

## **EVOLUTION OF THE REFUGEE CONCEPT**

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### **Abstract**

*At the end of World War II, almost one million uprooted people sought refuge all across Europe. At the same time, as the Cold War quickly became global and independence processes were triggered, the frightening figure for refugees of concern to UNHCR stood at approximately 13 million people. However, the refugee problem has no single solution. On the one hand, in some cases, they seek temporary protection in neighboring countries. On the other hand, there is a need to combine other protection policies for conflict prevention, development aid for democratization, and maintenance of peace. The complexity of today's conflicts and the overlap of different types of population movements (immigration or asylum), have led to confusing terminology and politics. Determining who should be recognized as a refugee has become a complex matter. With a view to encoding, regularizing and creating general frameworks, the international community has created a legal framework for refugees, through the Geneva Convention and its Protocol and, more than thirty years later, through the Cartagena Declaration, which together define the refugee concept.*

**Keywords:** refugees, UNHCR, Geneva Convention, Cartagena Declaration

### **I. Creation of UNHCR**

After the Second World War the refugee problem in Europe and Asia was very serious and needed legal regulation. Thus was born the Geneva Convention relating to the Status of Refugees which ruled that a refugee is a person who has “a well-founded fear of

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persecution because of their race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality and is unable or, owing to such fear, is unwilling to seek the protection of their country”.

It all began with the creation of UNHCR by the United Nations General Assembly, as a humanitarian and non-political organization with two main objectives: on one hand, the protection of refugees (this being its most important function, known as “international protection”, aiming at ensuring respect for basic human rights to refugees, especially that none of them gets returned against their will to a country where they have reason to fear persecution) and, on the other hand, the search of lasting solutions to their problems.

The movements of people in Europe during and following the Second World War raised the need to tackle such a massive upheaval. In 1943 already, still during the War, the **United Nations Relief and Rehabilitation Administration (UNRRA)**<sup>2</sup> was created. It was replaced in 1947 by the International Refugee Organization which was created under the auspices of the United Nations Organization. These organizations were the direct predecessors of UNHCR, created by the UN in 1950, which led the following year to the adoption of the UN Convention on the Status of the Refugees, adopted in Geneva on 28 July 1951<sup>3</sup>.

## **II. The Concept of refugee under the Geneva Convention**

The definition of the “refugee” concept sparked a fierce controversy. For instance, the definition favored in the United States was narrow, whereas in the Western European States accepted a

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<sup>2</sup>[https://en.wikipedia.org/wiki/United\\_Nations\\_Relief\\_and\\_Rehabilitation\\_Administratio\\_n\\_2](https://en.wikipedia.org/wiki/United_Nations_Relief_and_Rehabilitation_Administratio_n_2) consulted on 15 December 2015

<sup>3</sup>The Convention relating to the Status of Refugees was adopted on 28 July 1951 by the United Nations Plenipotentiary Conference on the Status of Refugees and Stateless Persons, convened by resolution 429 of the United Nations General Assembly on 14 December 1950. It entered into force on 22 April 1954, in accordance with Article 43.

broader definition<sup>4</sup>. Finally, a general definition of “refugee” was agreed upon, centered on the “well-founded fear of persecution” that a person may incur.

Although the Universal Declaration of Human Rights of 1948 established the right of everyone to seek and enjoy asylum, the signatory States of the Geneva Convention intended to preserve their sovereign right to authorize the entry into their territories, as one of the key provisions of the Convention was the obligation of States not to expel or return refugees to another State where they may face persecution, assuring thus a much needed balance between the obligation of a State to ensure refugee protection and also to protect itself from potential threats that refugees could generate.

Therefore, Article 1 of the Convention, as amended by the 1967 Protocol, defines a refugee as a “*A person who owing to a 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.*”

In order to understand the context in which such a definition was agreed, one must analyse the definitions refugees were given prior the Second World War, in times of peace (1920-1935) and in times of pre-conflict (1935-1939), as this process took place in the framework of *ad-hoc* solutions adopted by the international community to respond to humanitarian crises produced by historical events that generated a large people displacement.

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<sup>4</sup>THE REFUGEE CONVENTION 1951 - The Travaux Préparatoires analysed with a commentary by dr Paul Weis, page 18, document available at <http://www.unhcr.org/4ca34be29.pdf>

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From 1920 until 1935, refugees were defined almost conventionally and on a case by case basis based on a group criteria, especially taking the fact of being a member of a particular group of people deprived of the protection of their home States<sup>5</sup>. This criterion appeared simultaneously with the first legal instruments of protection of minorities, as, mainly in Europe, after the First World War, the League of Nations signed several treaties with the defeated countries to the national minorities protection<sup>6</sup>.

Under the sign of that period, the League of Nations applied the same criteria in the first legal-political international actions for the protection of people forced to leave their places of origin to seek protection elsewhere. The legal concept, such as defined, was useful to protect those groups who have been forcibly displaced. From the beginning, for the recognition of refugee status, a person should be outside the limits of the country of origin, as, at that time, the international humanitarian protection has been mediated by the political concept of national sovereignty.

The second criterion adopted before 1951 was one based on the social perspective and covered the pre-Second World War period, *i.e.* the years 1935 to 1939. During this time, the international community had to protect people independent of any group setting, but who had been affected by political or social events. This criterion also represented a breakthrough in enabling the protection based on the initial group criterion, but extended to all of people that had in fact

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<sup>5</sup>HADDAD, Emma *Who is (not) a refugee?*, available at <http://cadmus.eui.eu/bitstream/id/1769/sps2004-06.pdf/>, consulted on 27 December 2015 (see also Hathaway, James C., *The Law of Refugee Status*, Toronto, Butherworths 1<sup>st</sup> Edition 1991, pp. 3-6; see also Gill. G - *Who is a refugee?*, available at <https://is.muni.cz/el/1423/podzim2005/EVS139/Gill.G.Who.is.a.refugee.pdf>, consulted on 23 December 2015).

<sup>6</sup>Such treaties were signed with Poland, the Serbo-Croatian-Slovenian State, Albania, Bulgaria and other States, these instruments containing dispositions for the protection of ethnic, linguistic and religious minorities, as well as introducing international responsibility with regard to the general protection of people.

lost the protection of their home States, the establishment of this criterion being undeniably influenced by the rise of Nazism in Germany since 1933, which triggered massive persecutions, primarily based on political criteria and then on ethnic ones.

Therefore, one could say that, with the 1951 Convention relating to the Status of Refugees, a universal instrument of protection of this nature was established for the first time, thus allowing anyone, regardless of their belonging to a specific social group or their political or social orientation, to benefit from international protection. The criteria of the 1951 Convention clearly take into consideration all past experiences and demonstrate that building the legal concept of defining the status of refugees has no longer an *ad-hoc* basis, but is universal. This universality was applied in the legal sense of the refugee definition term, even though, from a political point of view, States set the time and geographical limits to their obligations, *i.e.* the Convention initially applied only to events that occurred before 1951 in Europe, in the hope that the problem of refugees was located and could be solved within a certain time, which unfortunately never happened. This is the reason for which the geographic reserves (Europe) and temporal ones (events occurring before 1 January 1951) were eliminated by the 1967 Protocol, which finally universalized international protection.

As a general consequence, one could say that the 1951 Convention defines the refugee as any person who, as a result of events occurring before 1 January 1951 and fear of being persecuted for reasons of race, religion, nationality, social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail of the protection of that country. The concept of refugee incorporates both national and racial elements as determinants of persecution and also the events that triggered the persecution.

Finally, another significant innovation brought by the Geneva Convention, that represents an originality which remains the only

example to date in the field of international law, is that it turns fear into a legal category, since the persecution need not be effective, but the real threat and fear justify international protection of that person<sup>7</sup>. This criterion is absolutely consistent with the protection of human beings and the preservation of fundamental rights, since it does not act only upon damage but also by preventing a person to suffer violations of their fundamental rights.

### **III. The 1984 Cartagena Declaration on Refugees**

Nevertheless, despite the clear breakthrough that the Geneva Convention and its 1967 Protocol represented for refugees and human rights protection, the situation in the seventies and the eighties, mainly in Africa and South America, made it necessary for the international community to rethink the concept of refugee. In the late seventies, the massive presence of refugees in Central America acquired unprecedented proportions. Neither Governments nor host communities were familiar or prepared for this type of emigration, unprecedented in Latin America, characterized by containing within them the most marginalized sectors of the population with a significant presence of indigenous populations of the Guatemalan Maya in Mexico and Nicaraguan Miskitos in Honduras, with more than two million people being uprooted by the bitter civil wars that were fought in El Salvador, Guatemala and Nicaragua.

Thus, a new category of refugee surfaced, as the people most directly affected by these conflicts were mainly from poor rural communities, leading that all Central America was affected by these refugee movements which, in addition to deriving from regional conflict, contributed to it. Besides the three countries ravaged by the conflict

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<sup>7</sup>Carneiro, Perreira W - A DECLARAÇÃO DE CARTAGENA DE 1984 E OS DESAFIOS DA PROTEÇÃO INTERNACIONAL DOS REFUGIADOS, 20 ANOS DEPOIS, in DIREITOS HUMANOS E REFUGIADOS, Coord. Cesar Augusto S. da Silva, Ed. UFGD 2012, ISBN: 978-85-8147001-6

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(Belize, Costa Rica and Honduras), States such as Mexico and the United States were also involved in the refugee problem by hosting a large number of asylum seekers and migrants coming from those conflict areas.

The acknowledgment of such a massive problem in Central and South America generated within the international community the Cartagena Declaration on Refugees<sup>8</sup>, which established a unique and pragmatic mechanism that has renewed international protection in Latin America and influenced the other countries, starting from a completely different basis to define refugee status<sup>9</sup>.

The concept introduced in Cartagena has its inspirational sources in the Organization of African Unity Declaration on the specific problems of refugees in Africa and the Pact of San José, Costa Rica. In Africa, with the independence process, a supportive mechanism to accommodate refugees was established, based on large and generous criteria, mainly as the result of foreign occupation of the colonial metropolis and thereby supporting the populations fighting for independence and self-determination. However, with the independence process ended, these broad criteria were falling out of favor and were not usable, until they were refurbished by the Cartagena Declaration.

The prospect of Cartagena Declaration is not a simple extension of the concept of refugee, since the declaration itself does not introduce new elements to the individual perspective of the refugee as per Geneva Convention, but starts this process of defining refugee

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<sup>8</sup>Available at <http://www.unhcr.org/45dc19084.html>, consulted on 14 December 2015

<sup>9</sup>LA CRISIS DE LOS REFUGIADOS CENTROAMERICANOS - in MEMORIA DEL VIGÉSIMO ANIVERSARIO DE LA DECLARACIÓN DE CARTAGENA SOBRE LOS REFUGIADOS, available at <http://www.derechoshumanos.unlp.edu.ar/assets/files/documentos/reflexiones-sobre-la-aplicacion-de-la-definicion-ampliada-de-refugiados-corcuera-cabezut.pdf>, consulted on 1 December 2015

status from a completely different basis, as it takes into account the objective situation of the political and social environment that can affect anyone regardless of their individual attributes and scopes<sup>10</sup>.

As such, the broader refugee definition given by the Cartagena Declaration is that of people *“who have fled their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”*<sup>11</sup>.

The fact that this Declaration is not legally binding became a reference point in the area of refugee protection, especially in Latin America but not only, as many States have inserted in their own national legislations the outcomes of this document.

Moreover, the Latin America States have continued to work under the same auspices that led initially to the Cartagena Declaration and, 30 years later, in the 2014 Brazil Declaration, other aspects related to refugees, such as gender issues, as well as the problem of unaccompanied children and adolescents in Central America were highlighted, as well as the need and importance of eradication of statelessness.

Consequently, despite the institutional and international efforts, it can be noticed that the current governance structures are ineffective in solving this global problem. The violence accompanying the trafficking in persons, as well as the flows of migrants, generates the need for an overall decrease of vulnerability of migrants and the strengthening of the justice and security systems of the States, innovative solutions being necessary for the migration problem.

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<sup>10</sup>*Ibid.*

<sup>11</sup>*“considere también como refugiados a las personas que han huido de sus países porque su vida, seguridad o libertad han sido amenazadas por la violencia generalizada, la agresión extranjera, los conflictos internos, la violación masiva de los derechos humanos o otras circunstancias que hayan perturbado gravemente el orden público”*



### **Instead of conclusion**

Within the framework of international relations, one realizes today the need for a convergent implementation of the International Law of Human Rights, International Refugee Law and International Humanitarian Law so that a positive and significant change in the lives of refugees, stateless and displaced persons could be realized and that the 1951 Geneva Convention really achieves its ends.

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