

Abstract

The dissertation examines the definition of a refugee and its interpretation and application in the current international law. The thesis is based on the definition which is incorporated in the Convention Relating to the Status of Refugees of 1951. According to the Convention a refugee is a person who “*owing the well-founded fear for 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 (...)*“. The dissertation deals with the inclusive part of the definition only.

The following theses are discussed: 1) whether there has been a shift in the interpretation and application of the definition of a refugee. Also, the dissertation analyses whether a new customary definition was established and what is eventually its content; 2) whether a regional customary definition was established and what is eventually its content; 3) whether the restrictive practises of the states prior to and during an entry of a foreigner influence the interpretation and application of the definition of a refugee.

The study is divided into four parts. The first part analyses the historical development of the definition of a refugee. The previous perception of the issue may influence the later formulation of the positive specification in a treaty. The reaction of the international community to the refugeehood phenomena came only in the 20th century and it was mainly on *ad hoc* basis in the early decades. The Convention came with a general definition, the first one in the history of the international law. It must be admitted that it also has its roots in a particular situation; it mirrors the events of Second World War and division of the world into East and West. The analysed definition was therefore *an ad hoc* reaction too, but it reached a widespread use in connection with adoption of another treaty, the Protocol Relating to the Status of Refugees of 1967. This chapter also deals with recent debates of possible revision of the convention of 1951 and its definition of a refugee.

The second chapter of the dissertation analyses the refugee definition itself. It is this definition, which represents a legal specification of the term refugee. The constituent elements of the definition are analysed with the focus on interpretation and application of it. Not only the current interpretation is examined, also the approach of states in 1951 is taken into account. If there are differences, it may indicate formation of a possible new custom (with the practice of states fulfilling both *usus longaevus* and *opinio iuris*). However, it may still be

only a shift in the interpretation. The application of the refugee definition in practice of states – parties to the respective convention – is examined too.

It is the practice of states which allows us to see whether there is different interpretation of the positive delimitation of term refugee. We may presume that it should be the same, there is only one universal convention and state parties should respect its obligation arising from the treaty. But if it differs than there is no universal interpretation. The analysis confirmed the fact that there is no universal interpretation of the refugee definition. There is no supervisory mechanism to this treaty which would unify the views of the states, and it may be seen as a weak point for the issue under review. Because there is no uniform practice in interpretation of the term we may say that there is also no custom formed. The practice of states was determined from the judicature of national bodies, mainly courts; American, British, Australian and Czech court decisions were the main ones analysed; also the standards of United Nations High Commissioner for Refugees were examined, because it is this UN body that is in charge of this procedure in many states.

The current interpretation of the refugee definition is influenced by the obligations which arise to state from other treaties, mainly the treaties on human rights. That is one of the reasons why there is no uniform view on the interpretation: states must respect their other obligations and this influences their understanding of the definition. Some states must fulfil more obligations than others (here the concept of gender can serve as an example). One of the elements of the refugee definition, a term “particular social group”, may be interpreted from the gender point of view, e.g. if the state is a state party to a Convention on the Elimination of All Forms of Discrimination against Women. Then the term refugee should incorporate also cases of refugees who escape female genital mutilation. Some of the states do respect this interpretation, some of them do not. The existence of female genital mutilation may even be supported (even through legislation) or tolerated by the state in those cases. But we may see different standard of interpretation even when the states should theoretically have the same opinion, because they are parties to the same or similar instruments. This is the case of the view of scientology in e.g. US and Germany. The first one has been open and possibly granting protection to members of this church, the latter has been banning this religion.

The differences may be seen as regional. It is the region where states might see a common interest and cultural compatibility more easily comparing to universal standards. Therefore the third chapter focuses on regional interpretation and application of the refugee definition. There are self-contained schemes in Europe, Americas and Africa which do

develop the legal perception of the issue. A new status for those who need protection is added to the universal one in Americas and Africa. It answers the needs of the region, especially deals with situation of mass influx of refugees, which is not covered by the definition. Europe chooses a slightly different approach. It is the EU sub-region that deals with the issue deeply. It does so through the EU law. There are many directives which harmonize the states' approach towards refugees, including the interpretation of the refugee definition, other provides for subsidiary statuses (subsidiary protection, temporary protection). The EU member states are the only state parties of the convention of 1951 which regionally accepted an obligation to grant a *status* to refugees.

It is this – it must be said that very positive and broad-minded – approach which at the same time needs clear criteria of to whom the protection may be granted. States try to divide voluntary and involuntary migration and find those who need protection among those who leave their home country generally. Some of the states, including those in the EU, adopted measures to control migration and to avoid entry of illegal immigrants. Those measures may at the same time be restrictions for refugees seeking protection. Refugees may not even be successful in leaving their home country and entering the other in which they want to seek protection. Carriers' sanctions or notion of safe countries are examples of those practices. The fourth chapter deals with those “obstacles” for refugees.

To conclude: The definition of a refugee, even if created 60 years ago, is still used and up to date. There is a shift in interpretation, but no customary definition replaced it. There is no uniform interpretation, which may be seen as double-edged. On the one hand there is no certainty of the same standard; a refugee may be granted protection in one country while it will be refused to him or her in another. A creation of a supervisory mechanism would unify the approach of states to interpretation of the definition. But on the other hand it is this openness of the definition which allows for integration of new legal concepts to it, for shift in its interpretation – and it might be why it is still up to date. Nevertheless creation of the new supervisory body would not necessarily harm this immanent ability of the definition. There are new protection statuses which comply with the refugee status, but they do not endanger the definition itself. It is the restrictions for voluntary migrants that must be examined carefully. The Convention Relating to the Status of Refugees of 1951 and its refugee definition is applicable even in the 21st century.