

THE ASYLUM, BETWEEN HUMANITARIAN RESPONSE AND POLITICAL INSTRUMENT

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Abstract

At 9 November 2010, the European Court of Justice, in a preliminary ruling, decided to depart from the interpretation promoted by the United Nations High Commissioner for Refugees, in the matter of the application of the exclusion clauses. The European Court considered that no proportionality test between human rights protection and gravity of a crime is to be applied in the case of a person suspected of having committed an act contrary to the principles and purposes of the United Nations. By eliminating this test, the Court is sending a signal on rethinking the asylum institution, from a humanitarian tool that it became, to a political instrument. This decision could not be read alone; corroborated to the concerns already raised on the suitable use of the asylum instrument to address massive humanitarian needs, it would indicate a reorientation in the interpretation of international norms governing the refugee law.

Still, the human rights organs and the European Court of Human Rights continue to refer to the asylum as a situation where a humanitarian perspective, reflected in the proportionality test, or for those mechanisms the risk of human rights violation probability test, is still valid. The two apparently divergent directions will need to converge in the implementation of the European Union regulations on asylum.

This paper is exploring the possible reinterpretation of the European norms, trying to identify the new trends in the political perspective of asylum and the limitations to these trends that the respect for human rights is establishing.

Keywords: *refugee status, serious non political crime, act contrary to the purposes and objectives of the United Nations, proportionality considerations, preliminary ruling*

1. Introduction

The refugee law is in quest of a redefinition. The last twenty years have shown that the humanitarian perspective, reflected primary in the work of the United Nations High Commissioner for Refugees, although very appreciated, is not succeeding in coping with, on one hand, the massive influx of refugees which do not always fulfill the criteria set down in the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (here after “the Geneva Convention”) and on the other hand with the restrictions imposed by the immigration regulations. The development of human rights law had a major impact on the interpretation and application of the refugee definition, extending it as far as the notion of discrimination and the standard of protection from the State of origin are concerned, but also weakening its political dimension. Against this background, new theories emerged, trying to rediscover the essence of asylum as refugee protection and to clarify its relation with the humanitarian approach¹.

This rediscover also determines a reinterpretation of the exclusion clauses, i.e. those provisions in the Geneva Convention that are establishing the persons who, although having a well-founded fear of persecution, are undeserving of international protection because they committed certain acts that show they are unworthy, undignified of such a response from a State.

Traditionally, the application of the exclusion clauses were conditional, at least in part, by the performance of a proportionality test; a person fulfilling the criteria laid down in Geneva Convention

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¹ Mathew E. Price, *Rethinking asylum: History, Purpose, and Limits* (Cambridge, CUP, 2009), p. 13.

would not be excluded from being a refugee if his or her need for protection outweighs the need to sanction the acts committed.

However, if one is approaching the refugee concept from a political perspective, the humanitarian considerations in the application of the exclusion clauses are no longer justified.

This trend seems to be adopted by the European Court of Justice in its recent case-law; in the context of the development of an European asylum law, where the European Court will play a major role as the only institution with the authority to interpret European Union regulations, it is clear that the direction she is offering is essential for all the Member States.

2. The context: factual background and questions referred

The judgment rendered on November 9th by the European Court of Justice in the cases *Bundesrepublik Deutschland against B and D* (joined cases C-57/09 and C-101/09)² was issued in a preliminary ruling proceeding generated by the German Federal Administrative Court, who asked the European Court to clarify the interpretation of the exclusion clauses from the refugee status, as stipulated by the Council 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 (hereafter “Directive 2004/83”), in its article 12.

This European piece of secondary legislation had the aim of ensuring that Member States apply common criteria for the identification of persons genuinely in need of international protection and of guiding the competent national bodies of Member States in the application of the Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951.

According to its article 12, a person is disqualified from being a refugee where there are serious reasons for considering that, *inter alia*, he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; or he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations³. The questions referred to the European Court aimed at a clarification of the notion of a “serious non-political crime” and of an “act contrary to the purposes and principles of the United Nations”, in order to determine if the participation as a member in an organization listed as a terrorist one could be qualified as entering into one of the two categories of deeds excluding the person from being a refugee; they were also requesting a response on the application of a proportionality test between the seriousness of the crime, and therefore the need to condemn it and its perpetrator, and the risk faced by the person if disqualified from being a refugee. Thirdly, the questions referred to the European Court were enquiring over the place, in the application of the proportionality test, of the existence in the national legal system, of protection against deportation under the prohibition of torture and other ill treatments rule.

The questions raised in fact some interesting issues relating to, on the one hand, the value of the United Nations High Commissioner for Refugees guide on implementation of the Geneva Convention and if this body’s practice would be a source of inspiration for the European Court as it has been, for almost 35 five years for the national courts and, on the other hand, on the character of asylum, understood as protection for the refugees.

² European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83756&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=365610> [accessed 20 February 2012]

³ Article 12 is also stipulating that a person is excluded from being a refugee if there are serious reasons to consider that he or she has committed crimes against peace or security, but this hypothesis is outside the scope of the present study.

The German authorities seemed to have difficulties in determining whether, from the perspective of the European law, persons that belonged to organizations listed as terrorist were to be excluded from being a refugee; in fact, the lower German courts considered that an asylum seeker should not be excluded from being a refugee without a proper application of the proportionality test, even if he or she had committed, before being admitted on the German territory, a serious non-political crime. The two applicants in the domestic procedures were former members of organizations listed as terrorist in accordance with Common Position 2001/931/CFSP on the application of specific measures to combat terrorism⁴.

The request for asylum filed by the first applicant, B., was rejected as he confessed that as a schoolboy he had been a sympathizer of the Revolutionary People's Liberation Army/Front/Party (DHKP/C). Engaged in guerilla fighting for this organization in the period between 1993 and 1995, he was arrested and sentenced to life imprisonment, after giving statements under torture. While in prison, he was again sentenced to life imprisonment for the killing of a fellow prisoner. Released from custody on health grounds, he left Turkey and entered Germany.

The second case was generated by the decision of German authorities to revoke the status of refugee, previously recognized to D., a former guerrilla fighter for the Kurdistan Workers' Party and one of its senior officials. He was a member of this organization since 1990, but in 2000, following some political differences with other leaders, he decided to leave the organization.

Two preliminary remarks are worth making in connection to these cases: the first one is related to the qualification of their conduct by the domestic jurisdictions as serious non-political crimes; the second remark concerns the demarche of the Federal Administrative Court (the instance that requested the preliminary ruling of the European Court): although this tribunal is acknowledging the fact it is bound by the findings of the lower courts, nevertheless, it is requesting the European Court to clarify if the conduct of the applicants is a serious non-political crime or an act contrary to the purposes and principles of the United Nations.

The relevant rules of international law at the time of the judgment

As mentioned in the previous sections of this article, the Geneva Convention represents the cornerstone of the international legal regime for the protection of refugees. In fact, as recognized by the European legislation, the Geneva Convention represents both the source of inspiration but also the goal, as the Directive 2004/83 sets as objective to achieve a common application of the criteria for the identification of persons genuinely in need of international protection. Against this background, it is useful to recall the main rules regarding the exclusion of certain persons from being refugees, on account of their conduct that makes them undeserving of international protection. According to article I F of the Geneva Convention, 'the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

The first hypothesis is of no interest for the present study; the other two are invoked in the European Court's ruling and therefore deserve our attention. The intention of the drafters of the Convention was to ensure that important fugitives from justice are not able to avoid the jurisdiction

⁴ Adopted on 27 December 2001, by the Council of the European Union in order to implement Resolution 1373 (2001) of the UN Security Council. Resolution 1373 was adopted on 28 September 2001, in response to the terrorist attacks committed on 11 September 2001 in New York, Washington and Pennsylvania, on the basis of Chapter VII of the Charter of the United Nations.

of a state in which they may lawfully face punishment⁵. As far as the exclusion clause relating to the perpetration of a serious non political crime is concerned, it is to be noted that not all the extraditable offences were to be considered serious; although no list, exemplificative or exhaustive was drawn up, the drafters were determined to exclude the offences punishable by three months' imprisonment and referred to capital crimes⁶ as being covered by the exclusion clause. It is also interesting to note in connection to this exclusion clause, that its application is only possible if the punishment faced by the asylum seeker were to be or would be applied in a non discriminatory way and that receiving States are not to ignore the risk that would be done by returning the claimant to face prosecution or punishment⁷ or, in other words "the well-founded fear of persecution".

The United Nations High Commissioner for Refugees has, over the years, and in the fulfilling the task of supervising the application of the provisions of the Geneva Convention, issued series of Background Notes and Guidelines on the interpretation to be given to the conventional norms. Its task was truly remarkable taking into consideration the fact that the Geneva Convention is international in the affirmation of the refugee status, but essentially national in its application. Therefore, the role of the High Commissioner was to ensure as broad uniformity as possible in the application, by domestic authorities and courts, of the disposition of the Convention. And to combat the risk of very divergent interpretation on the notion of a refugee, it even elaborated a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention⁸.

With respect to the exclusion clause for the commission of a serious non-political crime, the UNHCR firstly pointed out the offences that would attain the level of seriousness: crimes against the physical integrity of a person, crimes committed through the use of violence. The traditional interpretation of the UNHCR would place terrorist acts under this exclusion clause, as the alleged political objective of such acts is clearly annihilated by the violence of means and no longer predominant. The other exclusion clause of interest to this study refers to the commission of an act contrary to the purposes and objectives of the United Nations. Although there was agreement for the inclusion of this clause in the draft of the Convention, the reasons behind it were very diverse and confusing: some representatives limited its application to war collaborators in the Second World War or to acts similar to the gravity of war crimes, while others thought of it as a prohibition for refugees to engage in activities contrary to the country of origin. Another suggestion for the understanding of this clause refers to the commission of acts such as racial discrimination or denial of the right of self-determination.

As the terms of the purposes and objective are general and vague, the UNHCR recommended careful and narrow consideration of this exclusion clause. As the Charter of the United Nations bounds States, in principle only persons in positions of power would appear capable of committing such acts⁹. Still, the discussion is left open for the cases involving a terrorist act.

From the language of the 1951 Geneva Convention, it would appear that the application of the exclusion clauses is mandatory ("the provisions shall not apply"). Commenting on the proportionality considerations, the UNHCR in its analysis, is invoking the humanitarian object and

⁵ James Hathaway, *The Law of Refugee Status* (Canada: Butterworths Law, 1991), p. 221

⁶ Statement of representative of Belgium, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary Record of the twenty-ninth meeting, last visited at: <http://www.unhcr.org/3ae68cdf4.html> [accessed 20 February 2012]

⁷ James Hathaway, *The Law of Refugee Status*, p. 224

⁸ UN High Commissioner for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html> [accessed 20 February 2012]

⁹ UN High Commissioner for Refugees, Guidelines on International protection: Application of the Exclusion clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 september 2005, p. 5 available at: <http://www.unhcr.org/refworld/docid/3f5857684.html> [accessed 20 February 2012]

purpose of the Convention to justify the necessity of assessing the respect for human rights in the application of the exclusion clauses. In the words of the UNHCR “as with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity and acts falling under article 1F(c), as the acts covered are so heinous.”¹⁰

Several consequences are to be drawn from the drafters’ intention and the UNHCR interpretation. Firstly, although the terms of the Convention would support a mandatory application of the exclusion clauses (that is, any person having committed such acts should not recognize as a refugee), in fact, their application is subject, to a wider or narrower degree, to a proportionality test. This test would allow striking a fair balance between the seriousness of the crime and the need to see it punished and the risk the person is facing. It is to be noted that the result of the proportionality test would be either the revocation or cancellation or non-recognition of the refugee status or the maintenance or recognition of this status.

This is important to underline, because the proportionality test is similar to the one applied by the human rights organs in deciding if a measure restricting the exercise of a right represents a legitimate interference or a violation of that right. Still, its consequences in the field of refugees’ protection go beyond the simple avoidance of a violation to someone’s rights. A person who committed a serious non-political crime would face an inhuman punishment or an unfair trial. Two possibilities are opened to a receiving State at that point, according to the domestic practice: either to have recourse to proportionality considerations, either to consider that such a punishment or trial represents a violation of a human right so they should be dealt with from the human rights perspective. However, the consequences are not the same and therefore the two possibilities should not be seen as excluding each other, but as complementary, the second one being activated if the first one would lead to the exclusion from being a refugee. As to the consequences, the application of proportionality considerations would result in the maintenance of the refugee status, with all the rights it confers and with the guarantee of *non-refoulement* that is more protective than that prohibition to return under human rights law. In fact, in refugee law, the existence of a threat to the life or freedom of a person on account of race, religion, nationality, political opinion or membership to a particular social group is prohibiting any measure of expulsion or return: under human rights law, the individual must prove a real risk and concrete risk of being subjected to ill treatment¹¹.

The automatic exclusion, on the ground that the person is protected under human rights law, would simply mean the prohibition to expel or return, without any particular statute being afforded to that person; besides, the threshold of proof is higher than refugees’ *non-refoulement*. Only a probability of individual application would stay the execution of the return measure.

Secondly, in general the test would apply only in connection with the perpetration of serious non-political crimes; still, although normally excluded from the application in the other hypothesis, the test is not completely ignored; in some extraordinary cases, the UNHCR applied the test even when crimes against humanity were committed¹². We consider that this application is justified by the fact that the status determination officer and even the domestic courts dealing with the exclusion

¹⁰ UN High Commissioner for Refugees, Guidelines on International protection: Application of the Exclusion clauses, p. 7

¹¹ European Court of Human Rights – Press Unit, Factsheet - Expulsions and Extraditions, January 2012, available at http://www.echr.coe.int/NR/rdonlyres/211A6F9C-A4EC-4CF7-AB2E-42E9D49FB2EF/0/FICHES_Expulsions_and_extradition_EN.pdf [accessed 19 February 2012]

¹² UN High Commissioner for Refugees, *Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers*, 12 September 2005, available at: <http://www.unhcr.org/refworld/docid/440eda694.html> [accessed 19 February 2012]

clauses are not criminal tribunal and their evaluation does not attain the strictness of a criminal procedure. It follows that the individual would be found “guilty” outside the normal guarantees of a penal procedure.

Thirdly, it is not definitively agreed as to the qualification of the terrorist acts, if they would fall under the “serious non-political crime” notion or the “acts contrary to the purposes and objectives of the United Nations” one. Still, the UNHCR seems to favor inclusion in the first category, as the methods and consequences are those of a serious non-political crime. This position is also more favorable to the individual, as in general, the perpetration of a serious non political crime is proved by the initiation of criminal proceedings, documents and evidence collected in the file, prosecution applications, and judicial decisions. A conclusion as to whether a person “is guilty” for an act contrary to the purposes and objectives of the United Nations, if that act is not at the same time a crime, is more difficult and the evaluation of individual responsibility, that does not benefit from the criminal standard, more fluid.

The judgment of the European Court of Justice

In responding to the questions referred by the German Federal Administrative Court, the European instance considered, in the first place, the qualification to be given to terrorist acts; it concluded that those acts could fall to be regarded both as serious non political crimes and as acts contrary to the purposes and objectives of the United Nations. Still, as the language employed both by the Geneva Convention and the Directive 2004/83 shows, it is not sufficient that the organization to whom the person belongs had perpetrated such acts; it must be shown that the acts were committed by the person in question. Recalling the principle of individual responsibility, the European Court underlined that “the mere fact that the person concerned was a member of such an organization cannot automatically mean that that person must be excluded from refugee status pursuant to those provisions”¹³.

By way of consequence, although the domestic court provoked the re-qualification of the acts reproached to the applicants, the European instance refrained from making a choice; it is to be noted that this abstention from the European Court is not without consequences – as the first applicant had committed both acts as member of a terrorist organization but also murder. From the factual background, it follows that neither the domestic nor the European courts were interested with the second potential „serious non political crime”, only with the acts committed while a member of the organization.

At the same time, the European Court’s directions as to the assessment of the individual responsibility, without clarifying the notion she is dealing with (non political crime or act contrary to the purposes and objective of the United Nations), would imply that the same standard of proof applies for serious crimes that are generally discovered upon extradition requests (that is, a criminal proceeding is ongoing or has been completed) and for the other acts. Although this could be regarded as a guarantee and applauded as such and we genuinely acknowledge its importance, it is worrying however that a person is evaluated as being “guilty” in the absence of specific guarantees and a specific procedure¹⁴.

However, the European Court, in answering the third question, considered that, once the domestic authority or court has determined that the person in question has committed a crime so falling under the exclusion clauses, their effect is mandatory and the person is excluded from being a refugee.

¹³ European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 88

¹⁴ Without entering into a lengthy discussion on the subject, it is worth noting that in the sanctions regime considering the events in the Cote d’Ivoire, some persons were listed on the visa-ban and assets freeze lists for incitement to racial hatred; should this also mean that they were to be excluded from being refugees, if the case may be? The standard of proof for the listing in restrictive measures is less strict and transparent.

The Court considered that no proportionality test is required, as the domestic instance has already, „in its assessment of the seriousness of the acts committed by the person concerned and of that person’s individual responsibility, taken into account all the circumstances surrounding those acts and the situation of that person”¹⁵. But a few paragraphs earlier, when indicating the elements to be taken into consideration, the Court only remembered: the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct¹⁶. The indication is correct as it only takes into account the demarche to determine whether the acts committed by the organization concerned meet the conditions laid down in exclusion provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned.

Still, the proportionality test, that the Court obviates, is not reduced to just assessing the role or the subjective state of mind of the person concerned and is applied after the qualification of an act as serious non political crime or act contrary to the purposes and objectives of the United Nations. Among proportionality considerations one should take into account the period of time elapsed from the perpetration of facts, the punishment already completed, the age of the perpetrator at the moment of the fact, the fairness of the trial. By using these tools, even if one is in the presence of a serious non-political crime of an act contrary to the purposes and objectives of the United Nations, could decide, after balancing different interests, not to exclude the person concerned from being a refugee.

The European Court is very firm in its position; the commission of a crime – against peace or humanity, war crime, non political one, contrary to the purposes of the United Nations – renders the perpetrator not worthy of the protection deriving from the refugee status. It is another way of proclaiming that refugee protection is for a person that is being persecuted, that suffering from a harm that is being illegitimately, maliciously and unjustifiably inflicted. The fact that a person is guilty of serious or - as the UNHCR put it - heinous acts, transforms him or her into an individual undeserving of protection. It is a clear vision of the refugee protection through asylum as a political instrument. In general terms, a political vision on asylum is concentrated on reaction for the protection of the persecuted (understood as persons chased out of their political communities) but also for the chastising of the persecutory state for its conduct.

From the fact that the European Court did not qualified the acts described in the present cases, it follows that its position is one of principle; irrespective of the type of crime, the person considered to be guilty is to be excluded from being a refugee. This is in line with the political view on refugee status; the moment a person, although persecuted or fearing persecution, is, on serious grounds, considered to have committed such a crime, she is no longer or anymore in the position to invoke the risk of persecution in order to keep its status.

The revocation, cancellation or refusal to recognize the refugee status as a consequence for the application of an exclusion clause does not mean however the absence of all evaluation of the risk of a violation of fundamental human rights for that person, in case the exclusion clause is accompanied by an extradition request or by a decision to remove the person from the receiving State’s territory. Still, as explained in more detail bellow, the decision to stay an extradition or a return order will not imply the recognition of a certain status and the presence of the risk must be real and concrete. The Court itself recognize it in paragraph 110 of its decision: “it is important to note that the exclusion of a person from refugee ... does not imply the adoption of a position on the separate question of whether that person can be deported to his country of origin”.

¹⁵ European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 109

¹⁶ European Court of Justice, judgment of 9 November 2010 (cases C-57/09 and C-101/09), para. 97

3. Conclusions

Divorcing the concept of refugee protection through asylum from the humanitarian goals promoted by the NHCR does not, in consequence, have the meaning of refusing all protection for a person confronted with a probable violation of her rights; it only tries to delimitate the refugee status from the humanitarian protection, that is subsidiary and non-distinctive, in the sense that is not sanctioning a distinctive kind of harm – persecution.

It is too early to say if the trend emerging from this judgment will be consolidated; there some signs of interest from the part of domestic instances as well, which, by the questions referred to the European Courts, are provoking a new interpretation of the meaning of “membership of a particular social group” or a distinction among human rights violations that would or would not amount to persecution. The current intention of the European Court is also suggested by the total absence of any reference to the work or works of the UNHCR; however, it will certainly be difficult for the European Court to change the trend in a short term, as for many years the UNHCR has been the trainer of the domestic authorities, including in Europe and its lines of interpretation are just consolidating in the case-law of national bodies.

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