

The pervertibility of refugee status

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The desire to categorise all those seeking refuge throws up continuing challenges to traditions of hospitality and to the realisation of migrants' rights.

There are two types of problems associated with international refugee rights: 'formal' problems referring to the definition of legal concepts relating to refugee status, refuge and asylum; and 'practical' problems linked to implementation of these rights by nation states. On the first question, it is necessary to ask why and how 'refugee status' limits the right to hospitality, as understood by 'asylum'. While asylum has been a practice and a right founded in pre-state customs which can be traced back to ancient traditions, refuge as a legal status was created with the Convention on the Status of Refugees (1951). This change of emphasis, from asylum to refuge, has led to a transformation in the reality of hospitality itself.

The right to refuge is conditional in nature. The UN system instituted the notion of 'refugee status' to define and determine who can gain access to temporary protection, thus abandoning defence of the unlimited and inalienable right to movement and settlement. The definition of refuge promoted by the UN thus leaves a set of fundamental problems associated with hospitality to foreigners (in its fullest sense) in the shadows. This 'binding' international protection system does not defend the human right to migrate and settle but assures the sovereign right to produce refugees, placing the right to receive above the right to be received.

The facility to grant refuge is jealously guarded by states, as part of their sovereign privilege. Universal rights and the international legal framework to protect and validate the right to be a member of a political community do not yet have the legal power to unconditionally guarantee either migration or settlement¹; the best evidence of this can be seen in the proliferation in recent decades of the restrictive

mechanism of detention, founded on the criminalisation of asylum seekers, illegal immigrants and refugees.

The big problem is not so much that states pervert the sense of international refugee law in practice (although in fact they do) but that the legal structure and definition of this contain the latent possibility of perverting its spirit. In order to understand how it is possible that the rights associated with the right to refuge can contain within themselves their own 'pervertibility', the seed of their own destruction and the possibility of culminating in detention, emphasis must be placed as much on the reasons for inclusion as on those for exclusion within the parameters of the legitimate defence of sovereignty (national security and maintenance of public order).

Refugees, alongside the stateless, asylum seekers and the internally displaced, are categories of foreigners who find themselves under the international protection of UNHCR, part of what in recent decades has become known as 'forced migrations'. But what counts as forced or involuntary in the UNHCR framework? The definition would appear to be very clear. The forced or involuntary nature of these migrations refers to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." The definition of refugee hides a 'liberal prejudice' according to which it is possible, desirable and legitimate to differentiate political, religious, ethnic, cultural and sexual issues from economic and social issues. The illusory nature of the distinction between forced and other migration is clearly manifest in the conundrum – for those who wish to ensure the protection of refugees – of 'mixed migrations'.

Voluntary or involuntary?

In recent years, those who must implement effective policies for the protection of refugees at the international level have come up against the problem of mixed migrations: in other words, the impossibility of distinguishing between supposedly 'voluntary' economic migrations and forced and involuntary migrations. But just how 'voluntary' is the departure of a person who lives below the poverty line and for whom crossing the sea might mean a fourfold increase in life expectancy? Is it perhaps because the poor, the hungry and the marginalised do not have a well-founded fear of dying in the midst of absolute poverty? How can it be that when people who have "suffered serious human rights violations" must be protected, the grounds for persecution can immediately be restricted to so few? Extreme poverty and the lack of basic subsistence conditions can also be considered as "serious human rights violations" and an objective threat to "future existence".

The Slovenian philosopher Slavoj Žižek differentiates two types of violence: subjective violence and objective violence.² International refugee law aims for protection against subjective violence, exercised in a visible form by people against other people, and there is a deliberate non-inclusion of objective violence, which is invisible and economic. The Polish sociologist Zygmunt Bauman follows a similar line of thought, maintaining that immigrants and refugees are incarnations of the 'human waste' of the capitalist production process, manifesting what the systems seeks to hide at all costs: the implicit vulnerability of individuals within economic globalisation.³ Both authors show that the main sources of violence and insecurity are 'objective' and 'impersonal' economic processes. In the context of globalisation, the security policies implemented by states are directed towards easy

targets: immigrants, refugees and stateless persons, who become the personification par excellence of evil.

Seekers of refugee status must be able to prove truthfully, convincingly and certifiably – and in the language of the host State – the fears behind their request on the grounds of race, nationality, social group or political opinion. Yet: “A person is a refugee ... as soon as he fulfills the criteria contained in the definition ... Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”⁴ Determination of refugee status, therefore, is a process undertaken and assessed by each State in accordance with its resources, traditions, economic needs and prejudices. This implies that any decision on refugee status is, essentially, political – and ultimately arbitrary. This not only opens the door to perversion of the law (in that a restrictive application of the

law is always possible) but also to its perfection (in that a law dependent upon political decisions is open to interpretation and may become the target of campaigns to broaden its meaning and applicability).

For example, in order to respond to the growing number of internally displaced people, a new category of displaced person was introduced – that of the Internally Displaced Person (IDP), thereby extending UNHCR’s mandate to displaced people who are not however outside their country of nationality.

An interesting example is the introduction of ‘collective’ or ‘prima facie’ determination of refugee status. It is evident that the most urgent cases of refuge are, in general, not limited to one person nor their family but to a wider group of people and to particular political contexts. Although it initially appeared a great advance for applications for refugee status to be evaluated on the basis of each individual case, practice shows (through the delays and discretionary

actions by States in terms of determining refugee status) that it is necessary to reactivate and rethink the political and collective nature of mass migrations of people. Individual rights are much better protected and safeguarded in the framework of broad collectives. On this point, once again, it is necessary to fight against the liberal prejudice that thinks and calculates in terms of individuals. The needs of those seeking refuge should not be considered in isolation, emanating from individuals, but as a global challenge relating to groups of people and concrete political contexts.

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1. For more information see Penchaszadeh, A P & Morales P ‘Refugio y soberanía. Algunas reflexiones en torno de los conceptos y las prácticas del ACNUR’ in *Revista Ágora Internacional*, Año 3 N° 6, ISSN 1850-2040, UNA Argentina, July 2008.
2. Žižek, Slavoj, *Sobre la Violencia. Seis reflexiones marginales*, Editorial Contextos, Buenos Aires, 2009.
3. Bauman, Zygmunt, *Vidas desperdiciadas. La modernidad y sus parias*, Editorial Paidós, Buenos Aires, 2009.
4. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, January 1992, available at <http://www.unhcr.org>