The Ambivalence of Current Refugee Law Between Solidarity with “Friends” and Solidarity with “Human Beings”

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Published online: 24 October 2016
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Abstract The history of refugee law, since its beginning in the year 1905 to current times, is characterized by a fundamental ambivalence. On the one hand it is determined by the desire to help people who are persecuted because they stand up for ideals we share with them, or to which we can at least be sympathetic. On the other hand it is also determined by the moral obligation to protect and support those who cannot live in dignity in their country of origin, even if they do not pursue certain ideals, or if they pursue ideals to which we are not sympathetic. This ambivalence leads to the result that today’s refugee law is contradictory and inconsistent. It is difficult to understand and allows ample room for arbitrary decisions, because the aim is not clear. This essay traces this history, in particular taking into account the developments in Europe and in Germany.

Keywords Refugee law · International protection · Human rights · Solidarity

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Introduction

Today’s refugee law as it is applied in Europe and in many other parts of the world, is characterized by a strange ambivalence that makes it very difficult for those who have to interpret and apply this law to identify the crucial ideas behind the text. So, it is difficult for them to orientate the interpretation of these ideas. A very impressive example of this ambivalence is the fact that it is possible to get refugee status according to the Geneva Refugee Convention of 1951 without being threatened by a (serious) violation of (basic) human rights. A mere discrimination because of race, religion, nationality, membership in a particular social group, or a political opinion is sufficient (see Article 9 para 2 lit b-c QD 2011). On the other hand, subsidiary protection status, which is much lower than refugee status, can be received only by those who are threatened by death penalty, torture, inhuman or degrading treatment, or by indiscriminate violence in situations of armed conflict (see Article 15 QD 2011). Briefly and somewhat simplified: the higher the threat, the lower the protection. This strange result tempts governments to play with the different statuses according to current public mood or political purpose. The German Office of Migration and Refugees, for example, in 2015 generally granted refugee status to all asylum seekers from Syria, which includes the right to family reunification. When the public mood toward asylum seekers started to change, the government wanted to avoid family reunification. Therefore, it gave the order to grant only subsidiary status for asylum seekers from Syria, simply because this status makes it possible to hamper the family reunification (n-tv 2016).

The ambivalence of current refugee law concerns the purpose of refugee law. It is not clear whether it serves the protection of those who are persecuted because they stand up for the same political or religious ideals as those who grant protection (I call them “friends”), or whether it serves for the

protection of those who are threatened by a severe violation of their human rights—for any reason whatsoever, and regardless whether or not the protectors have any liking of them (I call them simply “human beings”).

I would like to trace below, in broad outline form, the historical development of this ambivalence, in order to make it clear and comprehensible.

The British Aliens Act of 1905

The history of refugee law starts with the year 1905. In this year, the UK enacted its first Aliens Act (UK 1905).

During that time, before the Aliens Act came into force (1 January 1906), there was no regulation for immigration in the UK. Everybody could freely reach the shores of the British Island, leave the ship and settle in the country. Among those who came to England in order to settle there to find a better life, or among those who wanted to pass through England on the way to the USA (but could not afford the expenses for the further journey), there were also people who fled from persecution in their country of origin. However, they were not considered as “refugees,” because there was no relevant distinction between refugees and other immigrants. Aliens who came to England were immigrants for whatever reasons whatsoever. “Refugees” or “Asylum Seekers” were not a particular relevant category (Coleridge 1905).

This situation changed as an effect of the so called “May laws” of the Russian Tsar Alexander III and the following pogroms against Jews in Russia and in Russian Poland through the 1880s and 1890s (Bashford and McAdam 2014, 314). Subsequently, large numbers of Jews came to England intending to eventually land in the United States. Approximately 120,000–150,000 Jews from Continental Europe settled in England, most of them in the East End of London (Hereford 1905). There rose a subcultural community where people spoke Yiddish and coined the image and culture of the district. The rental rates for flats skyrocketed and living conditions were very bad because of overcrowding. Although one cannot say that the immigration of Jews from Russia posed an irksome situation in the whole of the UK or in the big cities outside the East End of London, more and more, public opinion demanded the repulsion of aliens who wanted to immigrate; in particular, those who were deemed as destitute and therefore undesirable, which was exactly the position of the Jews fleeing from Russia. However, the immigration of poor Jews from Russia did not raise serious economic or social problems. First, the pure number was not extremely high; second, they enjoyed the financial support from established Jewish organizations that helped them to integrate in society; and third, almost everybody found a job and could earn a living. The need to become productive as soon as possible led to new forms of division of labor. Therefore, it was, for

example, not necessary to invest a lot of time in order to learn the complete tailor’s trade. One person sewed only the sleeves, another sewed only the collars, etc. The effect was not only that the time to learn a trade was reduced to a minimum, but the productivity increased rapidly (Hereford 1905).

So, the immigration of the Jews was, in fact, not a burden, but rather a benefit for British society. The repudiation of the immigration of the Jews from Russia can therefore better be explained through a rising atmosphere of anti-Semitism in British Society of the time (Bashford and McAdam 2014, 310). The ruling Conservative Government under Prime Minister Arthur James Balfour introduced several bills concerning the regulation of immigration, including the establishment of a residence license. The bills of January 1897, February 1898, and April 1904 were roundly defeated by the Parliamentary majority and the liberal opposition. The most effective counter-argument was the reference to the alleged British tradition of giving shelter and protection for those persecuted in their country of origin (Bashford and McAdam 2014, 315).

It is true that Huguenots from France, Protestants from Flanders driven forth by the cruelties of the Duke of Alba and the persecution by the Spanish in the sixteenth century, French nobles and priests fleeing the guillotine of revolutionary France, as well as persecuted intellectuals from Germany (e.g., Karl Marx) could get asylum in England. However, from Bashford and McAdam’s writing that “Britain had a long tradition of granting Asylum to those fleeing political and religious harms” (Bashford and McAdams 2014, 321), one can surmise that there was simply no regulation of immigration in the UK and that there was therefore no decision making on application for entry. Nobody considered and decided whether or not a person in need should be granted asylum; therefore, it seems to be an exaggeration to talk about a tradition of “granting” asylum. Nevertheless, the “self-story” (Brashford and McAdams 2014, 320) of the great liberal tradition of granting asylum delivered the crucial objection motive against the former bills. They failed because they were considered as incompatible with the English self image. When the *Jewish Chronicle* wrote that the proposed Aliens Bill of 1904 was simply “un-English” because of its failure to include an asylum clause, the way out of the impasse was demonstrated (Brashford and McAdams 2014, 323). The Aliens Bill of 1905 was obviously eventually successful only because the drafters had implemented an asylum clause. It was issued by the Parliament on 11 August 1905 and it came into force on 1 January 1906.

Article 1 section 3 of the statute regulates that an immigrant shall be considered as an undesirable immigrant, “if he cannot show that he has in his possession or is in a position to obtain the means of decently supporting himself and his dependents,” if he is a “lunatic or an idiot,” or for some other reasons. The text continues as follows: “[B]ut, in the case of an

immigrant who proves that he is seeking admission to this country solely to avoid persecution or punishment on religious or political grounds or for an offence of a political character, or persecution involving danger of imprisonment or danger to life and limb, on account of religious belief, leave to land shall not be refused on the ground merely of want of means,”

The formula is not very strict and is somehow confusing; in particular, because it seems to repeat more or less twice the same rule. But, it is interesting that protection should not have been granted to those who had escaped from a state of emergency in general, but only to those who were *persecuted*. The crucial criterion was not the bad state of the immigrants concerned, but that this bad state was caused by “evil” fellow humans who were committing acts of persecution against the refugee. In other words: protection should not have been granted for those who were “persecuted” by a bad fate, but only for those who were persecuted by human beings. Furthermore, not everybody who was persecuted by fellow humans should have been granted asylum, but only those who were persecuted for particular reasons, namely, on political or on religious grounds. The reference to political reasons was not completely new. It rather further developed the traditional idea that persons who were threatened with prosecution for political crimes should not be extradited (political offense exemption). This rule was deeply rooted in the international law of the nineteenth century (Stüdemann 2008, 41; Cantrell 1977, 778). It was first developed in revolutionary France and was based on the idea that people who committed crimes in order to free the society from governmental oppression should be protected and not surrendered. “As Enlightenment and democratic movements swept across European states in the nineteenth century, political offenders who committed crimes in their homeland were viewed more sympathetically” (DeFabo 2012, 72). Protection for those who were considered as persecuted for political reasons was clearly meant as solidarity with freedom fighters and heroes.

The regulation of the Aliens Act goes, however, further. It also protects those who are persecuted on religious grounds. This was a completely new motive of the willingness to protect refugees. When we ask why of all thinkable reasons religion was considered as of particular importance, we can find an explanation if we think about the fact that the Aliens Act was discussed in a political atmosphere of Anti-Semitism. The huge resistance against the ongoing immigration during the last decades of the nineteenth century was based on the very fact that most people by far who came into the country were Jews from Russia. The growing Anti-Semitism, however, also provoked a counter-movement that was based on a growing solidarity with the Jews. The “persecution on religious grounds” clause can therefore be considered as a compromise formula. The Anti-Semitic and xenophobic currents of the time should be met by rules concerning closing of the borders, border-control and the condition of residence permits, while

the currents related to solidarity with the Jews from Russia should be met by rules concerning asylum for those who were persecuted on religious grounds.

From the pre-understanding of the contemporaries, “persecution on religious grounds” was understood as “persecution because of being a Jew from Russia” (Lords Hansard 1905). Neither the British legislature nor the British public had the idea in mind that everyone who was persecuted because of his religion—no matter how strange and unsympathetic his religion was—should be granted asylum in the UK.

The persecution grounds of politics as well as of religion thus mirror neither solidarity with all fellow humans in need for protection because of their state of suffering, nor with all persecuted fellow humans for the sake of their human dignity, but only solidarity with those who are “like we are” or who are our friends because “their enemies are our enemies.” I call this conception of refugee protection in the following the concept of *Solidarity with Friends* and distinguish it from the concept of *Solidarity with Human Beings*.

Development in the Aftermath of the World War I

During and after World War I, the refugee problem in Europe increased rapidly to hitherto unknown dimensions. The first event of the time that triggered huge waves of refugees was the genocide of the Armenians by the Turks in 1915, followed by the expulsion of survivors in 1922 (Kiffner 2015; Akçam 2012). The second event was the October revolution in Russia in 1917. It led to much larger numbers of refugees coming to Western Europe (Skran 2011, MN 2). In December 1921, the Soviet Union deprived these people of citizenship. From then on, they were stateless and could not seek help and protection in any state.

This situation led for the first time to an international reaction in the year 1922. Many members of the League of Nations concluded an arrangement that endowed the High Commissioner of Refugees with the authority to issue international passports to the stateless refugees (Skran 2011, MN 5; Einarsen 2011, MN 8). This was to enable them to become mobile and improve the chance to find a new legal residence elsewhere in the world.

The mandate of the High Commissioner of Refugees related only to the former Soviet citizens who had left their country because they were in risk of persecution by the Bolsheviks. Only this group was defined as “refugee” in the meaning of the international law. Here it was obvious that international protection should only be devoted to those who were considered to be enemies by the enemies (the Bolshevik regime in Russia) of the protecting countries (the rest of the world). The members of the League of Nations felt solidarity with those who were persecuted by the Russian Communists because at least the leading classes of all the other states themselves

feared being one day persecuted by the Communists. So, it was easy for them to consider the refugees from Russia as the “enemies of our enemies” and therefore as friends. Later, the Armenians were included in this arrangement, so that they could also get a “Nansen passport” (named after the first High Commissioner for Refugees Fridtjof Nansen – Arrangement 1928). Again, it was easy for many Western members of the League of Nations to consider the Armenians as their friends, as they were persecuted by the former wartime enemy Turkey and because they were Christians who were persecuted by Muslims.

The thesis that the refugee law of the time was based on the “solidarity with friends” approach is confirmed by the following development. When Nazi-ruled Germany left the League of Nations in 1938, it became possible to do something to favour the protection of Jews who fled from German persecution. Fourteen countries drafted a *Convention Relating to the Refugees from Germany*, but only seven signed it, and finally, only two ratified it with many restrictions and reservations (Belgium and the UK – cf. Skran 2011, MN 79, 94). This result mirrors the widespread Anti-Semitism of the time (Skran 2011, MN 69–70; Chanes 2004). Neither Jews, nor Sinti and Roma, nor homosexuals were considered as “our friends,” and neither were the Communists who were persecuted by the German regime.

Development in the Aftermath of the World War II

Shortly after the foundation of the United Nations (UN) organization, one of its first activities was the establishment of a new agency that should manage the huge number of more than 10 million refugees who lived in Europe as a result of the events of the World War II: The International Refugee Organization (IRO). Its mandate embraced for the first time in international law not only refugees of a certain nationality or (former) citizenship, but it also described the property of being a refugee according to abstract criteria. The IRO was supposed to be responsible for any person who was outside the country of his nationality and who as a result of the events of the war was unable or unwilling to avail himself of the protection of that country (IRO Constitution 1946; cf. Einarsen *supra* MN 12).

This very broad wording of the mandate was, however, limited only to those who should be recognized as refugees who were persecuted because of their race, religion, nationality or political opinion. This formula was (except for “nationality”) taken over from Art. 6 lit. c of the London Charter of the Nuremberg Military Tribunal (London Charter 1945). It is obviously a derivative of the formula of the *British Aliens Act* of 1905. So, the criteria were indeed determined abstractly, but the related ideas were very concrete. The IRO should precisely protect those who had been victims of Nazi

persecution. Furthermore, the IRO was also an instrument in the beginning of the Cold War. In particular, the United States, which bore most of the financial burden of IRO, had the protection of those refugees who left communism and “voted with their feet” in mind. This was the main reason why neither the Soviet Union nor its satellites joined the organization (Einarsen 2011, MN 14).

The underlying idea was therefore an old one: the victims of our enemies are our friends, and therefore, we should help them. Not everyone who was persecuted for racist reasons should be protected, but only those who were persecuted by the Nazis or by the Soviet Communists or on reasons that were typical for Nazi persecution. Racist persecution that was independent from the Nazi persecution was outside of the focus. This is confirmed by the fact that between six and eight million refugees of German origin (ethnic Germans – “*Volksdeutsche*”) were expressly excluded from the definition of the term “refugee” in the IRO Constitution. Concerning the persecution of political opinions, the drafters of the IRO Constitution had certainly only upright democrats in mind and not those who were persecuted for their commitment to the dictatorship of the proletariat.

The Refugee Convention of 1951

The previous catalogue of persecution reasons (race, religion, nationality, political opinion) was finally introduced in the Convention Relating to the Status of Refugees (Geneva Refugee Convention – GRC 1951). The convention was adopted by the UN General Assembly on 14 December 1950 and entered into force in 1954 (A/Res/429). Once the geographical and temporal restrictions were removed from the convention by the additional Protocol of 1967, this convention could be called the “Magna Carta of international refugee law” (UNHCR 2001).

In preparation for the negotiations on this convention, the UN Secretary General at the time, Trygve Lie, submitted a memorandum in which he expressed demand for the broadest possible definition of the term “refugee.” The crucial criterion was to be only the need of protection of human beings and nothing else. According to this approach, it is not relevant as to which reasons persons in need are persecuted, nor whether they are persecuted at all—which is not the case in cases of a natural disaster or in cases of war or civil war (Einarsen 2011, MN 31).

This proposal was, however, expressively rejected by almost all of the negotiating delegations. They spoke about a blank check that could not be delivered because nobody would be able to judge whether it could be cashed, or whether the contracting states might therefore possibly overtax themselves when they accept such an unlimited duty to protect (Einarsen 2011, MN 35, 47).

It was therefore concluded that as a refugee can only be recognized as a person who “as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” This is more or less the definition of the IRO statute.

When negotiations on the concept of refugee had already been completed, something surprising happened. The Swedish diplomat Sture Petré, who later became a judge at the International Court of Justice and the European Court of Human Rights, introduced a very strange proposal.¹ He suggested to expand the list of reasons for persecution by one; namely, by persecution for “membership of a particular social group” (Einarsen 2011, MN 52–57).

He argued that the reasons for persecution approved thus far were not clear enough. The remaining ambiguities would be eliminated by the introduction of the new persecution ground. There were namely cases that fell under the new term and should therefore be explicitly mentioned. Petré did not undertake the slightest attempt to explain the term “membership of a particular social group” in detail. He did not point out how in any way this expression could eliminate any ambiguities.

In fact, this concept clears up nothing. On the contrary, it is much more ambiguous and unclear than all the other persecution grounds. It would have been expected that Petré's proposal would have met with critical questions and triggered a severe discussion. In particular, the question was obvious regarding which cases he was thinking of. But nothing happened. Petré's proposal was unanimously adopted without any debate. It has formed since then the fifth ground of persecution that leads to the granting of refugee status. Interestingly, any written internal correspondence between Petré and his own government does not indicate what should be meant by “membership of a particular social group.” In a letter of Petré to the Swedish Foreign Office of June 28, 1951 (a few days before the opening of the Geneva conference) he justified his intended proposal recalling a similar clause in the then draft of the Swedish Aliens Act. But this draft also came from his pen (Tommy Lindberg. Einige Gedanken zur Einführung des Begriffs “Zugehörigkeit zu einer bestimmten gesellschaftlichen Gruppe” in der Flüchtlingsdefinition der UNO-Konvention über die rechtliche Stellung von Flüchtlingen von 1951, annex of the letter of the Swedish Embassy in Berlin at Paul Tiedemann of 12.10.2000 - not published).

In the literature, the assumption is taken that it did not come to critical questions and possible explanations, because all the diplomats gathered around the conference table in Geneva not

only knew what Petré meant, but also understood that the reasons for Petré's proposal must not be uttered (Einarsen 2011, 56–57). According to this assumption, the term “membership of a particular social group” should include all those who are excluded from their community and made victims of a violation of human rights without meeting one of the criteria that has been typical for persecution by the Nazis. It is assumed that Petré and his fellow diplomats had in mind the persecution of homosexuals because of their sexual orientation, or the persecution of vagrants because of their way of life, which was considered to be deviant. In other words, it is assumed that the diplomats in Geneva thought of groups of refugees who were and who are persecuted not only by the Nazis, but also by the societies and governments of Western countries. This would indeed explain very clearly why the idea behind the term “membership of a particular social group” could not be uttered. Its open expression would have had the result that none of the Western governments had agreed. On the contrary, an open discussion could possibly have led to the conclusion that the countries would restrict the catalogue of reasons for persecution even more than before, in order to avoid that the inhumane behaviour of the contracting states could be considered as a reason for refugee protection. An open debate would have drawn attention to the fact that simultaneously persecution on grounds of race took place in the United States, where people were deprived of their human and civil rights simply because of their skin colour (Fredrickson 2003). It would become clear that not only had the Nazis forcibly sterilized mentally handicapped individuals and deprived them of their life and liberty, but that the first national race-biological Institute was built in 1921 in Sweden, where until the 1970s, they carried out forced sterilizations of the mentally ill, of people with impaired intelligence, of social misfits, and of alcoholics (Lappalainen 2007). It would have been obvious that not only had the Nazis taken children away from their parents and supplied them to forced adoption, but in Australia, Aboriginal children had to suffer this fate until the end of the 1960s (Windschuttle 2009).

If this hypothesis on the idea behind the persecution ground of “membership of a particular social group” should be true, then the introduction of this formula into international law would mark the very point in history where refugee law took a turn away from a law of solidarity with “friends” and towards a law that deals with the protection of human beings only on account of their humanity. One could also talk about the turn from a partisan refugee law to an impartial refugee law.

Further Development: Toward Protection Based on Humanity

The further development is coined by the increasing importance of new provisions concerning the protection of refugees

¹ Cf. for a CV of Sture Petré: Eyffinger et al. 1999, 318

according to which persecution grounds do not play a role anymore. More and more, the need for protection because of a serious risk of human rights violations is all that stands in focus.

This development started with the UN Convention against Torture (CAT), adopted in 1984 (CAT 1984). Article 3 of CAT contains a so-called *refoulement* ban that depends only on the risk of being tortured: “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

The second step of this development is marked by the judgment of the European Court of Human Rights (ECtHR) in the matter of *Soering v. UK* of July 1989 (ECtHR 1989). In this decision, the Court ruled for the first time that no one may be expelled, returned, or extradited to another State where there are substantial grounds for believing that the person concerned would in the country of destination face a real risk of being subjected to a severe violation of the human rights as they are codified in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950 (ECHR 1950). This judgment enlarges the scope of protection from torture to all kinds of violations of basic human rights. This right to protection depends only on the existence of the risk concerned. It does not depend on the fact that the persecution or inhuman treatment that the person concerned has to face is motivated by certain persecution grounds. Therefore, it is not dependent on the refugee’s personal attitude toward religion or politics, nor to her race or nationality.

These new regulations were implemented in the German *Aliens Act* in 1990. However, the humanity-related law did not replace the older “friend” related-law. Rather, it was added to the former one. It was common in Germany to speak of the “big asylum” and the “small asylum” (Hauser 2011; Schachtmeister 2016). The difference between the two was not that the dangers against which the “small asylum law” granted protection were smaller than those against which the “big asylum law” granted protection. The attributes “big” and “small” related rather to the chance of the refugee to be integrated in the German society. Those who flew to Germany because they were persecuted on grounds of race, religion, nationality, or membership of a particular social group or political opinion were granted refugee status according to Article 16a German Basic Law resp. to the Refugee Convention of 1951. They received a residence permit, free access to the labour market and to the health and educational system, social benefits, etc. On the contrary, those who were granted the “small asylum” received only a paper that made sure that they could not be returned in their country of origin (“*Duldung*”), but they did not receive a legal status. Their stay in Germany remained illegal. They did not get a residence permit nor all of the other benefits and rights which are necessary in order to become able to integrate in the society. The beneficiaries of

“small asylum” remained *outlaws* in a literal sense. The different treatment of the beneficiaries of “big” and “small” asylum shows again that the turn from “solidarity with friends” to “solidarity with human beings” was neither really understood nor really adopted. The law of “small asylum” was only ever accepted because it was prescribed by international law and because since the foundation of the Federal Republic of Germany, the conformity of national law to the international law was always considered as a *raison d’état* (see Article 24, 25, 26 Basic Law; BVerfG 2004). Therefore, no one bothered about the fact that there were no rationally comprehensible reasons for the distinction between “big” and “small” asylum. On the contrary, the distinction appeared almost natural, because it corresponded to the still dominant thinking, according to which the refugee law was still primarily considered as based on the idea of solidarity with friends and not solidarity with human beings because of their humanity.

The third step of development is marked by the judgment of the ECtHR in the matter of *D. v. UK* of May 1997, according to which, a violation of the contracting State’s obligations from the *European Convention of Human Rights* cannot only occur in cases where the person concerned has to face a real risk of being subjected to a certain kind of *treatment* contrary to fundamental human rights. It is, however, sufficient when the person concerned has to face living conditions in the country of destination under which it is not possible to live in dignity (ECtHR 1997). In the case *D. v. UK*, the terminally ill claimant was to be deported to St. Kitts, where he would have had to expect his death because no medical treatment was available for him there through which he could have been saved. The Court deemed the forced return in such a case as inhuman treatment carried out by the State, who deports the person concerned in that country. This case law applies not only in cases of a lack of a health-care system, but also in cases of unavoidable homelessness and other similar cases. The crucial point is that in these cases, the State that coerces or forces someone to live under inhuman living conditions carries out a violation of human rights itself, although it has not caused these disastrous conditions of life. It is obvious that this case law applies to cases of natural disasters, as well as in cases of war and civil war.

Germany, however, has ignored this case law. In particular, it was commonly understood among lawyers and the courts that war refugees would not have a right to protection (Tiedemann 2014, pp.116). Civilians in areas of war and civil war were considered as persons who are not treated inhumanly. They are not objects of targeted acts of maltreatment. They are only exposed to certain risks for life and limb because they are situated at the wrong time at the wrong place. This was considered as a matter of fate and not as a matter of maltreatment, and therefore not as a matter of protection in the frame of refugee law.

This attitude is an extreme manifestation of a partisan conception of refugee law. Refugee law was considered as offering of protection to any persons with whom the protector shares a common enemy. This approach is based on the principle that the enemies of my enemies are my friends. But war refugees are considered not to be victims of persecution by enemies. They are considered victims of mere circumstances and suffer therefore only “collateral damage.”

The Europeanization of Refugee Law

In 2004, the law concerning the status of refugees became a matter of the law of the European Union. In that year, the first European Directive “on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection” (in short: Qualification Directive – QD) was issued (QD 2004).² The Directive is compulsory for almost any EU member state.³ It provides for two different statuses. The first one is called refugee status and can be recognized under the conditions of the Geneva Refugee Convention of 1951. The second is called subsidiary-protection status and is available for those who do not qualify for the refugee status, in particular because they are not persecuted on the grounds of race, religion, nationality, or membership of a particular social group or political opinion. Subsidiary-protection status is, however, not granted for any person who has to face a real risk of damage concerning the protection scope of one of the human rights listed in the ECtHR. The status is rather only available for those who have to face the death penalty or a violation of the rights of Article 3 ECtHR (torture, inhuman and degrading treatment or punishment) and for those civilians who have to face a “serious and individual threat to [...] life or person by reason of indiscriminate violence in situations of international or internal armed conflicts” (Art. 15 QD).⁴ Thus, subsidiary-protection status is not granted to any person who is at risk to suffer a severe violation of human rights, but only to those who are at risk of a small portion of them. In this frame, however, it is a historical progress that the legal consequences consist not only of a *refoulement*-ban, but of a certain legal status including a residence permit, access to the labour market, to the health and educational system and other public beneficiaries. The status is today very similar to the status of refugees by the meaning of the Geneva Refugee Convention (GRC). The German transformation of the European law, however, made use of

the possibility to discriminate the owner of subsidiary-protection status in terms of the period of validity of the residence permit (§ 26 I, sentence 2 and 3 German Residence Act). GRC-refugees receive a residence permit for 3 years, and subsequently, an unlimited residence permit. Owners of subsidiary-protection-status receive a residence permit for only 1 year, which can be prolonged several times for 2 years. Only after 7 years are they eligible to receive an unlimited residence permit. There is no rational ground for this distinction. It is only understandable as the ongoing effectiveness of the idea that people who are, indeed, in need of protection, but cannot be considered as “friends,” should be underprivileged.

A big step toward a refugee law that is based only on the idea of solidarity with human beings because of their humanity is the introduction of protection for civilians coming from areas of armed conflicts. However, the wording of the provision concerned (cited above) shows a high level of relativization and some contradictions (e.g., “individual threat” contra “indiscriminate violence”) that make clear that protection without persecution is still considered a strange approach. The deep ideological resistance to a refugee law based on pure humanity is finally demonstrated by the fact that those refugees who are at risk of a violation of other human rights today also enjoy a legal status, but it is a status lower than that of subsidiary-protection status (§ 26 I, sentence 4 German Residence Act).

Counter-Developments

Apart from all these differentiations and the half-hearted acceptance of humanity-based protection grounds, we can observe a clear tendency of development toward a refugee law that is based on pure humanity and not only on the idea of solidarity with “friends.” But the development is not a consequent. Rather, there are always also counter-developments. An example from the recent case law of the Court of Justice of the European Union (CJEU) is the judgment in the *Matter of B.* of 09.11.2010 (CJEU 2010). According to the traditional German Right on Asylum which is provided by the German Constitution (Art. 16a GG) and according to the related case law of the Federal Constitutional Court (BVerfG), the right to asylum could not be forfeited (BVerfG 1989). The right to Asylum was assigned to any person who was in a real risk to be persecuted on reasons of race, religion, etc., regardless of whether or not she has committed a crime of aggression, a war crime or a crime against humanity. On the contrary, Article 1 F GRC provides that refugee status “shall not apply to any person with respect to whom there are serious reasons for considering that [...] 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”. Exactly the same provision is provided

² This Directive was replaced by the Directive 2011/95/EU of 12.12.2011 (QD 2011)

³ The Directive does not bind Denmark, Ireland, and the UK. Ireland and the UK are still bound on the QD of 2004. Denmark has opted out. (The latest iteration of the QD is 2011.)

⁴ Cf. to this clause in detail: Paul Tiedemann 2012; see further: Kelly 2015

in Article 12 Para 1 QD. The German Supreme Administrative Court (BVerwG) addressed a requirement of a preliminary ruling to the CJEU in order to clarify whether the German national asylum law is in accordance with the European law (BVerwG 2008). The CJEU decided that it is not. Indeed, according to Article 3 QD, the Member States have the right to introduce or to retain more favourable standards for determining who qualifies as a refugee. But the Court considered the granting of refugee status to those who had committed a crime against peace, a war crime or a crime against humanity not as a “more favourable standard,” but rather an act of undermining the common European refugee law.

There cannot be any doubt that the exclusion clauses of the GRC are a very clear confession to the idea of refugee law as a law in favour of “friends” and not a law in favour of the protection of humanity. However, it is also obvious that this approach is not in accordance with the idea of human rights. According to the human rights approach, any human being is entitled to inalienable, indispensable, and irrevocable human rights regardless of what he has done or what he will do. He is entitled to human rights simply because he is a human being. Even in the case of a war criminal, the right to protection is to recognize if he is in real risk to face an inhuman situation that is contrary to human dignity. From the viewpoint of humanity, it is not an undermining act against the common refugee law, but rather a more favourable standard when a country protects human beings because of their humanity and not only because they can be considered as “friends.”

Conclusion

When a beginner starts to study the international, supranational (European) and national refugee law, he/she is confronted with the monstrous complexity of the matter. The law follows neither clearly the historically traditional conception of partisanship and of solidarity with “friends,” nor the conception of impartiality and protection of human rights. It has some of this and some of that. Therefore, it seems to be totally inconsistent, chaotic and irrational. It does not meet the expectations toward the law, namely consistency and coherence. The final cause of this phenomenon is the fact that since the beginning of the history of refugee law, there is an element of uncertainty and ambivalence involved in the matter. Societies and states that adopted refugee law had never strictly decided which idea should prevail; that is, the idea of solidarity with “friends,” or the idea of humanity and the respect of human dignity.

The complexity and confusion of the current refugee law can also be seen as a necessary step in the right direction, as an answer that is still in the making, even if it imposes more mystery today than it is a signpost.

The present state of refugee law can, therefore, be compared to a boy who is in puberty. He is no longer what he once

was, namely a child, and is still not what he will become, namely a mature adult. Childish and adult impulses pull him back and forth. It is exhausting and demands the patience and perseverance of those who accompany this process. Lawyers who work in the field of refugee law should bear with this matter in the same way, and should make every effort to promote its development.

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