of the 1951 Convention related to the Status of refugees, includes provisions regarding several categories of persons that, although they fulfil the characteristics of refugees mentioned in section A of the same article, cannot receive the status of refugee. The convention divides these cases of exclusion in three categories, namely¹⁶:

1. The category of persons that already benefit from protection or assistance from the United Nations - category which includes Palestinian refugees from the Middle East which received the protection of the United Nations Relief and Works Agency - UNRWA.

2. The category of persons not considered to need international protection - Art. 1 E of the 1951 Convention provides that *“This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he/she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country”*. Practically, this provision is about the persons that, in other circumstances, can be included in the conditions required for receiving the status of refugee, but which was not received in the state where there were attributed most rights the citizens of that state benefit from, but did not receive officially the citizenship, being recognised also under the name of *“national refugees”*. Most of the times, the state which receives them has a population with the same origin as the refugees. This exclusion is based on the reality that once a person is almost considered as citizen of a state, there is no reason

¹⁶Handbook and recommendations regarding the procedures and criteria for determining the status of refugee, UNHCR 2011, pp. 42-48

PUBLIC ADMINISTRATION & REGIONAL STUDIES

8th Year, No. 2 (16) – 2016

Galati University Press, ISSN 2065 -1759

to receive the status of refugee, as it is protected against expulsion or deportation.

3. The category of those persons considered as not worthy of benefiting from international protection – provided in Art. 1 F. According to Art. 1 F, such persons are those about which there are “*serious reasons for considering that*”:

a) “*They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes*”. With the purpose of not letting unpunished the international crimes by nature, the General Assembly of U.N.O. adopted a document named “*Principles of international cooperation in the detection, arrest and punishment of the individuals guilty of war crimes and of crimes against humanity*” (Pivniceru 1999: 71-72). Among the principles established, there is one according to which: “*the states will not grant asylum to individuals upon whom there are sound suspicions they committed a crime against peace, a war crime or a crime against humanity*”.

b) “*They have committed a serious non-political crime outside the country of refuge prior to his/her admission to that country as a refugee*”. It was underlined in the doctrine (Stoica 2009: 161) that especially the crimes committed with cruelty, even when they had an assumed political purpose, can be considered serious crimes, without being of political nature.

c) “*They have been guilty of acts contrary to the purposes and principles of the United Nations*”.

They will be considered as unworthy of receiving and benefiting from the status of refugees those persons that had the capacity of accomplice or instigator to committing the crimes mentioned above (Stoica 2009: 161).

PUBLIC ADMINISTRATION & REGIONAL STUDIES

8th Year, No. 2 (16) – 2016

Galati University Press, ISSN 2065 -1759

It is only natural that this last category of persons be considered unworthy of benefiting from the rights and freedoms generated by the status of refugee, due to their reprehensible behaviour being of an increased gravity as against the social values appreciated as being of importance for the human society at global level. We consider that the answer at national level, but also at international level, in relation to the behaviour of these persons, cannot be but their sanctioning first of all under criminal law, in order to prevent, on the one hand, the committing in the future of such deeds extremely dangerous for all states at international level, as well as limiting or restricting some social rights, as well as obtaining the status of refugee.

In what concerns *the crimes against peace, the war crimes and those against humanity* and their definition, the Convention makes reference to the definitions given to these deeds in "*the international instruments issued in order to provide provisions regarding these crimes*". Among these instruments, the most inclusive definitions are given by the Charter of the International Military Tribunal and by the 1945 London Agreement.

According to the Charter, there are *crimes against peace*: "*planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing*" (according to Art. 6, letter (a)), and *war crimes* "*violations of the laws or customs of war*" (Art. 6 letter (b)). The violations, as mentioned thenceforth in the Treaty, include, but they are not only limited to murder, ill-treatment or deportation to slave labor or for any other purpose, of civilian population or population from the occupied territories, murder or ill-treatment of prisoners of war or sailors, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

PUBLIC ADMINISTRATION & REGIONAL STUDIES
8th Year, No. 2 (16) – 2016
Galati University Press, ISSN 2065 -1759

Letter (c) Art. 6 from the same Treaty defines *the crimes against humanity* as follows: "*murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated*".

A second category of crimes whose perpetration leads to losing the right to benefit from the status of refugee is that of *serious crimes of common law* committed outside the country of refuge, before allowing the author as refugee in it. In case he/she would commit such a crime in the country of refuge, then the respective person would be subject to its criminal legislation and, in exceptional situations, would be allowed the expulsion of refugees, as it is provided by the 1951 Convention related to the Status of refugees in Art. 33 paragraph 2 which stipulates that the refugee could be expelled or returned to the frontiers of the territories where his/her life or freedom would be threatened, in case there are reasonable grounds for considering him/her a danger to the security of the country where he/she is found or in case he/she is convicted definitively for committing a crime or a very serious offence, representing a threat for the community of that country.

This exclusion has as purpose defending the population of the host country against the danger represented by admitting a refugee which committed a serious crime of common law. When the Convention refers to serious crimes, we consider that it refers to those deeds considered as presenting a high degree of danger for humanity, for the international society, not only for some states that sanction under criminal law certain deeds that might not present the severity of some crimes for other countries.

Finally, the third and last category of crimes that draw the exclusion of the subsequent offender status deals with *actions that contradict the purposes and principles of the United Nations*.

In the Preamble and in articles 1 and 2 of the Charter of the United Nations, there are provided the principles and purposes of the United Nations. This third category of crimes, whose perpetration would lead to the unworthiness of receiving the statute of refugee, deals with those who commit acts contrary to the respective principles and who can be only persons in the government in one of the member states and through his/her function, may bring his/her contribution to breaching the principles of the United Nations by the state he/she is a citizen of¹⁷.

Corroborating the international documents with the international provisions regarding the persons that cannot benefit from the form of protection of refugees, we conclude that a person who, although the personal situation justifies obtaining the status of refugee on the one hand, will not benefit from this status because he/she committed a certain crime, as it is defined in the international documents which include provisions regarding such crimes, and, on the other hand, is liable under criminal law for perpetrating crimes against peace and against human race security.

In what concerns the liability proceeding under criminal law for perpetrating crimes against peace and human race security, in capacity of natural person, it can operate in the situation when the respective person – refugee in our case – participated to the perpetration in the following ways:

- He/She perpetrated the act that constitutes a crime.
- He/She tried to perpetrate the act that constitutes a (serious) crime.
- He/She did not manage to prevent perpetrating the act.
- He/She participated to preparing that act.
- He/She was accomplice to perpetrating the act.

¹⁷Handbook and recommendations regarding the procedures and criteria for determining the status of refugee, UNHCR 2011, p. 48.

All these modalities of participation, which the Project of the Code of crimes against peace and human security provides, will involve the individual liability under criminal law only when the crime was actually produced or there was an attempt to produce it.

In the Charter of the International Criminal Court it is provided (art. 25) as a cause of non-punishment preventing perpetrating the crime (among those found under the Court's jurisdiction), in case a person renounces totally and voluntarily to perpetrating it or who prevents perpetrating the crime.

Practically, the person who becomes an active subject of an international crime will have to answer for his/her deed according to the rules of international law. In the case when that person is interested to receive the status of refugee and the benefits that result from it, he/she will be sanctioned also by losing this benefit. In case the respective person received already this status, she/he will be subject to liability under criminal law according to the international provisions. To this extent, the Law from Nürnberg established two of the principles of the international criminal law and of the criminal international liability (Pivniceru 1999: 47):

- 1) Any person that perpetrates an act that constitutes a crime according to the international law is responsible for it and liable.
- 2) The fact that the national legislation does not punish an act that is an international crime does not exempt from liability the one who perpetrated it under the international law.

A crime is international when, either due to its nature, or following to the way of incrimination, fulfils the conditions provided by the international law or by the national laws, in order to be liable under criminal law, under the jurisdiction of the International Criminal Court, or according to the private law systems (Pivniceru 1999: 49).

Actually, the person that fulfils the personal conditions necessary for obtaining the legal status of refugee will not benefit from this status in case he/she perpetrated international crimes by their nature – like crimes against peace or war crimes or crimes against humanity – or international crimes through the way of incrimination, named conventional crimes (because their international character was defined by an international law).

In the case of conventional crimes¹⁸, the interest protected by incrimination is common to all states, so that they organised an international repression of criminality that is internationalised, recognising thus the international character of the values that must be protected.

The international convention will be the author of sanctioning, only if two conditions are fulfilled cumulatively:

1. to impose a real obligation of incriminating in the internal legal order;
2. to describe the prohibited behaviours precisely enough.

In other words, the content of the legal provision protected from a criminal point of view belongs to the convention (that is the will of the states) and the incrimination belongs to the internal legislator.

According to the Charter of the International Criminal Court, certain conditions, circumstances and situations constitute both causes of exclusion from liability under criminal law, as well as causes of removing the criminal liability. They are: (1) irresponsibility, (2) intoxication, (3) self-defence (in case of war crimes), (4) moral constraint, (5) error of fact and error of law, (6) orders from superiors.

There are international offences by nature (crimes against peace, war crimes, crimes against humanity), as they are defined by

¹⁸Examples of conventional offences: forgery of coin, international terrorism, illegal traffic of drugs, women and children trafficking, slavery and human trafficking.

the international instruments, that comprise provisions regarding such deeds. In order to be liable under criminal law for perpetrating international crimes by nature, according to the Charter of the International Criminal Court (art. 26), the minimum age of the person that can be brought under its jurisdiction is 18 years old, that must be turned at the date of perpetrating the criminal act, and the guilt form is the one of intent and being fully informed in connection to the deed and with its consequences and with its result, or at least with one consequence of the deed (according to art. 30 of the Charter).

Accordingly, the person that perpetrates such deeds considered crimes against peace and human race security (war crimes, crimes against humanity and peace) will be liable under criminal law according to the international provisions and, in case he/she requires subsequently to obtain the status of refugee, will not be able to obtain it, being obviously unworthy of receiving international protection based on this status. In case the respective person received previously to perpetrating the deed the status of refugee, he/she will be liable under criminal law, according to international provisions. At the same time, against these last categories of persons, there are certain measures which can be applied by other states against them in the capacity already obtained by the refugees, in order to interrupt their presence on the territory of the state where they have obtained this status. It is about *expulsion* and *extradition*.

The expulsion is an institution regulated by the internal right of every state and it is that safety measure that consists in removing from the territory of the country the foreign citizen or the person without citizenship that does not domicile in that country, in case he/she perpetrated an offence and it is considered that his/her remaining on the territory of the state presents a social danger. The refugees can be expelled only due to the following reasons: 1. Reasons of national security; 2. Reasons of public order. In case

they will be expelled, a series of rights will be recognised to them, such as: to present evidence in their favour; to make an appeal; to be presented in front of competent authorities; to be granted a reasonable time for trying to be legally allowed in another country; not to be expelled in a state where he/she might be tortured or submitted to inhuman or degrading treatments or in the state of origin.

In case expulsion is decided, the foreigner will be taken in public custody until it is achieved and accommodated in an accommodation centre - an enclosed place administered by the State's Authority for foreigners (Moldovan 2004: 746).

Extradition is another measure that can be decided against the refugees, only if:

1. It does not take place in the country of origin.
2. It is not done by another state where life and freedom might be threatened or where those extradited would be submitted to torture, to inhuman or degrading treatments.

Conclusions

We consider that the status of refugee is a way through which the international community understands to prove its compassion and support towards a category of foreign persons found in difficult circumstances and much suffering due to unjust and tough situations they face independently from their will. Towards these persons, the entire international community agreed to show its support as much as possible, by taking some administrative and social measures, according to the moral and legal norms, which would help these persons to find again the normal and natural evolution of each living individual. Due to these reasons, at international level, to the persons to which it is recognised the status of refugee are granted benefits in connection to this status, among which: the right to remain on the territory of the state where they requested asylum, the right to

PUBLIC ADMINISTRATION & REGIONAL STUDIES
8th Year, No. 2 (16) – 2016
Galati University Press, ISSN 2065 -1759

choose the place of residence, the right to work legally in the state which granted this status and the right to benefit from services of social security and health insurance in the same conditions as the citizens of the same state.

Having in view the existing preoccupation and the benefits granted at international level to these persons, it is obvious also the attitude of the international community to analyze attentively each distinct request for obtaining the status of refugee and to consider unworthy for obtaining it those who perpetrate deeds considered by states, also at international level, as war crimes, serious crimes of common law or actions that contravene to the purposes and fundamentals of United Nations.

We consider it natural that the person that commits such deeds of extreme gravity against peace and humanity should not request and subsequently receive a protective treatment and should not benefit from defence against some reprehensible deeds which he/she perpetrated and more so, not to be sanctioned for a behaviour that denotes an extremely social threat. If this were the case, the citizens of the states that constitute the international community would not themselves benefit from the right to safety of their existence and, maybe, even worse, from the right to life, a fundamental right for any of us, which may become in such circumstances a "luxury" that no state of law can afford.

References

1. Diaconu, D. (1999), *International Criminal Court, history and reality*, All Beck Publishing House;
2. Moldovan, A. T. (2004), *Expulsion, extradition and readmission in international law*, București: C.H.Beck
3. Pivniceru, M. M. (1999), *Criminal Liability in International law*, Iași: Polirom
4. Stoica, F. C. (2009) *European Union law. Fundamental freedoms*, București: University Publishing House
5. Tătar, A. C. (2008), *The foreigner resident in Romania*, București: C.H.Beck

PUBLIC ADMINISTRATION & REGIONAL STUDIES
8th Year, No. 2 (16) – 2016
Galati University Press, ISSN 2065 -1759

6. Handbook and recommendations regarding the procedures and criteria for determining the status of refugee, UNHCR 2011.