Chapter 1. Is a Refugee a Refugee Everywhere? A Comparative Study between Turkish, Italian and Brazilian Law

Annalisa Morticelli[1], Emília Castro[2] And Ülkü Sezgi Sözen[3]

Introduction

This paper aims at discussing, analyzing and comparing the definition of the term refugee to reflect upon the terminology enshrined by 1951 Geneva Convention on Refugee Status and its application on the globalized world.

Firstly, it presents an overview of international refugee law, focusing on the above-mentioned Geneva Convention, which is the pioneer international instrument for the protection and welcoming of refugees.

Secondly, there will be a legal analysis of Turkish, Italian and Brazilian Refugee Law. These national laws (which also comprise the definitions of the Geneva Convention) are used as comparative standards in order to suggest some improvements to refugee law matters, especially to the definition of the refugee status. These three completely different approaches derived from the refugee law of these countries help us reach our goal, which is not only to suggest some changes for International Refugee Law, calling the Geneva Convention into question, but also to reflect upon the *ratio* of the refugee status and on the granting or withdrawing of this status.

In this work, the hermeneutic method will be used together with a comparative law approach.

The Geneva Convention on Refugee Status: The First Definition of Refugee

The Geneva Convention and the 1967 New York Protocol are considered as the two legislative pillars of the rights of refugees at international level. The Convention relating to the Status of Refugees of 1951 is the first document that presents a regulation of the international legal system regarding the assistance to those who are forced to abandon their home country. The first definition of the term "refugee" is introduced in Article 1 of the Geneva Convention:: *"…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*

[1]Annalisa Morticelli, Master of Laws, is a Ph.D. candidate at the Faculty of Law of the University of Hamburg, Rothenbaumchaussee 33, and 20148 Hamburg, Germany. E-mail address: annalisamorticelli@hotmail.it

[2] Emília Lana de Freitas Castro, Master of Laws, is a Ph.D. candidate at the Faculty of Law at the University of Hamburg, Rothenbaumchaussee 33, 20148 Hamburg, Germany. E-mail address: emilia.castro@studium.uni-hamburg.de.

[3] Ülkü Sezgi Sözen, LL.M. is a Ph.D. candidate at the Faculty of Law of the University of Hamburg / Albrecht Mendelssohn Bartholdy Graduate School of Law, Rothenbaumchaussee 33, 20148 Hamburg, Germany. E-mail address: u.sezgisozen@gmail.com

Eroğlu, D. Cohen, J.H., Sirkeci, I. (eds.) (2016). *Turkish Migration 2016 Selected Papers*. London: TPL.

his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it…".

Taking into account new patterns on movements of people occurred during the second half of the 20th century, it is important to reflect whether the definition for refugee drawn up in 1951 still reflects the needs of the refugees in the current globalized world.

In fact, in 2001, the State Parties of the Geneva Convention have reflected upon the wording of the Geneva Convention and have, therefore, signed the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees. In this Declaration, the State Parties have recognized some difficulties States have in giving international protection to refugees and, in this sense, the Declaration has also considered the importance of other human rights and regional refugee protection instruments.

Therefore, our goal is to prove whether, once the definition of the term refugee is broadened, this could be a step forward for the international burden sharing of the State Parties. If refugees have the same international protection in each State Party, there could be hope that refugees would avoid fleeing to specific countries where they acquire the refugee status and where they have the full international protection recognized. If all State Parties offer equal protection to refugees, these displaced people would be able to choose among a bigger number of States where they could start a better and new life.

The implementation of the Geneva Convention, moreover, depends on political will and on the challenge of its enforceability: the reality of 1951 seems to differ too much from the needs of refugees nowadays and, considering the principle of sovereignty of the States, the Convention also fails to address how States should implement their responsibilities with refugee protection into their domestic circumstances (Hathaway, 2005, p. 992).

As initially conceived, a State Party to the 1951 Refugee Convention should consider two restrictions while applying the Convention. Firstly, when the 1951 Convention was drafted, many States were concerned about not taking obligations, which were not foreseeable. This led to the insertion of a temporal limitation, according to which the Convention only applies to facts occurred before 01.01.1951. Secondly, the 1951 Convention has given the State Parties the possibility of limiting their obligations under the Convention to those who have become refugees because of events occurring in Europe (geographical limitation).

The 1967 Protocol relating to the Status of Refugees (or New York Protocol) to the Geneva Convention set up for some Contracting States the overcoming of the restrictions mentioned above. The 1967 Protocol abolished the temporal limitation for the States that have adopted the Protocol. Special attention must be paid to the geographical limitation. The New York Protocol allows governments to maintain in force a previously declared geographical limitation to refugees from the European continent, even if those governments decided to accede to the Protocol. However, this option is only possible to States that had entered a geographical restriction under the Refugee Convention before the adoption of the Refugee Protocol in 1967. That was the case of Turkey, Congo and Malta (Hathaway, 2005, p. 97). For the purposes

of this article, it is important to notice that Italy and Brazil overcame both limitations. Turkey, however, still keeps the geographical restriction.

Therefore, according to the New York Protocol, the term "*refugee*" means any person within the definition given in Article 1 of the Convention as if the words "*as a result of events occurring before 1 January 1951*" and the words "*as a result of such events*" in Art. 1(2), were omitted.

Turkish Refugee Law

In the refugee crisis Turkey is playing the most significant and critical role as a guardian of the European Union's borders. Especially at the moment - mostly from Syria, but also from other Middle Eastern and African countries – mass movements of refugees are passing through Turkey in order to reach Europe, seeking international protection. Due to this crisis, Turkey adopted a new Law on Foreigners and International Protection (hereafter LFIP) in April 2013.[4]

The LFIP finally regulates the issues on international protection in a comprehensive way. All regulations in Turkish Law adhere to the one main principle. Art. 16 of the Turkish Constitution regulates the rights of foreigners in general. In this respect, law in accordance with international law may restrict fundamental rights and freedoms of foreigners. In connection with this possible restriction, according to Art. 88 parag. 2 of the LFIP, rights and facilities of persons with one of the types of international protection shall not be interpreted more favorably than the rights and facilities of Turkish citizens.

In the global context, the term refugee is defined in accordance with Art. 1A of the Geneva Convention (1951). As explained above, Turkey put a geographical limitation on this Convention, which does not make possible to grant the refugee status for people who do not come from Europe (Kirisci, 2001, p. 71). Consequently, according to Art. 61 of LFIP, refugee is defined with a geographical limitation as follows "*Owing to the facts happened in European countries...*"

Therefore, Turkey divided the granting of refugee status into four different subcategories: (1) refugees who come from Europe; (2) conditional-refugees who come from outside of European countries; (3) refugees with secondary protection, who can be defined neither as refugee nor as conditional-refugee; and (4) refugees with temporary protection, who come collectively, such as Syrian people.

According to Art. 62 of the LFIP, conditional-refugees are "*Owing to the facts happened outside of European countries...*"

These two subcategories show that besides the geographical limitation both status definitions are identical to the one provided by Art. 1A of the Geneva Convention (Cicekli, 2016, p. 95).

Another subcategory of international protection is the secondary protection, which is laid down in Art. 63 of the LFIP, as follows: "*A person, who is a foreigner or stateless person, who can be defined as neither refugee nor conditional-refugee but in case they intended solely to send back to their country of nationality or the country of former habitual residence, they will be sentenced to the death penalty or*

[4] Law on Foreigners and International Protection adopted on 4.4.2013 with the number 6458, published in Turkish Official Gazette on 11.4.2013 with the number 28615.

the execution will be carried out, they will be subjected to torture, inhuman or indignity treatment or punishment, in case of international or internal armed conflict, they can encounter serious threats, is unwilling it avail themselves of the protection of that country, can get secondary protection." As we can already understand from the definition of secondary protection, this type of protection is influenced by European Law and is also very similar to the definition of subsidiary protection in the Qualification Directive[5].

Temporary protection is a new kind of protection, dedicated especially to Syrians coming collectively to the Turkish borders and it is laid down in Art. 91(1) of the LFIP as follows: "*Temporary protection is available for persons, who were forced to leave their country, are not able to go back to their country, came collectively to Turkish borders or passed through Turkish borders in order to find urgent and temporary protection*." This type of protection is similar to the European temporary protection[6] especially in case of massive and urgent need of international protection and aims at preventing an urgent protection without regular procedures, to avoid conflicts with asylum system at the national level. According to Art. 91(2) of the LFIP, the Council of Ministers of the Turkish Republic shall decide the status for temporary protection, as well as its procedures.

Based on all subcategories, one can argue that, on the one hand, all those distinctions make the refugee status clearer. On the other hand, though, the same distinction confuses the refugee status and separates willing refugees from unwilling ones rather than trying to grant enough international protection. This categorization means that, once Turkey defines a refugee with the geographical limitation, refugees categorized in one of the Turkish subcategories will be granted international protection and, therefore, according to LFIP, these people might be granted a permission to stay in Turkey and according to the *non-refoulement* principle would not be exposed to the possibility of returning to their home country or country of residence. These people, however, must finally find a way out to another country. That is why even if Turkey has finally a comprehensive legislation on international protection, it does not mean that Turkey grants a proper international protection for asylum seekers. The reason for that is not only technical, since Turkey has already legislation on the issue, especially regarding legal procedures, but more than that, a practical one.

The differences between the types of international protection emerge from the rights between refugees, conditional refugees, persons with secondary protection status and temporary protected Syrians. While refugees acquire right to residence in Turkey and get a foreigner identification number (herein referred as ID only) for 3 years, conditional refugees and persons with secondary protection status get a

[5] Qualification Directive 2004/83/EC of 29 April 2004 on minimum standards for the 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 published on 30.9.2004 in the OJ L 304/12.

[6] Temporary Protection Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof published on 7.8.2001 in the OJ L 212.

foreigner ID for one year.[7] Moreover, according to Art. 84 of the LFIP, refugees get immediately a travel document, as laid down in the Geneva Convention. However, application for a travel document for conditional refugees and people with secondary protection status must be first examined with regard to Art. 18 of Passport Law.

All in all, all foreigners with one of the status of international protection, according to Turkish Law, have social rights, right to education, access to health system (in case they cannot afford their own expenses, Turkish government makes the access to the health system possible).

Italian Refugee Law

The Italian legal system that determines whom can be granted the right of asylum is composed by rules from International Conventions, European Union Law and national laws. At domestic level, there are two forms of asylum protection: constitutional asylum according to the Art. 10, parag. 3 of the Italian Constitution[8] and the status of refugee, which is granted according to the Art. 1 of 1951 Geneva Convention, which has been ratified by Italy with Law no. 722 of 1954[9].

In Italy, in the last twenty years, several laws have been enacted to regulate the matter of asylum law[10]. Most of them are now part of the Consolidated Immigration Act[11]. The normative on refugees stated by Consolidated Immigration Act has been criticized for not being effective enough and some specialists claim that there is a necessity of a specific asylum law, which should be more effective, homogeneous and systematic.

Moreover, in recent years, Italy has implemented relevant European Union Directives. For the aim of this article, the most relevant ones are the Qualification Directive[12] and the Temporary Directive[13]. The first one has comprised in Art. 2 the status of subsidiary protection, which has a secondary and supplementary nature: it expands the concept of protection to other categories of people, who do not meet the definition of refugee, that is, who cannot return to their country of origin and need protection. Initially, in the Directive and, consequently, in Italy, there were some differences at protection level between the guarantees of political asylum and the guarantees of subsidiary protection, which were unfavorable to the latter. Some of those inequalities were abolished by the new Qualification Directive. Also, the Directive introduced to Art. 5 the case of refugee *sur place*. Refugee *sur place* is the one who, due to circumstances arising in his/her country of origin during his/her

[7] According to Art. 83 of Law on Foreigners and International Protection foreigners' IDs are used as residence permit.

[8] Italian Constitution, *Official Gazette,* no. 298 of 27 December 1947.

[9] Italian Law 24 July 1954, no. 722, *Official Gazette*, no. 196 of 27 August 1954.

[10] In 1990 the Martelli Law; later the Turco-Napolitano Law on Immigration, which merged into the Consolidated Immigration Act still in force; in 2002 the Bossi-Fini Law.

[11] Legislative Decree of 25 July 1998, n. 286. *Official Gazette* no. 191 of 18 August 1998.

[12] Council Directive 2004/83/EC of 29 April 2004. Received from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF on 05.06.2016.

[13] Council Directive 2001/55/EC of 20 July 2001. Received from http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF on 05.06.2016.

absence, turns out to be a refugee. The risk of suffering persecution or serious harm may arise from (1) "*events occurring after the departure of the applicant*" or (2) "*activities carried out by the applicant since he/she left his country of origin*".

Regarding the Temporary Directive, it introduces a procedure of exceptional character which provides immediate and temporary protection to people who cannot return to their country of origin in case of massive and imminent influx of displaced persons from non-EU countries. In 2011, Italy has requested the application of this Directive to the European Union, because of the "*Arab Spring*", but nothing has followed this demand. European Union has never used the Directive.

Finally, a further form of protection is the Resident Permit for Humanitarian Reasons granted by the police station in cases the migrant does not have the requirements for the International protection but he/she has serious humanitarian reasons to get protection, such as in the case of natural disasters. This Permit does not ensure all the rights of the refugee status; for example, it is not possible to evoke family reunion.

In conclusion, on the one hand it is possible to affirm that the Italian Law is quite extensive, if one considers the detection of the cases of foreigners who have right to the recognition of International Protection, thanks also to the implementation of the European Union legislation. On the other hand, a problematic aspect is posed by the fact that different protection status does not guarantee the same rights to persons in the same need.

Brazilian Refugee Law

Compared to the amount of immigrants Turkey and Italy have been receiving in the last years, Brazil´s reception of immigrants appears to be not that relevant. According to Brazilian authorities that are responsible for the national census, the Brazilian population growth should be positive until 2035, once Brazil, since 2010, has been welcoming the greatest amount of immigrants compared to the last few years (de Oliveira, 2015, p. 49).

The Brazilian Foreigners´ Statute (*Estatuto do Estrangeiro*, *Lei Nº. 6.815, de 19 de Agosto de 1980*) regulates the entrance, permanence, and departure of an immigrant in the Brazilian territory. This Statute is – together with the 1951 Refugee Convention, which has been ratified by Brazil, with Brazil´s Refugee Act Statute (*Estatuto do Refugiado,* Lei nº 9.474/1997), as well as with the Brazilian Constitution – the most important legal instrument for the protection of all immigrants in Brazil.

In Brazil, the Constitution guarantees an equal treatment of Brazilians and immigrants. According to Article 5 of the Brazilian Constitution, all people are equal before the law, i.e., all Brazilians and foreigners resident in Brazil[14] are guaranteed the inviolability of the right to life, liberty, equality, security and

[14] From the literal interpretation of Article 5, it could be understood that only the foreigners residing in Brazil have their fundamental rights guaranteed. However, the doctrine interprets the text of this article including all immigrants, also the ones who do not live in Brazil. The way this article was written has to do with the political rights, which are enumerated in Article 5, to which only Brazilians and foreigners living in Brazil may have access. For more details, see Dolinger, 2014, p. 103 and Moraes, 2002, p.172.

property, the so-called fundamental rights. In addition, according to Art. 95 of the Brazilian Foreigners´ Statute, immigrants living in Brazil are entitled to the same legal treatment to which Brazilians are.

In this sense, all immigrants have their fundamental rights guaranteed, which also includes the social rights (Bastos, 1988, p. 4). According to the Brazilian Constitution, the social rights are the rights to 1) education; 2) health; 3) food; 4) work; 5) residence; 6) leisure; 7) security; 8) social security; 9) protection of motherhood and childhood; and 10) assistance to homeless people.

In this panorama, one could divide immigrants into three juridical categories under Brazilian Law: 1) foreigners (generally considered); 2) refugees; and 3) non-Brazilians who claim for domestic asylum. It must be taken into consideration that all three categories are included in the general category "foreigners" and, therefore, all of them have access to the rights mentioned above which are enshrined in the Brazilian Constitution.

According to Brazil´s Refugee Act, massive violation of human rights is considered the main reason for persecuted people to be protected and receive asylum. In this sense, this broad recognition of the refugee status enshrined by Brazil´s Refugee Act classification is based not only on the 1951 Refugee Convention, but also mainly on the regional refugee instruments, such as the 1969 Organization of African Unity (OAU) Convention and the 1984 Cartagena Declaration of Refugees. This Latin American legal instrument included other criteria apart from the ones already used by international instruments, such as "*persons who have fled their country 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*". This definition, broader than the one stated in the Geneva Convention and considering "*massive violation of human rights*", was internalized by Brazil´s Refugee Act, in its Art. 1, parag. 3.

Apart from all rights above mentioned, to which refugees in Brazil are also entitled, it is important to mention that refugees may move freely in the Brazilian territory and have the right to start applying for jobs as soon as they receive their Labour and Social Welfare Card (Carteira de Trabalho e Previdência Social) and a Natural Person Registry (Cadastro de Pessoas Físicas)—an essential document for financial purposes and for the needs of daily issues. This shows that, within the first months of residence in Brazil, refugees are able to integrate in this sense into Brazilian society (Jubilut, 2006, p. 35). As Brazil has been dealing in the last six years with a massive migration movement from Haitians fleeing from the dire consequences of a strong earthquake in 2010, attention must be paid to people who were displaced because of natural catastrophes. Because of lack of legal definition both in the Geneva Convention and in Brazil´s Refugees Act, that do not refer specifically to people fleeing from natural catastrophes, Brazil has not been considering these people fleeing from natural catastrophes as refugees, but as immigrants on humanitarian grounds, who have the same privileges and rights refugees do, but whose immigration processes are not carried out by CONARE (*Comitê Nacional para os Refugiados*, or National Committee for Refugees) (Godoy, 2011, p. 62-65). CONARE, which was created by the above mentioned

Refugee Act, is a committee responsible for reviewing applications and granting approval of refugee status in the first instance, whereas CNIg (Conselho Nacional de Imigração - *National Immigration Council*) is responsible for all immigrants' processes, which are not those related to the granting of the refugee status.

Apart from the refugee status and from the immigrants on humanitarian grounds, non-Brazilians may also claim for the so-called domestic asylum. This is considered the political side of the *asylum* mechanism, which refers to the shelter of people who suffer from political persecution and therefore cannot continue living in their home countries (Ramos, 2011, p. 15). It derives from the instable political atmosphere in Latin America, represented by dictatorships, coups and persecution (Jubilut, 2006, p. 29). This typical Latin American instrument has some similarities with the refuge institute, but some points make it slightly different from it. The domestic asylum is a discretionary act of the State and therefore it does not have legal limitations regarding its concession. Moreover, this institute is limited to political persecution, and this persecution has to exist in fact, so that the simple fear of persecution is not enough in order to ask for domestic asylum. The domestic asylum can be granted either inside the State of origin or inside the State of residence of the person fleeing persecution. In addition, people who are guaranteed the right of domestic asylum are allowed the possibility of living legally in the host State. Becoming a political asylee depends solely on the constitutive decision of the granting State (Jubilut, 2006, p. 29). This Latin American asylum category relates to the fact that these political persecuted people could not be considered as refugees according to the Geneva Convention and, therefore, were in need of an alternative form of protection (asylum).

As so far exposed, Brazil, with its many inclusive status categories, seems to have built up a very protective and inclusive system of protection to people suffering from many kinds of persecution.

Conclusion

As it could be stated, the Geneva Convention is differently applied in each one of the three State Parties, which have had their Refugee Law analyzed in the present work. Besides this fact, it was clear to see that each country has its own problems considering the actual refugee crisis: while Turkey and Italy currently deal mostly with Syrian refugees, Brazil deals with thousands of displaced people coming from Haiti.

Migration is nowadays globalized and follows all tendencies of the multifaceted world people live in. However, the definition of refugee proposed by the Geneva Convention appears to be not in accordance with the needs of people all over the globe who are fleeing from their countries and pursuing humanitarian protection. As proved above, even the world´s current most difficult situation regarding refugees, the Syrian crisis, cannot be covered by the solely wording of the Geneva Convention. As the Geneva Convention is not a blueprint anymore – once it does not cover the demands and necessities of the current refugee crisis - it should be thought of a new international instrument which cherishes an adequate refugee definition.

It is important to underline that some States, such as Turkey, with the introduction of the secondary and temporary protection, and the EU, with the creation of subsidiary protection, showed efforts in order to broaden the definition of refugee status and consequently cover new cases. However, there is still lack of a common more extensive definition of refugee status at international level, which binds all signatory States of the Convention to implement a definition more adapted to the current situation.

Another critical aspect of the Geneva Convention refers to human rights protection of refugees. The *non-refoulement* principle in the Geneva Convention represents the main obligation for the States on human rights issues but it alone is insufficient to grant enough protection to refugees. Refugees need their legal guarantees to be implemented through an effective *lex specialis*. In this sense, the Geneva Convention is not sufficient to provide an effective protection for refugees.

Based on the considerations expressed here, in order to introduce a more adequate and complete definition of refugee at international level, as already mentioned, the Convention could be modified. However, modifying the Convention could decrease the protection level guaranteed by it until now, because of the renegotiation process which would have to be done by the signatory States in order to change the Convention. For those reasons, it would be advisable that, instead of negotiating a new international agreement on the rights of refugees, States Parties of the Geneva Convention adopt an additional protocol to this Convention, covering more cases based on the evolution of the refugee phenomenon in the current context, and, therefore, maintaining the level of protection of the Convention unchanged.

References

Bastos, C. R. (1988). *Comentários à Constituição do Brasil*, vol. 2. Saraiva.

Cicekli, B. (2016). Reforms Introduced by the Act on Foreigners and International Protection (AFIP) into the Turkish Law on Foreigners and Refugees. *Review of International Law & Politics*, 12(1), 75-120.

de Oliveira, A. T. (2015). O perfil geral dos imigrantes no Brasil a partir dos censos demográficos 2000 e 2010. *Cadernos Obmigra - Revista Migrações Internacionais*, 1 (2). pp. 48-73. Available: http://periodicos.unb.br/index.php/obmigra/article/view/14895/10661 Accessed: 27.05.2016.

Dolinger, J. (2014). *Direito Internacional Privado – Parte Geral.* Forense.

Godoy, G. G. de (2011). O caso dos haitianos no Brasil e a via da proteção humanitária complementar. *Ramos, A. d. C. Rodrigues, G. and de Almeida, G. A. (eds.) 60 anos de ACNUR: perspectivas de futuro*. São Paulo: Editora CL-A Cultural. pp. 45-68.

Hathaway, J. C. (2005). *The Rights of Refugees under International Law.* Cambridge University Press.

Jubilut, L. L. (2006). Refugee Law and Protection in Brazil: a Model in South America? *Journal of Refugee Studies*, 19 (1), 22-44.

Kirisci, K. (2001). UNHCR and Turkey: Cooperating for Improved Implementation of the 1951 Convention Relating to the Status of Refugees. *International Journal of Refugee Law*, 13(1), 71-97.

Moraes, A. d. (2002). *Constituição do Brasil interpretada e legislação Constitucional.* Atlas.

Ramos, A. d. C. (2011). Asilo e Refúgio: semelhanças, diferenças e perspectivas. *Ramos, A. d. C. Rodrigues, G. and de Almeida, G. A. (eds.) 60 anos de ACNUR: perspectivas de futuro*. São Paulo: Editora CL-A Cultural. pp. 15-44.