



**TRABAJO FIN DE ESTUDIOS / IKASGAIEN AMIERAKO LANA**  
**GRADO EN DERECHO**

**REFUGEE PROTECTION IN INTERNATIONAL LAW**  
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**ABSTRACT:** The main goal of this work is the analysis of the refugee protection in international law. The primary instrument for the protection of this group is the 1951 Geneva Convention relating to the Status of Refugees, which contains the definition of refugee and its rights. Moreover, the research is based on the study of the asylum that can grant third States and the functions of UNHCR, the Office of the United Nations whose crucial purpose is the protection of refugees. Finally, it would be discussed the actual situation which principally affects to Syrian refugees who try to arrive to Europe.

**KEY WORDS:** REFUGEE- 1951 CONVENTION- ASYLUM- UNHCR

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**RESUMEN:** El presente trabajo tiene como objetivo el análisis de la protección de los refugiados en el derecho internacional. El principal instrumento de protección de este colectivo es la Convención de Ginebra de 1951 sobre el Estatuto de los Refugiados, en la que se contiene la definición de refugiados y los derechos de los mismos.

Asimismo se hará un estudio sobre el asilo que pueden conceder terceros Estados y las funciones de ACNUR, agencia de Naciones Unidas cuya función primordial es la protección de los refugiados. Por último se analizará brevemente la situación actual que afecta principalmente a los refugiados sirios que tratan de llegar a Europa.

**PALABRAS CLAVE:** REFUGIADO- CONVENCIÓN DE 1951- ASILO- ACNUR



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## **ABBREVIATIONS**

ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council of the United Nations
EU	European Union
ICCPR66	International Covenant on Civil and Political Rights 1966
IRO	International Refugee Organization
UDHR48	Universal Declaration of Human Rights 1948
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	Office of the United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugee in the Near East





## I. INTRODUCTION

Nowadays, refugee in international law has acquired huge importance due to the large number of conflicts that cause mass influx of migrants. Every day in all Medias there are news about asylum seekers who wish to arrive to Europe and start a new life.

The principal instruments of refugee protection are the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol. The 1951 Convention has been ratified by 145 States, and 146 States are party of the 1967 Protocol. Originally, the 1951 Convention was applicable to refugees who fulfil the criteria established in other international agreements and to those who comply with the requirements established in the Convention as a result of events occurring before 1 January 1950 and for some States limited to events occurring in Europe. Nevertheless, the territorial and temporary restrictions were eliminated by the Protocol which is an independent instrument, it is not a revision of the Convention. The refugee in international law has a special character because it is necessary to combine the principle of sovereignty of States and humanitarian principles which lead from general international law<sup>1</sup>.

First of all, it is important to distinguish the concept of refugee from other situations than can be similar. In practice it is difficult to make this differentiation because mass influx of persons implies the displacement of people for diverse reasons. The term refugee is a legal concept defined in article 1.A of the 1951 Convention referred to those persons who having a well-founded fear of persecution due to a Convention reason, cannot receive protection from their own Government and have to seek asylum in a third country. On the other hand, economic migrants normally leave their country voluntarily to seek more favourable conditions and they continue receiving the protection of their own State<sup>2</sup>. Moreover, other denominations are emerging, such as the forced migrations, which include those who have to leave their country not only by threat to life and violence, but also by reasons of natural disasters or catastrophes caused by human action<sup>3</sup>.

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<sup>1</sup> To understand the relationship between refugee law and human rights see EDWARDS A., "Human rights, Refugees and the right to enjoy asylum", Oxford University Press, 2005.

<sup>2</sup> See International Organization for Migration, "Glossary on Migration", 2004, page 40.

<sup>3</sup> See International Organization for Migration, "Glossary on Migration", *idem*, page 25.

This work is divided in seven parts. In first place, it is important to analyze the historical context on which the 1951 Convention was created. The World War II cause large number of refugees and States tried to solve this problem through the 1951 Convention. Secondly, is essential to examine the concept of refugee established in article 1.A of the Convention by analyzing the meaning of its elements. In particular, the sense of well-founded fear of persecution, the Convention reasons for being persecuted, the fact of being outside the country of nationality and the lack of protection of the State of nationality.

Then, it is necessary to discuss briefly about the rights and obligations of refugees established in articles 2-34 of the 1951 Convention. Refugee rights depend on the attachment that they have with the asylum State. Specifically, the most important right of refugees is the principle of *non-refoulement*, so it needs a detailed study. This principle prohibits the expulsion of refugees to the frontiers of one territory on which their life or freedom could be at risk.

Hereafter, it is necessary to examine the right to seek asylum. This right is included in article 14 of the 1948 Universal Declaration of Human Rights. States do not have the correlative obligation to grant it, so in practice they try to limit it. Nevertheless, they have always to respect the principle of *non-refoulement*.

Fifthly, the analysis focuses on the causes of cessation and exclusion of the refugee status and the differences between them. Cessation refers to those reasons which cause that the refugee does not have any more the protection of a third State and exclusion includes those ground that make the refugee status unavailable for one person.

Then, I will examine the mandate of United Nations High Commissioner for Refugees, the UN agency specialized on the protection of refugees, and their main functions. Finally, taking into account the previous study of International Law in this field, I will discuss about the EU-Turkey agreement to return refugees from EU to Turkey and its possible violation of the principle of *non-refoulement*.

## **II. THE 1951 CONVENTION: HISTORICAL CONTEXT**

The League of Nations, considered as the precedent of United Nations, was created in 1919 by the Versailles Peace Treaty. After World War I, conflicts among

States continued existing, many cities were destroyed and as a result millions of refugees appeared. During this period, many international agreements for the protection of refugees were adopted, but they were limited to specifically groups of refugees.

The World War II cause a large number of displacements, and the United Nations Relief and Rehabilitation Administration (UNRRA) was created to assist displaced people and help in the reconstruction of war-torn areas. After the replacement of the League of Nations by United Nations Organization, in July 1947, the International Refugee Organization (IRO) was created as a non-permanent organism of UN. Its mandate was limited in time until 30 June 1950, but finally it exercised its functions until February 1952. It was the first time that refugee protection was considered as responsibility of this Organization. When the mandate of IRO finished, the UN decided to establish UNHCR because it was necessary to continue cooperating to solve the problems of refugees<sup>4</sup>.

After the establishment of the High Commissioner, it was necessary to adopt an international agreement which creates obligations for States parties. In this way, the 14 December 1950 the General Assembly approve a Resolution whereby the Conference of Plenipotentiaries was convoked for the purpose of adopting a convention relating to the status of refugees and stateless people.

In 1951 this Conference was celebrated in Geneva with the presence of 26 States. It was not possible to reach an agreement about stateless people, but relating to refugees, the text of the Convention was adopted. Initially, the position of States was divergent in the definition of refugee. The representatives of Western Europe advocated for a wide concept of refugee, while the United States defended a more restrictive concept. Finally, the definition of refugee was conceived in a broad way, but the temporal and territorial limitations to the applicability of the Convention reveal the reluctance of States to create compromises for the future.

### **III. REFUGEE DEFINITION**

The term refugee has different meanings. In an ordinary sense refugee signifies someone who leaves his country due to intolerable conditions or personal circumstances

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<sup>4</sup> GOODWIN-GILL G., "Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees", *United Nations Audiovisual Library of International Law*, 2008.

related with war, persecution or other disasters and needs to be assisted. Nevertheless, States try to limit the concept of refugee to restrict the right of asylum.<sup>5</sup>

The principal instrument of refugees' protection is the 1951 Geneva Convention and its 1967 Protocol. Member States of both instruments agree that the term "refugee" should apply to any person consider refugee taking into account earlier arrangements as a result of events occurring even after 1 January 1951 and without any geographical limitation<sup>6</sup>.

Article 1 of the 1951 Convention defined a refugee as a person that "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 his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Article 1.A.2 of the Convention refers to two different situations. On the one hand, the first part of the article alludes to those persons who have nationality, but don't have the support of their own government. On the other hand, the article refers to stateless people who are unable to return to his country of habitual residence. However, the protection of both groups is similar and both of them have to proof a well-founded fear of persecution for a Convention reason.<sup>7</sup> To understand the sense of the definition is necessary to examine all the elements that form it individually, but lastly the analysis has to be global.<sup>8</sup>

## **1. Well-founded fear of persecution**

Firstly, the asylum seeker has to demonstrate a well-founded fear of persecution that is that the persecution has to be based on objective facts that show the possibility to

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<sup>5</sup> The *Oxford English Dictionary* defines a refugee as a "a person who has been forced to leave their country in order to escape war, persecution, or natural disaster"

<sup>6</sup> Temporary and geographical limitations of article 1.A.1 and 1.A.2 of the 1951 Convention had been eliminated by article 1.2 and 1.3 of the 1967 Protocol.

<sup>7</sup> See Federal Court of Australia, *Savvin v. Minister for Immigration and Ethnic Affairs*, FCA 478, 26/04/2000. (Katz).

<sup>8</sup> See United Kingdom Chamber of Lords (Judicial Committee), *Horvath v. Secretary of the State for the Home Department*, UKHL 37, 06/07/2000.

be persecuted if he comes back to his country of nationality or former residence.<sup>9</sup> Hence, to demonstrate a well-founded fear, the applicant has to combine objective and subjective factors. Subjective factors refer to the fear that the asylum-seeker feels, but this fear has to be based in objective factors because it has to be well-founded.

UNHCR's *amicus curiae* in *INS v. Cardoza-Fonseca* established that the subjective fear has to be based on objective situations, and for it, is necessary to consider the personal experience of the asylum seeker, the intensity of the fear, the history of persecution in the home country and the nature of the harm<sup>10</sup>.

One specific aspect that has been long debated is the case that the well-founded fear can disappear if the person moves to another part of the territory, but without crossing an international border. These cases are problematic if the fear of persecution is limited to a specific part of the country and usually it excludes those situations where the persecution arises from state-agents because they exercise the authority in all the territory. Some States required that the applicant proves that they would not be protected in any part of the territory, but the important question is if the effective national protection can mitigate the fear of persecution.<sup>11</sup>

For example, related to the nature of the harm, in the case *Bolanos-Hernández v. Immigration and Naturalization Service*<sup>12</sup>, the United States Court of Appeals declared that it is not sufficient to demonstrate a general level of violence in a specific country. The applicant has to show a clear probability of persecution or threat to its own life or freedom and is required some factual support, concrete evidences or documentary evidence.

The term "persecution" is neither defined in the Convention, nor in any other international instrument. The persecution covers serious violations of human rights.

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<sup>9</sup> See UNHCR, *Handbook and guidelines on procedures and criteria for determining refugee status*, Geneva, 2011, page 12, para.42: "in general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

<sup>10</sup>See UNHCR's *amicus curiae*, Supreme Court of the United States, *INS v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. 07/10/1986.

<sup>11</sup> See UNHCR Position Paper, *Relocating Internally as an Alternative to Seeking Asylum*, February 1999. In the case of north Iraq, even if the State has *de facto* no control over the territory, it is not possible to argue that the fear of persecution disappear, so an internal resettlement has to be rejected.

<sup>12</sup> See United State Court of Appeals for the Ninth Circuit, *Bolanos-Hernandez v. Immigration and Naturalization Service*, 767 F.2d 1277, 19/12/1984.

Even if a repetitive element is not required<sup>13</sup>, it is generally admitted that a simple discrimination does not create a situation of persecution, but a continued and generalized discrimination can justify an international protection. Some States limit the meaning of persecution to the harm promoted by State-agents, but the Convention does not require this element, so the persecution accomplished by non state-agents is also taken into consideration to grant the refugee condition<sup>14</sup>.

The persecution can also emerge from a law, but in this case it is necessary to distinguish between prosecution through a law of general application and persecution for a Convention reason. Firstly, a person liable of a criminal offence can have a well-founded fear of being persecuted if the punishment is absolutely excessive considering the nature of the crime committed. The text of the law or even its application can be opposed to human rights standards. Usually, national authorities compare the laws or their application with their own legislation and principles contained in international agreements to verify if the law has a persecutory intention. States have to analyze if the person prosecuted do not have access to a fair trial with procedural guarantees, or if the punishment is applied in a discriminatory manner, being higher for some people<sup>15</sup>.

## **2. Reasons of persecution**

The 1951 Convention has identified five causes of persecution, all of them related with the principle of non-discrimination. The same person can be persecuted due to several Convention reasons<sup>16</sup>.

### *2.1. Race*

The definition of racial discrimination of article 1 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination can be considered valid for the purposes of the 1951 Convention. This article states that racial discrimination means any distinction based on race, colour, descent or national or ethnic origin.

Verdirame<sup>17</sup>, taking into account the *Prosecutor v. Rutuganda* case, declares that the Trial Chamber I of the International Criminal Tribunal of Rwanda has shifted to a

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<sup>13</sup> See High Court of Australia, *Applicant A v. Minister for Immigration and Ethnic Affairs*, 24/02/1997 (McHugh J.).

<sup>14</sup> See Supreme Court of Canada, *Attorney General v. Ward*, 2 S.C.R. 689, 30/06/1993.

<sup>15</sup> See UNHCR, *Handbook, op. cit.*, page 14, paragraphs 56 to 60.

<sup>16</sup> See GOODWING-GILL G. AND MCADAM J., *The refugee in international law*, Oxford University Press, 2007, pages 70-90.

subjective position were the most important element to know if there is a persecution based on race is the perception of the community of that racial unit and not the real fact of being part of a racial group. Hence, the perception of the perpetrator of the crime is more important than the authentic ethnicity of the victim.

## 2.2. Religion

Article 18 of the Universal Declaration of Human Rights prescribes that every person has the right to freedom of thought, conscience, and religion, which includes the right to change the religion or belief and freedom to manifest his religion or belief, alone or in community. The same definition is established in article 18 of the 1966 Covenant on Civil and Political Rights. The 1950 European Convention on Human Rights also recognizes the freedom to change religion, but it has to be distinguished from the right to practice religious belief.<sup>18</sup>

In 1981 was adopted The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief by the General Assembly of UN<sup>19</sup>, which prohibits any type of discrimination by States, institutions or individuals and in which the Third Committee suggested to include theistic, non-theistic and atheist beliefs in the expression “religion or belief” of article 1.

## 2.3. Nationality

The inclusion of this reason for persecution seems strange because is odd that one State persecutes its own nationals due to their membership to this State and if one State persecutes nationals of other States, probably they will be protected by their own government.

This reason for persecution is not clear because the term “nationality” can refer to ethnic origin of a person, but also to the link between the individual and the State. However, this cause of persecution is interpreted widely to include origins and membership of particular ethnic, cultural or linguistic communities. For example, article

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<sup>17</sup> VERDIRAME, G., “The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals”, *International and Comparative Law Quarterly*, volume 49, issue 03, July 2000, pages 578-598.

<sup>18</sup> See European Court of Human Rights, *Kokkinakis v. Greece*, [1993] 17 EHRR 397, [1993] ECHR 20, 25/05/1993. The European Court of Human Rights declares that the freedom to manifest one’s religion or beliefs needs to have some limitations in democratic societies because there are many religions and is necessary to reconcile the interests of all the groups and ensure that everyone’s beliefs are respected.

<sup>19</sup> See UN General Assembly Resolution 36/55, *Declaration on the Elimination of All forms of Intolerance and on Discrimination based on Religion or Belief*, 25 November 1981.

27 of the International Covenant on Civil and Political Rights establishes that ethnic, religious, or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion or to use their own language<sup>20</sup>.

The reason for the introduction of this reason for persecution could be related with the principle of nationality, the precedent of the right to self-determination. In this sense, the concept of nationality could be synonymous of “people” or “nation” who claimed for their own forms of government.

#### *2.4. Membership of a particular social group*

The phrase “particular social group” should be given a broad interpretation and should be construed in light of the context in which it appears. “Social group” refers to a collection of persons that are “capable of being associated or united to others”.<sup>21</sup> Hence, the collection has to be recognizable as a group in society because its members share some characteristics which unites them and sets them apart from society.

Usually case law requires that the social group exists independently of the persecution. Dawson J., in *Applicant A v. Minister for Immigration and Ethnic Affairs*<sup>22</sup>, declares that the element that unites the group cannot be the fear of persecution because it would make unnecessary the rest of the Convention reasons. In this case, related to China’s one-child policy, the judge states that persons affected by this policy do not belong to any social group and the government itself do not perceive those persons as a group. The persecution is carried-out in the enforcement of a policy which applies generally.

On the other hand, applicants do not have to prove that all members of the group have a well-founded fear of persecution in order to establish a social group. Indeed, if this were the case, the persecution would be the element that defines the group<sup>23</sup>.

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<sup>20</sup> See United Kingdom House of Lords, *London Borough of Ealing v. Race Relations Board*, 16/12/1971. The court excluded nationality from the term “national origin”.

<sup>21</sup> See Federal Court of Australia, *Morato v. Minister for Immigration, Local Government and Ethnic Affairs*, 02/03/1992. (Lockhart J.).

<sup>22</sup> See High Court of Australia, *Applicant A v. Minister for Immigration and Ethnic Affairs*, 24/02/1997. (Dawson J.).

<sup>23</sup> ALEXANDER ALENIKOFF T., “Protected characteristics and social perceptions: an analysis of the meaning of “membership of a particular social group”, in *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, pages 263-311.



To determine the meaning of social group, attention should be given to the presence of linking factors, such as ethnic, cultural and linguistic origin, education, family, shared values or aspirations. It is also important to take into account the State policy or society attitudes towards a particular class. Thus, the actions of the persecutor serve to identify or create a particular social group in society. To identify a social group, firstly it is necessary to single out the society of which it is part<sup>24</sup>. Hence, social groups can be formed by individuals with innate or inherent characteristics, subjects with characteristics which are adjustable, but express fundamental human rights or are linked to the identity of the person and groups detected by the State as a threat.

### *2.5. Political opinion*

Article 19 of the 1948 Universal Declaration of Human Rights recognizes the right to freedom of opinion and the rights to seek or receive information through any media. Normally, the political refugee is the one persecuted by the State, whose opinions can be considered as a threat to the government. The political opinion can be expressed or not and it does not matter if they have been wrongly attributed to this person. It is possible to understand that a well-founded fear of persecution exists when the person who express their political opinions or others located in the same place have been threaten by the government of the Sate.

Difficulties arise in the determination of the political activity, because it is not easy to figure out when an activity has a political character<sup>25</sup>. In this point, it is necessary to consider political opinions made after the departure, after leaving their country of nationality. The applicant has to demonstrate that the government knows their political opinions, the intolerance of their opinion and that he has a well-founded fear of being persecuted because of their political opinions<sup>26</sup>.

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<sup>24</sup> See United Kingdom House of Lords (Judicial Committee), *Islam v. Secretary of State for the Home Department*, 25/03/1999. (Lord Hoffman).

<sup>25</sup> See Belgium, Conseil d'Etat, No. 135.838, 08/10/2004. The asylum seeker activity is view as political even if he did not had a significant political opinion.

<sup>26</sup> See Council's Common Position 96/196/JAI, 4 March 1996.

In case that the flow of a person from his country of origin constitutes a political crime, and there are possibilities of being persecuted if he comes back, the German doctrine, *inter alia*, understands that it is possible to grant the refugee status<sup>27</sup>.

### **3. Outside the country of nationality**

A petitioner of refuge has to be outside his country of nationality or former residence in case of stateless people, in short, he is a territorial asylum-seeker. This requirement to grant asylum is easy to delimit, but the asylum-seeker does not have had to leave his country due to the persecution<sup>28</sup>. The person can be outside the country owing to other reasons when the events which produce a well-founded fear of persecution, occur. Those persons are called “refugees *sur place*”<sup>29</sup>.

Some authors have questioned the need of good faith in order to grant asylum. In this point, it is necessary to analyze the conduct of the individual before going out of his country, but what is essential is the probability of persecution due to a Convention reason<sup>30</sup>.

### **4. Unable or unwilling to avail himself of the protection of the State**

There are two different positions about this point. Some jurisdictions refer to the State protection inside the country of origin as the essential element, together with the well-founded fear of persecution to grant asylum. Other jurisdictions focus on the impossibility of the external and diplomatic protection to those citizens which are outside their country of origin<sup>31</sup>.

In the definition this requirement follows the phrase “outside the country of his nationality” and the Convention also contains a procedure for stateless people, so the second position prevails and the impossibility of having the protection of the State of nationality means the inability of external protection because the individual is scared of return to his country, where the persecution can happen.

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<sup>27</sup> See GORTAZAR ROTAECHE C., *Derecho de Asilo y no Rechazo del Refugiado*. Dykinson, Universidad Pontificia de Comillas, 1997, pages 128-129.

<sup>28</sup> See UNHCR, “Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees”, April 2001.

<sup>29</sup> UNHCR *Handbook*, *op. cit.*, page 19, paragraphs 94 to 96.

<sup>30</sup> See Federal Court of Australia, *Minister for Immigration and Multicultural Affairs v. Mohammed*, 05/05/2000.

<sup>31</sup> FORTÍN A., “The meaning of Protection in the Refugee definition”, *International Journal of Refugee Law*, Volume 12, Issue 4, 2000, pages 548-576.

## **IV. RIGHTS AND OBLIGATIONS**

### **1. General Considerations**

All the persons who meet the definition of refugee established in article 1.A of the 1951 Convention have the rights recognized in articles 2 through 34 of the Convention. The intention of the Convention was to improve the treatment given to refugees and thus, all obligations created for States are written in a mandatory form.

Article 9 allows States to limit and suspend the rights included in the Convention, but only in exceptional circumstances and in a provisional way. Not all the refugees has the same rights, it depends on the level of linkage that he has with the State in which he seeks asylum. Moreover, refugee rights can be applicable in the same way as aliens generally, or they can also receive a most-favoured-nation treatment. National treatment is applicable to a wide variety of rights, as in the case of right of association (Art. 15), right to engage in wage-earning employment (Art. 17.1) religious freedom (Art. 4), artistic and industrial property rights (Art. 14), access to national courts (Art. 16), rationing (Art. 20), elementary education (Art. 22.1), labour and social security legislation (Art. 24.1) and fiscal charges (Art. 29).

The first group of rights is recognized for all refugees who are physically present in the territory of the State, regardless of its legal or illegal arrival. These rights include the principle of *non-refoulement*, explained below, protection against discrimination, right of access to States' courts, freedom of religion and right to primary education. Moreover States have to proportionate identity papers to those who do not have documentation.

The second group of rights apply to those refugees who are lawfully present in the territory of the State. The phrase "lawfully present" is widely interpreted, including those persons who have applied for being recognized as refugees, but have not yet been admitted. The lawful presence of the applicant finishes when he obtains a decision refusing the refugee status. This concept has to be distinguished from lawful residence. Lawful presence implies admission in the territory for a temporary purpose and considering the immigration legislation. These rights include the right to self-employment, internal freedom of movement and protection against expulsion.

Those who are lawfully staying in the territory of a State, in the sense that they are enjoying asylum in the lines of residence and protection of that State, benefit from the right to move freely in the same terms as aliens in general. They also have freedom of association, protection of labour and social security legislation or intellectual property rights.

Refugees who can demonstrate durable residence in the territory of the State benefit from the right to legal aid and assimilation to nationals in the post for security in judicial proceedings. After a period of 3 years of residence, the refugee has to be exempted to the restrictions imposed to aliens in employment<sup>32</sup>.

## **2. Special reference to the principle of non-refoulement**

The principle of *non-refoulement* is set out in article 33 of the Convention and prohibits States from returning refugees to the frontiers of territories where his life or freedom is at risk on account of race, religion, nationality, membership of a particular social group or political opinion. This principle takes a special place in the Convention considering article 42, which excludes reservations to article 33, so it is an inderogable principle. The UNGA and the Executive Committee<sup>33</sup> have also highlighted the importance of this article and the Executive Committee has emphasized that it is progressively acquiring the nature of rule of international law<sup>34</sup>.

The prohibition of *refoulement* or expulsion refers to all States parties in the 1951 Convention or 1967 Protocol and includes all conducts that can be attributed to those States. The responsibility of “Contracting States” covers actions carried out by an organ of a State which is at the disposal of other State if it acts in the exercise of governmental authority of the State at whose disposal is placed, acts of persons under the authority of the State or who exercise acts of governmental authority and conducts adopted by the State by itself.<sup>35</sup>

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<sup>32</sup> See HATHAWAY C., “Refugee Rights are not negotiable”, *University of Michigan Law School Scholarship Repository*, 2000.

<sup>33</sup>See UNHCR Executive Committee Conclusion No. 79, (XLVII), 1996.

<sup>34</sup>See UNHCR Executive Committee Conclusion No. 25 (XXXIII) 1982.

<sup>35</sup> See Articles on State Responsibility adopted by the International Law Commission of United Nations, 31 May 2001.

The responsibility of Contracting States is not limited to its territory. The important element is if the act can be attributed to one specific State and if it is under its specific control, even if it takes place outside its territory.<sup>36</sup>

The prohibited conduct consists in expel or *refouler* and the words “in any manner whatsoever” reveal that is prohibited any conduct that put the refugee at risk. The Executive Committee has declared that this article applies to those cases where refugees are going to be extradited to a country where they have well-founded fear of persecution.<sup>37</sup>

*Refoulement* also covers rejection at the frontiers. Even if asylum is not an obligation for States, they cannot reject at the frontier those who have well-founded fear of being persecuted without any limitation. States have at least to remove refugees to a third safe country or grant them temporary refuge<sup>38</sup>.

Article 33.1 applies to refugees, taking into account the definition of article 1.A of the Convention, as those having a well-founded fear of persecution, without being necessary a formal recognition of their status<sup>39</sup>. This conclusion comes from article 31 of the Convention, which prohibits penalties in case of illegal entry when they have not been recognized as refugees, but they come within the definition of article 1.A. The expulsion of a refugee would put him in a situation worse than imposing him a penalty, so considering article 31, expulsion of persons not formally recognized is forbidden. This idea has also been repeated by the Executive Committee in several conclusions<sup>40</sup>.

Article 33.1 bans the expulsion to the frontiers of territories where the life or freedom of refugees could be threatened. Therefore, *refoulement* is prohibited to the frontiers of any territory where this risk exists, and not only to the State where the refugee comes from. This article also applies to States where there is a risk of being sent to another country at which the refugee would be at risk for the same reasons<sup>41</sup>.

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<sup>36</sup> See ECHR, *Loizidou v. Turkey*, 23/02/1995.

<sup>37</sup> See UNHCR Executive Committee Conclusion No. 17 (XXXI), 1980.

<sup>38</sup> See UNHCR Executive Committee Conclusion No. 15 (XXX) 1979.

<sup>39</sup> UNHCR, *Handbook*, *op. cit.*, page 9, paragraph 28.

<sup>40</sup> See UNHCR Executive Committee Conclusion No. 81 (XLVIII) 1997.

<sup>41</sup> See LAUTERPARCH E. AND BETHLEHEM D., “The scope and content of the principle of *non-refoulement*: opinion, in *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection*, *op. cit.*, pages 87-177.

Article 33 of the 1951 Geneva Convention prohibits expulsion to territories where life or freedom of refugees would be threatened, so it refers to those territories on which the refugee would have a well-founded fear of been persecuted, taking into consideration the definition of article 1.A, including fear of being subjected to torture<sup>42</sup>.

The last element of article 33 requires that the threat for their life or freedom may be due to their race, religion, nationality, membership of a particular social group or political opinion. In case that the flight of refugees arises from a situation of generalized violence, the Executive Committee has established that States cannot violate the principle of *non-refoulement*, even if the flight is not caused by a Convention reason<sup>43</sup>.

The principle of *non-refoulement* does not apply to those who have been convicted for a serious crime and constitute a danger for the community or to the refugees for whom there exist reasonable grounds for been considered as a danger for the country on which they are seeking asylum.

Firstly, in relation with article 1.F, which establishes the causes for the exclusion of the refugee status, article 33.2 focuses in the threat that the subject can suppose for the community or the country of refuge more that in acts that he could have committed in the past.

Exceptions to the principle of *non-refoulement* have to be interpreted restrictively, considering the particular circumstances of the case or the possibilities of reintegration in the society and have to be applied individually, having regard to his personal circumstances<sup>44</sup>.

The first cause of non application of the principle is that “there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he is.”<sup>45</sup> This provision does not take into account if the refugee is considered as a danger

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<sup>42</sup> See UNHCR Executive Committee Conclusion No. 79, *op. cit.*.

<sup>43</sup> See UNHCR Executive Committee Conclusion No. 6 (XXVIII) 1997.

<sup>44</sup> See UNHCR, “Note on the Principle of *non-refoulement*”, November 1997. “In view of the serious consequences to a refugee of being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33.2 should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and reintegration within society”

<sup>45</sup> See article 33.2 of the 1951 Convention relating to the Status of Refugees.

for a third State or the International Community. The Convention does not specify the standard of proof, nor the gravity of the risk, so States have to evaluate each case but they cannot act arbitrarily.

Moreover, States have to bear in mind the nature of the risk that the refugee would have to face if he is expelled to his country of origin or other territories. In case that a danger to cruel or inhuman treatment exist, *refoulement* is prohibited absolutely and in all cases they have to consider the proportionality among the gravity of the harm that the refugee could suffer if he is expelled, the seriousness of the risk for the security of the country and alternatives to the expulsion.

The second exception provides that the principle cannot be applied to a refugee “who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country.”<sup>46</sup> In this case, the discretion of States is smaller because it requires been convicted by a final judgment, so it is not sufficient with mere suspicion and it is also required that the judgment could not be object of an appeal because it has to be final. The crime committed has to be serious, which includes crimes such as murder, rape or armed robbery, and it has to constitute a danger to the community, in the sense of danger to the population in general.

## **V. ASYLUM**

### **1. The right of asylum**

Asylum is the protection that a State grants to a person who seeks it. There are two types of asylum, the one that a State grants on its own territory and the one that an State grants in embassies and consulates but it is typical of regional Latin-American law<sup>47</sup>, so it is not the object of this work.

Article 14.1 of the Universal Declaration of Human Rights states that “everyone has the right to seek and to enjoy in other countries asylum from persecution”<sup>48</sup>. The drafting of this article was modified because States did not want to recognize a right to be granted asylum, so actually the only right recognized is the one to seek asylum, but

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<sup>46</sup> See article 33.2 of the 1951 Convention relating to the Status of Refugees.

<sup>47</sup> See GOODWING-GILL G. AND MCADAM J., *The refugee in international law, op. cit.*, pages 355-358.

<sup>48</sup> In the same way, see UN General Assembly Resolution 2312 (XXII), 14 December 1967.

not the right to obtain it. Hence, this article does not contain an obligation for States, specially taking into account the non-legal binding nature of the General Assembly Resolutions<sup>49</sup>.

Some authors distinguish between the right of asylum and the right of refuge. The first of them refers to a discretionary power of the State and the refuge is granted to those persons who fulfil the criteria contained in the 1951 Convention, but nowadays both concepts tend to have the same regulation<sup>50</sup>.

The 1951 Convention does not regulate the procedures for granting asylum, thus each State have discretion to apply their own policies and they usually try to limit the access to their territories, but always with respect to the principle of *non-refoulement*.

The right to seek asylum encompasses the right to present the application in the State chosen by the asylum seeker and its individualized assessment. As said above, each State has its own regulation, so it is essential the collaboration of the institutions with the asylum seeker to facilitate that he can follow all the formalities. Applicants are in a vulnerable situation so States have to proportionate some help, such as interpreter when it is needed and the possibility to appeal the decision within a reasonable time.

During the analysis of the application, the asylum seeker has the right to obtain temporary protection, so he can stay in the territory until he receives a definitive decision<sup>51</sup>. In case that the application is presented in the border crossing point, some States retain the asylum seeker in their borders while the application is accepted and until that point, he cannot enter to the territory.

The right to leave any country is recognized in article 13.2 of the 1948 Universal Declaration of Human Rights, but it is not an absolute right<sup>52</sup>. The right to leave imply the obligation of the State not to prevent departures and the obligation to provide travel documents, but there is not an obligation to guarantee entry of non-nationals.

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<sup>49</sup> Moore in *Digest*, ii declares that the right to grant asylum “is to be exercised by the government in the light of its own interests, and of its obligations as a representative of social order”.

<sup>50</sup> See KENNEDY D., “International Refugee Protection”, *Human Rights Quarterly*, volume 8, 1986.

<sup>51</sup> This period of time includes the term on which the appeal is solved. Sometimes the refusal of asylum is accompanied by an order of departure of the territory. If the applicant appeals this decision it would imply the suspension of these orders, but this solution is not always followed by States.

<sup>52</sup> For example, the 1966 International Covenant on Civil and Political Rights in article 12 stipulates that the right to leave any country can be limited due to national security, public order, public health reasons or rights and freedoms of others.



Nevertheless, States have to respect the principle of *non-refoulement* and they are obliged to proportionate asylum procedures and provide protection to these persons who can demonstrate a well-founded fear of persecution.

Furthermore, article 31 of the 1951 Convention recognizes the right to enter to the territory of one State without possessing the documentation required and this State cannot penalize for irregular entry, so at least this State have to recognize a temporary admission while the proceedings for determining refugee status are been performed.

States have to fulfil their obligations derivative from international law in good faith<sup>53</sup>. A State does not have good faith if it searches to avoid the obligations that come from an international agreement which has accepted. Even if there is not an express provision in the 1951 Convention which obliges States to implement proceedings to grant refugee status, taking into account some provisions, such as *non-refoulement*, no penalties for illegal entry, or access to courts, reveal the intention to ensure refugees the maximum exercise of fundamental rights and freedoms. States are responsible for refugees under their jurisdiction and hence, they have to guarantee that they are not returned to those territories where they could be at risk of persecution. Considering the principle of good faith, at least States have to ensure provisional protection or guarantee that asylum seekers are sent to another State that would protect them.

States may ensure access to efficient proceedings for the determination of refugee status<sup>54</sup>. Usually States deny asylum if the person can obtain protection elsewhere. They argue that asylum seekers have to seek asylum in the first non-persecuting State and if they move to another State is a migration act without protection purpose, but States using this practice do not take into account the personal circumstances of the asylum seeker and furthermore, international law does not impose a duty to seek asylum in the first country in which protection is available.

## **2. States policies against asylum**

States use different mechanisms to avoid the entry of asylum seekers, to their territory. Interception refers to those acts implemented by States outside their

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<sup>53</sup> See 1969 Vienna Convention on the Law of Treaties, article 26.

<sup>54</sup> See UN General Assembly Resolution 49/169, 23 December 1994.

boundaries to stop movements of people and avoid that they cross their borders<sup>55</sup>. Interception tries to prevent unauthorized arrivals, but it operates as a restriction for those seeking asylum because States do not distinguish between asylum seekers and irregular migrants. Other mechanism used by States is visa requirement, which sometimes force asylum seekers to enter using illegally migration channels. Moreover, this mechanism creates a domino effect, endangering those States without visa regimes, because they become the objective of asylum seekers<sup>56</sup>.

Another way to prevent illegal entry, but which affects asylum seekers is controls to verify fraudulent travel documents. In this sense, annexe 9 of the 1944 Chicago Convention on the International Civil Aviation imposes to transport agents the obligation of controlling the documentation of travellers, but it is not possible to impose penalties to transport companies. This regulation obliges companies to make functions corresponding to security organs of the State and officers checking these documents do not have sufficient knowledge to identify those persons with protection needs<sup>57</sup>.

Another practice used by States to avoid mass influx of refugees is the adoption of bilateral agreements, which theoretically impose obligations for both parties, but in practice they oblige one country to accept the entrance of refugees who have cross their territory to arrive to the second State. With this practice, States make sure the devolution of refugees, but for being consistent with the principle *non-refoulement* they have to verify that the other State is a safe country.

### **3. Durable solutions**

International law does not oblige States to find durable solutions to the problem of refugees. Refugees have the right to come back to their countries of origin, but they are not obliged to do so, having the right to compensation<sup>58</sup>. Precisely, one of the most important functions of UNHCR is to find durable solutions to facilitate the voluntary repatriation alternative or assimilation in national communities.

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<sup>55</sup> See Executive Committee Conclusion, “Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach”, 9 June 2000.

<sup>56</sup> For example, during the Bosnian crisis in 1992, some countries without visa regimes, such as Croatia and Slovenia were blocked due to mass influx of asylum seekers.

<sup>57</sup> See ORIHUELA CALATAYUD, E., “Asilo y refugio: ¿Solidaridad o seguridad”, *Anales de Derecho*, Nº 22, 2004, pages 198-222.

<sup>58</sup> See UN General Assembly Resolution 35/124, 11 December 1980.

The traditional durable solutions are resettlement, voluntary repatriation and local integration. Local integration is an option that has to be exercised by States, it is a sovereign decision<sup>59</sup> and States are reluctant to grant it.

With regard to voluntary repatriation, considered as the most appropriate solution, it is difficult to verify if the circumstances in the country of origin have changed. In this sense, it is recommended to consider the relationship between both States and visits that the refugee could have done to its original country. Asylum States have to facilitate the return to the country of origin, but the final decision corresponds to the refugee. The State has to inform about changes in conditions in the country of origin. Likewise, the country of nationality has to cooperate to facilitate the return. Nevertheless, in case that the conditions for a well-founded fear of persecution disappear, the refugee does not need the protection of a third State any longer, so he can be required to return like any other foreign national.

Resettlement refers to the transfer of the refugee from a country of first asylum State to another. Resettlement contributes to solidarity and burden-sharing among States.

## **VI. CESSATION AND EXCLUSION OF REFUGEE PROTECTION**

### **1. Cessation**

Article 1.C of the Convention establishes that the Convention

“shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily reacquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

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<sup>59</sup> See UNHCR Executive Committee Conclusion No. 104, 2005.

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;  
Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.”

This article recognize 6 clauses of cessation, which have to be applied carefully, after a complete examination to make sure that it is no more necessary the international protection.

Clauses 1 to 4 refer to voluntary actions of the refugee and their objective is that he could beneficiate from a national effective protection. Interpretation of clauses 5 and 6 is more controversial, because they refer to changes in the circumstances in the country of origin. The Executive Committee has declared that those changes have to be durable and relevant to make the well-founded fear of persecution disappear. UNHCR has advocated a minimum period between twelve and eighteen months before evaluating shifts in the country of origin, but it can differ depending on the process of change in the country of origin. It is also necessary to evaluate the protection of human rights, as well as the particular cause of persecution<sup>60</sup>. Taking into consideration article 35 of the Convention, UNHCR can assist States in the evaluation of changes in the country of origin.

Firstly, States have to assess the situation of human rights, including right to life and liberty, non-discrimination, independence of the judiciary, presumption of innocence or right to freedom of expression. Significant improvements in these areas are necessary to provide a basis for concluding that a fundamental change in circumstances has occurred<sup>61</sup>. Nevertheless, States, when applying ceased circumstances, have to accomplish an individual process. Changes on Fundamental Rights are important, but focus must be upon the individual circumstances that create the well-founded fear of persecution and cause the individual's flight. The refugee has to introduce evidences on country conditions, and those relating to his individual situation. However, burden of proof rests with asylum States authorities because they have access to relevant information and the refugee has the right of international protection. In case of cessation of group-based refugee status, individuals have the

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<sup>60</sup> See UNHCR Executive Committee Conclusion N° 69 (XLIII), 1992.

<sup>61</sup> UNHCR, “Guidelines on the Application of the Cessation Clauses”, 4 September 2003.

opportunity to demonstrate that they are unwilling to return due to their particular situation, but in this case, the burden of proof rests with those who seek the reconsideration of their status and they have to present evidences which show that the risk continues<sup>62</sup>.

Paragraphs 5 and 6 recognize an exemption which applies to statutory refugees recognized before 1951 and it was introduced to cover those who suffer inhuman forms of persecution by fascist regime and were not able to come back to their countries. Furthermore, even if those regimes disappeared, the risk of persecution persisted in hands of non-State agents.

## **2. Exclusion**

Sections D, E and F of article 1 contain reasons for exclusion of refugee status. The first of them excluded from the protection of the Convention those persons who already receive protection of other UN agency<sup>63</sup>. Section E excluded those individuals whose residence state recognizes the same rights and obligations as nationals. For the application of this clause, individuals have to benefit from the right of non being expelled from the territory<sup>64</sup>.

Article 1.F of the Convention declares that the 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“.

This article contains some clauses which make the guarantees of the 1951 Convention unavailable, thus, it has to be interpreted restrictively because it exclude someone from refugee status. An only act of the applicant can be included in more than one of the clauses contained in this article. The correct application of this clause is

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<sup>62</sup> Fitzpatrick J. and Bonoan R., “Cessation of Refugee Protection”, in *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection, op. cit.*, pages 491-544.

<sup>63</sup> Nowadays, the only UN agency with a specific mandate in this regard, is the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA).

<sup>64</sup> See UNHCR, *Handbook, op. cit.*, page 29, paragraph 145.

essential, because individuals would not have the protection of article 33 of the Convention, which contains the principle of *non-refoulement*, explained below.

Article 1F requires “serious reasons” for considering that the person has committed one of the actions detailed above, so it is necessary a case-by-case determination because it is not possible a general restriction of fundamental human rights. Simple suspicions are not sufficient<sup>65</sup>. The tribunal must at list approach the level of proof required for a criminal sentence. The burden of proof lies on the State, who has to demonstrate the existence of serious reasons for considering that the asylum seeker has committed one of those acts<sup>66</sup>.

Related to crimes against peace, war crimes and crimes against humanity, it is necessary to take into consideration the Geneva Convention 1949 and its Additional Protocols 1977, the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Draft Code of Crimes Against Peace and Security of Mankind and the Statute of the International Criminal Court (Rome Statute).

In connection with crimes against peace, considering the 1974 General Assembly Resolution on the Definition of Aggression<sup>67</sup> only leaders of States and leaders of rebel groups in non-international armed conflict which seek secession can commit this crime<sup>68</sup>.

Crimes against humanity are defined in article 7 of the Rome Statute as those acts committed as a part of a widespread attack directed against any civilian population and with knowledge of the attack. War crimes are defined in article 8 and refer to some acts described in the article directed against persons or property protected by the 1949 Geneva Conventions about the protection of victims in international armed conflicts or violation of laws and customs applicable in international armed conflict, or attacks directed to persons that do not take an active role in the hostilities. Article 27 of the International Criminal Courts prescribes that immunities are not applicable, so generally State authorities are responsible for their acts.

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<sup>65</sup> See Federal Court of Appeal, *Canada v. Hussein*, 7 January 2000.

<sup>66</sup> GILBERT G., “Current issues in the application of the exclusion clauses”, in *Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection*, *op. cit.*, pages 425-478.

<sup>67</sup> UN General Assembly Resolution. 3314 (XXIX) define the crime of aggression as the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”

<sup>68</sup> The Kampala Compromise of the Crime of Aggression, 11 June 2010 up-dated the concept of aggression.

With reference to serious non-political crimes outside the country of refuge, first of all, the crime has to be “serious” in the sense of having committed a grave act not a minor offence, even if it is punished as a crime in some legislation. To know if a concrete act can be qualified as a crime, is necessary to take into account international law and the regulation in other legislations. Some elements, such as the proceeding used to arraign the crime or the punishment that follows it, can be useful to define the gravity of the crime<sup>69</sup>. Moreover, the crime has to be defined as “non-political”, in the sense of a common offence, without political purpose. However, perpetrators of political offences can be protected if it is the only way to prevent the persecution of an oppressive regime.

In all cases, it is necessary to search the proportionality between the gravity of the crime committed by the asylum seeker and the seriousness of the persecution. If the well-founded fear of persecution endangers life or freedom of the applicant, the offence committed by the asylum seeker has to be really serious to exclude him from the statute of refugee.

Finally, the crime has to be committed outside the country of refuge, before being admitted as refugee. Common crimes committed in the country of refuge would be held to the criminal jurisdiction in the same way as every person in the country of asylum.<sup>70</sup>

Related to acts contrary to the purposes and principles of UN, not all principles of the United Nations give rise to criminal responsibility for their violation<sup>71</sup>. Some jurisprudence argues that principles of the UN Charter are directed to States, so only people very high in the hierarchy of the State can be excluded of the refugee status taking into account this clause<sup>72</sup>. Nevertheless, Security Council Resolution 1377 declares that non-State agents can fall within this article referring to acts of international terrorism which constitutes a threat to international peace and security.

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<sup>69</sup> See UNHCR, *Handbook*, op. cit., page 14, paragraph 60.

<sup>70</sup> See Federal Court of Australia, *Ovcharuk v. Minister for Immigration and Multicultural Affairs*, 16/10/1998.

<sup>71</sup> Principles of the United Nations are set out in articles 1 and 2 of the UN Charter.

<sup>72</sup> See *Commission française des recours des réfugiés, Brahim*, 29/10/1993.

Article 1F(c) is vague and there is not an international consensus about the meaning of “acts contrary to the principles of the UN”. However, it is clear that it constitutes a limitation, so it has to be interpreted restrictively.

## **VI. THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR)**

In 1946, the UN General Assembly established the International Refugee Organization (IRO) with a limited mandate. In 1950, due to the ending of its mandate and the continuing concerns over refugees, the Statute of UNHCR was adopted by the UN General Assembly as a subsidiary organ<sup>73</sup> by Resolution 438(V)<sup>74</sup>. The General Assembly required the collaboration of States to fulfil the functions of UNHCR, which are providing international protection and seeking permanent solutions<sup>75</sup>. First of all, the competences of UNHCR were exercises over refugees who fulfil the criteria established in paragraph 6 of the Statute, but the UN General Assembly has progressively extended its competences, for example to those persons fleeing their countries due to generalize situations of violence<sup>76</sup>.

### **1. UNHCR functions**

Article 35 of the 1951 Convention declares that States have to cooperate with UNHCR specifically they have to facilitate its work of supervising the application of the Convention.

The High Commissioner is governed by the UN General Assembly and by the ECOSOC.

The Executive Committee was created in 1958, formed by seventy States, provides assistance to solve refugee problems. The work of UNHCR is humanitarian and does not have a political character.

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<sup>73</sup> See article 22 of the UN Charter: “The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions”

<sup>74</sup> See UN General Assembly Resolution 428 (V), 14 December 1950.

<sup>75</sup> See UNHCR Statute, paragraph 1.

<sup>76</sup> See for example, UN General Assembly Resolution 31/35, 30 November 1976.



Refugee protection is the principal function of UNHCR. In this regard, it has to ensure the basic rights to refugees and improve their safety and security<sup>77</sup>, including respect of the principle *non-refoulement* and searching durable solutions in the form of voluntary repatriation, local integration or resettlement. Moreover, UNHCR participate in national status determination procedures, both in individual cases playing an informal role and in those functions attributed by domestic legislations<sup>78</sup>. It is informed about asylum applications and about the development of the process. It also has access to all decisions taken by internal authorities and can interfere introducing its observations.

The High Commissioner has direct contact with refugees and asylum seekers to prevent violations of human rights and also with Governments and NGO's in order to develop and strengthen enforcement of refugees' rights. For the matter, it can advise national parliaments about a decree which can affect refugees during all stages of the process and can take part in judicial institutions in the form of *amicus curiae* briefs.

UNHCR has to promote the conclusion of international instruments for the protection of refugees, promote the admission of refugees and supervise the application of international agreements by States, but it cannot impose direct obligations to States. UNHCR, as a subsidiary organ of the General Assembly has international personality, so it possesses international rights and duties, but their resolutions are not binding for States<sup>79</sup>.

As said above, UNHCR has a supervisory role of the 1951 Convention. In this sense, it is necessary that UNHCR controls State practices, independently and without a political character<sup>80</sup>. Equally, the monitoring agency has to supervise the behaviour of States in an objective and transparent way.

Disputes about the interpretation and application of the 1951 Convention can be solved by the International Court of Justice, but this mechanism has never been used<sup>81</sup>. Moreover, The High Commissioner can request for the International Court of Justice an

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<sup>77</sup> See UNHCR Executive Committee, *Note on International Protection A/AC. 96/930*, 7 July 2000.

<sup>78</sup> See UNHCR Executive Committee Conclusion No. 28 (XXXIII), 1982.

<sup>79</sup> See KÄLIN W., "Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond", in *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, *op. cit.*, pages 613-666.

<sup>80</sup> Even if the work of UNHCR does not have a political character, UNHCR has to follow the directives of the General Assembly and Economic and Social Council. UNHCR Statute, paragraph 3.

<sup>81</sup> See article 38 of the 1951 Convention.

advisory opinion about the interpretation of an aspect of the Convention, with authorization of the General Assembly<sup>82</sup>, but it has neither been used<sup>83</sup>. Another way of monitoring the refugee situation is the Annual Protection Reports that UNHCR has to send to the UN General Assembly. These reports are not published and serve exclusively for internal purposes.

## **VII. BRIEF CONSIDERATION ABOUT ACTUAL SITUATION: SYRIA CIVIL WAR AND EUROPEAN UNION ANSWER**

### **1. Historical background**

Syria civil war started in 2011 after the riots known as “Arab Spring”. In some countries protests give rise to democratization and changes of political regimes, but in Syria the President El Assad regime resisted causing a civil war.

At the beginning the war confronted the government with rebels, an heterogeneous group. Nevertheless, the war has continued with really negative consequences: division of the country, millions of refugees, human rights and *ius in bello* violations. In 2014 took part the Geneva II Conference on Syria with the purpose of finishing the civil war through a peace agreement, but it was unsuccessful.

Nowadays, the territory is controlled by various armed forces, among which the most important are: El Assad government supported by Russia controls the part next to Lebanon, Islamic rebels supported by Al Qaeda controls Aleppo, ISIS which controls the central dessert and the zone that connects with Iraq and finally Kurds control the north and practically is an independent zone<sup>84</sup>.

As said above, the civil war has caused a large flow of refugees to bordering countries, especially Turkey, Lebanon and Jordan. Telling the truth, the European Union has become the main destination of refugees from Syria and other countries, in the last years, considering its closeness to some conflicts and the attitude of some European States, which grant asylum to many refugees.

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<sup>82</sup> Considering article 96 of the UN Charter, the General Assembly or the Security Council may request an advisory opinion of the ICJ about any legal question related with their activities.

<sup>83</sup> See Report of the Sub-Committee of the Whole on International Protection, 25 June 1992. States are reluctant to use this alternative because it does not fit with their sovereignty and is not useful to solve States' differences.

<sup>84</sup> See ORTEGA CARCELÉN M., “La crisis de los refugiados, la guerra siria y la respuesta europea”, *eprints*, 2 November 2015. Available at <http://eprints.ucm.es/33804/1/PracticaRefugiadosMartinOrtegaOct15.pdf>

The European Union has adopted different measures to deal with the arrival of refugees. Firstly, EU borders have been reinforced to avoid mass influx of people. Refugees use two ways for accessing to Europe: by sea, to Italy and by land, arriving to Greece and then moving to other countries. Some borders have been closed, for example, in Hungary.

Moreover, in 2015 the EU has reached an agreement to redistribute refugees among different States<sup>85</sup>. However, this agreement is being accomplished really slowly because States are not fulfilling its promises. In addition, the EU is taking measures to stop the civil war in Syria, but it is necessary a concerted action within the UN and taking into consideration the legal principles of the UN Charter.

## **2. Means of protection within the EU**

In the EU, considering freedom of movement and fundamental values shared by all States, a Common European Asylum System has been established. Harmonisation of standards of protection was required, just like cooperation and solidarity among States.

Since 1999, the EU works to create common norms for granting equal treatment of all refugees, independently of the country on which the application is presented.

The Revised Asylum Procedures Directive (2013/32/EU) improves asylum proceedings, making them quicker and limiting them to a maximum of six months. Moreover, it includes different assistance for persons with special needs.

The Revised Receptions Conditions Directive (2013/33/EU) ensures the protection of human rights. Specifically, it regulates the detention of asylum seekers and individual assessment for vulnerable persons.

The Revised Qualification Directive (2011/95/EU) clarifies the reasons for granting international protection and improves the quality of the proceeding.

The Revised Dublin Regulation (n° 604/2013) improves the process establishing the State which is responsible for examining the asylum application.

The Revised EURODAC Regulation (n° 603/2013) allows the access to a database of the fingerprints of asylum seekers to investigate the most serious crimes.

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<sup>85</sup> See European Union Parliament Resolution 10 September 2015.

### 3. Specific problem: EU-Turkey agreement

In March 2016 an agreement between the European Union and Turkey was approved with the purpose of returning irregular migrants from Europe to Turkey in exchange for 6.000 millions Euros. The agreement also establishes the compromise of strengthening the incorporation of Turkey to the EU<sup>86</sup>.

Considering the text of the agreement, both parts want to give it a binding character, but they have infringe the proceeding regulated in articles 216 *et seq* of the Treaty on the Functioning of the EU about the form in which the EU has to adopt an international agreement. Specifically, article 218 stipulates that is the Council of Europe (formed by the ministers of States member) the institution responsible for the negotiation and conclusion of the agreement. It also requires the approbation of the European Parliament, because it produces budgetary implications. Nevertheless, the EU-Turkey agreement has been adopted by the European Council, formed by Head of States and Governments and some authors consider that it does not follow the proceeding regulated in TFEU<sup>87</sup>.

The agreement also violates the 1951 Convention for the protection of refugees. As said above, article 33 establishes the principle of *non-refoulement*, which means the prohibition of expulsion of refugees to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. In this case, Turkey cannot be considered as a safe country for some reasons. Taking into account reports from international organizations, such as Human Rights Watch or Amnesty International<sup>88</sup>, Syrian refugees can be returned to their State, there are many arbitrary detentions and deportations of refugees who try to cross the border from Syria to Turkey. Furthermore, Turkey has been convicted many times by the European Court of Human Rights for inhuman treatments to refugees<sup>89</sup>.

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<sup>86</sup> See SEUFER G., "Turkey as partner of the EU in the refugee crisis", *German Institute for International and Security Affairs*, January 2016.

<sup>87</sup> See ORTEGA CARCELÉN M., "La crisis de los refugiados, la guerra siria y la respuesta europea", *op. cit.*

<sup>88</sup> See Amnesty International, *Europe's gatekeeper, unlawful detention and deportation of refugees from Turkey*, 16 December 2015.

<sup>89</sup> See *inter alia*, ECHR, *SA v. Turkey*, 15 December 2015.

## VIII. CONCLUSION

After the analysis of the 1951 Convention, it is clear that it is the most important instrument at the international level for the protection and determination of the status of refugee. The 1951 Convention defines the refugee as someone who has a well-founded fear of being persecuted based on race, religion, nationality, social group or political opinion. The definition involves certain limitations, because it does not cover certain categories of people, as for example the gender-related discrimination. This problem can be solved by a wide interpretation of the terms and updating it to the actual situation.

The 1951 Convention enshrines the principle of *non-refoulement*, which implies the prohibition of devolution to a territory where the refugee can suffer persecution. This principle has been recognized as a general principle of customary international law and hence, binding for all States. It also regulates others obligations that States have to assume on which it is not include the obligation to grant asylum.

The system created by the 1951 Convention is based on an individual determination of the refugee status. However, nowadays most of the conflicts that generate situations of persecution affect millions of people, causing mass influx of refugees. Some authors criticise the Convention arguing that it has to be updated to the new situations of refugees, including effective solutions to mass influx of people. Nevertheless, the 1951 Convention is applicable to those situations and it is only necessary a temporary protection while the individual assessment is being solved. In this sense, it is necessary the cooperation and solidarity among all States which allows a burden-sharing among them and in this way avoid the collapse of countries which are adjacent to the territories where the conflicts take place. The problem of refugees affects all the international community in general, so it generates obligations for all the States. Moreover, the protection of refugees is clearly related with the protection of human rights. In this sense, States should respect the rights contained in the 1948 Universal Declaration on Human Rights.

The 1951 Convention has to be interpreted according to the principle of good faith and taking into consideration its context, objectives and purposes. In this sense, the Preamble of the Convention states that the main goal is to ensure that every human being enjoys its fundamental rights and freedoms, without discrimination, specifically

to refugees. Hence, the Convention is a specific instrument for the protection of refugees which has to be interpreted considering the actual situation.

As opposed to the Universal Declaration of Human Rights, which was approved by a UNGA Resolution and hence, it is not binding for States, the 1951 Convention is an international treaty and States have given their consent to be bound by it. Therefore, States should denounce other countries which do not respect some of the principles contained in the Convention. Even if specific mechanisms to demand accountability for infringer States do not exist, the General Assembly has elaborated a Resolution which regulates the responsibility of States for Internationally Wrongful Acts. However, this resolution is not binding for States and in practice, there is not an instrument to demand international accountability to those States who do not fulfil obligations derivative of an international treaty. In this sense, it is necessary the development of this instruments and the willingness of States to make it binding.

Nevertheless, States do not observe basic rights of refugees contained in the 1951 Convention and they do not denounce infringer States because they have fear of reprisals in case that they infringe the Convention too. In view of these circumstances, there is an impunity situation at the international level because States feel fear of being subject of reprisals by other States due to their own actions if they have denounced previously wrongful acts of other governments.

Furthermore, they provide little information to UNHCR about the measures they implement related to refugees and the High Commissioner does not publish this information because normally it affects to those countries which finance the Office of the UN. States should denounce violations of the Convention, but in practice they do not do that, because all of them try to accept the less number of refugees and all of them can violate the legal provisions.

In conclusion, it is necessary the collaboration of all States to provide durable solutions and it is essential their willingness to enforce the provisions of the 1951 Convention. We have to bear in mind that it is possible to change the situation that nowadays are suffering the refugees. To achieve this objective, States have to be conscious of the problem and take into consideration the recommendations made by

UNHCR. Furthermore, States have to address the claims of civil population who are also involved in this event.

## **TABLE OF TREATIES AND OTHER INTERNATIONAL INSTRUMENTS**

- 1945 Charter of the United Nations

\_1948 Universal Declaration of Human Rights

\_1948 Convention on the Prevention and Punishment of the Crime of Genocide

\_1949 Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field

\_1949 Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea

\_1949 Geneva Convention (III) on Prisoners of War

\_1949 Geneva Convention (IV) on Civilians

\_1951 Convention relating to the Status of Refugees

\_1966 Draft Code of Crimes against Peace and Security of Mankind

\_1967 Protocol Relating to the Status of Refugees

\_1969 Vienna Convention on the Law of Treaties

\_1977 Additional Protocol to the Geneva Conventions

\_1988 Rome Statute of the International Criminal Court

\_ Revised Qualification Directive (2011/95/EU)

\_ Revised Dublin Regulation (n° 604/2013)

\_ Revised Asylum Procedures Directive (2013/32/EU)

\_ Revised Receptions Conditions Directive (2013/33/EU)

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