Combatants and armed elements as refugees. The Interplay between International Humanitarian Law and International Refugee Law.

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Introduction: Other perspective at the interplay of International Humanitarian Law and International Refugee Law: people who take part in hostilities.

The study of the interplay between international Humanitarian Law (IHL) and the International Refugee Law (IRL) becomes a classic for the doctrine and also for the institutions involved in this problematic. Above having lost validity along the years, it is an area that keeps highly topical, not in vain, the XXVII Round Table organised by the International Institute of Humanitarian Law (San Remo, Italy), in cooperation with the International Committee of The Red Cross (ICRC) dedicates again a monographic panel to this matter. In this qualified forum, the search of the necessary complementary legal system in situations of violence is described again as one of the most important challenges of the discipline[1].

Since the armed conflicts became the main cause found in the origin of forced population movements, the analysis of concurrence, compatibility, progressive and systematic development of both legal systems in order to offer a better protection to victims and the success of the effective application of its laws, have been unavoidable.

[1] ICRC. *"International Humanitarian Law and Others Regimes. Interplay in situations of violence",* November 2003. International Institute of Humanitarian Law, ICRC. XXVII Round Table on Current Problems of International Humanitarian Law

However, in this exposition we will not focus on the traditional perspective of study[2]. During the last twenty years, investigations about the interplay of rules of both legal systems have been developed from the point of view of the civilian population where the refugee status could appear. This way, if a special emphasis was put on the IHL it was supposed *grosso modo* to be identifying applicable dispositions to displaced people in time of armed conflict and difficulties derived from it[3]. Although the IRL tries to provide protection specifically to those groups, it cannot be forgotten that one of its dispositions, especially article 9, permits the State to withdraw its obligations, in time of war, establishing exceptional measures[4]. That is why the IHL is so important, as a complement and the advantages of a simultaneous application can be seen.

Whether on the contrary, the special emphasis was put on the IRL, the problematic was focussed on analyzing the compatibility of the concept of refugee with respect to the situations of armed violence; there has not been another challenge of the discipline during the latest years than adapting the legal framework of Geneva to the so-called «refugees of war» or «refugees ad hoc», people forced to flee due to dangers and consequences derived from armed conflicts but who do not feel a well-founded fear of persecution by any of the causes envisaged by the 1951 Convention.

On the contrary, in this communication the interplay between both legal systems will be analysed, not only with respect to the victims of the conflict but relating to those people who take part in hostilities[5]: combatants in case of international armed conflicts and armed elements in non international armed conflicts.It has to be determined under

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[2] See *inter. alia,* KÄLIN, W. <<Fligts in time of war>>, en *International Review of the Red Cross,* vol. 83, nº 843, September 2001, pp. 629-650.

[3] Rules of IV Geneva Convention are especially important, in particular the Articles 35 to 46 (aliens in the territory of a party to the conflict) ó 70.2 and the Article 73 of the I Additional Protocol (refugees and stateless persons). Concerning internally displaced persons in non-international armed conflict, Article 3 common, Article 4.4 of IV Geneva Convention and the Articles 13-18 of II Additional Protocol are applied. In fact, apart from the prohibitions of *refoulement* (Art. 45.4 of IV Geneva Convention), international humanitarian law does not contain special guarantees for refugee; therefore, they are treated like other civilians in time of war.

[4] In particular, the Article 9 of 1951 Convention provides that: << Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security>>.

[5] As an example of this second perspective of analysis, we recommend: JAQUEMET, S. <<The croos–fertilization of international humanitarian law and international refugee law>>, *International Review of the Red Cross,* vol. 83, nº 843, September 2001, pp. 651-664. JAQUEMET, S. *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or Non– International Armed Conflict Become an Asylum Seeker,* Legal and Protection Policy Research Series, Department of International Protection, PPLA/2004/01, June 2004.

what circumstances a combatant or armed element could arrive to claim the refugee status and take advantage of it. Firstly, it is important to highlight the absence of compatibility between IHL and IRL statutes, in short, between the statutes of «combatant or armed element» and the «statute of refugee». According to Refugees Law, the refugee status has a humanitarian character and it is essential that people who want to claim for it, have laid genuinely arms down in order to begin the process. It will deals in consequence with the concepts of ex-combatant and ex-armed elements *de iure and de facto.* Really, many of the people who have been part of the hostilities can pretend to continue its activities by using the territory of the host State with military aims «forced recruitment, militarization of camps, invasion, etc»; that is why it is essential to proceed to make an exhaustive distinction between those who really laid arms down and have the need of protection and those who pretend to make a fraudulent use of the asylum institution.

At the same time, conflicts of an international and non international character have to be distinguished. In the first case, as far as the person who has been part of the conflict has left the country or has been captured, acquires the statute of prisoner of war. The case of ex-combatants is a paradigmatic example of the complementary application of the IHL and the IRL, these areas are completed in this particular case consolidating the right of prisoners of war to seek asylum, this right can be seen in the first section of this study.

Once recognized the right to claim asylum, we will study in the second section the circumstances under which a prisoner of war can become beneficiary of the statute of refugee. Overcoming the double refugee filter of the inclusion and, especially in these circumstances, the exclusion test will be a requirement *sine qua non.*

In contrast to the case of the ex-combatants, preserving the right for claiming protection of armed elements, who were part of the hostilities of a conflict with a non international character and who have crossed an international border in the search of asylum, is extremely complex. Particularities in these conflicts at which it is so difficult to distinguish armed elements from the civilian population and the nature of the movement that usually is produced in mass, in emergent crisis with serious problems of assistance, protection and security for the victims and countries of asylum, place the right of the ex-armed elements to claim asylum in a situation which overcomes the problems of a mere legal complementarity to become a theoretical and practical

challenge that will be noted in the third section of the study. Knowing the suspicion climate around the institution of asylum as a consequence of the so-called «war against terrorism», the problems to this respect have become worse.

Ensuring internal security of the States in general and civilians in particular has a legitimate and unquestionable interest; achieving its development without detriment to human rights like asylum, a right that equally enjoy victims of the conflict and those who took part in hostilities and have laid down arms, it is the real challenge that proposes this communication.

I. The right of the Prisoner of War to claim asylum

It has been said before that, with respect to the people who have taken part in hostilities, a double statute is not usually enjoyed, neither IHL nor IRL (only in the case of civilian population can coincide the statute of refugee). While they are part of the conflict, they enjoy the statute of combatant which is not compatible with the statute of the asylum seeker that demands, as previous requirement having crossed and international border and having abandoned definitely arms. Consequently, only disarmed and arrested soldiers (or deserters and traitors) can arrive to claim asylum and after that, enjoy the Statute of refugee.

Once the combatant has been captured by a State enemy, he acquires the statute or prisoner of war under III Geneva Convention (art.12). Specially, prisoners of war can claim for the right to asylum if they feel their lives or freedom at risk due to the reasons protected by the Convention on the Statute of Refugees, at the end of the hostilities they have to be repatriated to their place of origin where they have a fear of persecution.

With the cessation of hostilities, the State has to proceed to repatriate prisoners and, usually they want to exercise their right to return home. However, according to political circumstances arisen from the resolution of the international conflict, the ex-combatant can harbours serious fears of being persecuted in his country. The former soldier can be seen by his compatriots as a hero or as a traitor[6], a coward co-worker of the enemy, so that, in that circumstances, repatriation supposes a violation of the principle of *non refoulement* (Art. 33.1 of the 1951 Convention), cornerstone of the IRL

[6] JAQUEMET, E. <<The croos–fertilization of international humanitarian law and international refugee law>>, *op. cit.,* p. 659.

and inflexion point of the need of compatibility of the duties of the States by virtue of both legal systems. See at length:

Whether it deals with deserters, former combatants who do not want to return to their country of origin and who have laid down arms, they can claim for asylum immediately and they do not have to be interned (an individual study will be initiated case by case), but when it concerns an former combatant, captured or found by a third country, usually he is interned. Such case has not a sanction character but it is a preventive measure in order to avoid that former soldiers find themselves involved in military activities.

At the cessation of the hostilities, the internment of prisoners of war ends and they must to be released and repatriated. Remember that those who enjoy the statute of prisoner of war do not enjoy the international protection guaranteed to the asylum seeker or refugee, due to its incompatibility. However, by virtue of the application of a more favourable statute, prisoners of war could choose the protective framework of the IRL, it cannot be forgotten that in the application of the article 9 of the 1951 Convention, the States are entitled to suspend the determination of the statute of refugee in time of war[7], in consequence at the end of the conflict the claim could be submitted, then it will also be the time when they feel the danger of persecution, just before proceeding to their repatriation.

The prisoners of war who refuse to be repatriated at the cessation of the hostilities, could claim asylum and get a new statute under the IRL. This is the right moment to process; just when the cessation of the conflict has been produced and the peace is signed there is an inflexion point and the responsibility move from the IHL to the IRL.

According to article 118 of the III Geneva Convention, prisoners of war will be released and repatriated, with no delay, after active hostilities reach an end. There is

[7] The purpose of Article 9 is to permit the wholesale provisional interment of refugees in time of war, followed by a screening process. There may also be cases where the status of a person possessing a nationality is not clear, i.e., the authorities are not convinced that he is a *bone fide* refugee. This authority does not prevent the application of Article 35 (supervision by the UN High Commissioner for Refugees). See: ROBINSON, N. *Convention Relating to the Status of Refugees. Its History, Contents and Implementation,* Institute of Jewish Affairs, New York, 1953, p. 95. About the *travaux préparatoires* of Art. 9 see: WEIS, P. *The Refugee Convention, 1951. The Travaux Préparatories analysed, with a commentary by the late Dr. Paul Weis,* Cambridge University Press, 1995, pp. 60-75.

only one exception in article 109 of the same Convention, with regards to the sick or wounded prisoners of war who are temporarily exempt of being repatriated.

Although looking at the literal precept and its *Travaux Préparatoires*, the will of the prisoner does not seem to be taken into account to this respect, nowadays; the only option is making compatible such exigency of repatriation with the standards of the international law and the principle of *non refoulement* in particular[8]. According to this principle of customary international law —applicable to any State Part or not of the Geneva Convention— even qualified as *ius cogens*, it encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the border of territories where his/her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the border or indirect *refoulement*[9].

The international contemporary law, in a brilliant exercise of convergence of laws between the IHL and the IRL, makes a more adequate interpretation of the article 118 which is resumed by the International Committee of the Red Cross:

> «1. Prisoners of war have an inalienable right to be repatriated once active hostilities have ceased. In parallel (…) it is the duty of the Detaining Power to carry out repatriation and to provide the necessary means for it to take place (…)
> 2. No exception may be made to this rule unless there are serious reasons for faring that a prisoner of war is himself opposed to being repatriated may, after his repatriation, be the subject of unjust ground of race, social class, religious or political views, and that consequently repatriation would be contrary to the

[8] For more exhaustive analysis of the Article 118 of III Geneva Convention, see: JAQUEMET, E. <<The croos–fertilization of international humanitarian law and international refugee law>>, *op. cit.,* pp. 660-664. The historical context of the norm and its current interpretation according to some cases of contemporary international Law are studied.

[9] See the excellent study of Professors Lauterpacht and Bethlehem in the context of Global Consultation on International Protection organised by UNHCR in commemoration of the fiftieth anniversary of the Geneva Convention relating to the Status of Refugees of July the 28th day of 1951. LAUTERPACHT, E.; BETHLEHEM, D. *The Scope and Content of the Principle of Non-Refoulement*, June 2001.

UNHCR supports the main conclusions of the study: *The Principle of Non-Refoulement, Global Consultation on International Protection,* Cambridge Expert Roundtable organised by the United Nation High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, Summary Conclusions, para. 4-5.

general principles of international law for the protection of human being. Each case must be examined individually[10]».

The right interplay between the article 118 in the IHL and the principle of *non refoulement* in the IRL is crucial to make effective the right to claim asylum of the prisoners of war when they are released.

This inflexion point that produces the cessation of the conflict also supposes a change in the role of the State that is responsible of the old soldiers however, acquires new responsibilities derived in this case from the IRL and in the application of the principle of *non refoulement*. The State stops being a Detaining Power competent to assure the effective enjoyment of the statute of the prisoner of war to become the State responsible for issuing the claims of those who have become asylum seekers.

The new responsibilities are also unavoidable. It can be said that in the light of the principle of *non refoulement* and international laws which help to prevent violations of fundamental human rights, several laws of the general international laws force the States to receive the asylum claims issued before the authorities and consequently based on good intentions that prevail at the performance of every international obligation for not establishing disproportionate, unreasonable or unfair obstacles that prevent the claim to be rightly presented, received of considered. The asylum seeker has at the same time the right to have an examination of the asylum claim (by a State Part of the Geneva Convention) and to be given the statute if requirements established to be obtained are met. The right to obtain refuge is a subjective right, internationally attributed to individuals by conventional laws that States Part must respect in a direct and immediate way in its internal laws[11].

Whether the State could not start to process the asylum claim, it would have to facilitate the access to the UNHCR or the resettlement of a third State that could proceed to study it. In general armed conflicts of international character, the ICRC in line with its humanitarian and protection functions, have replaced Detaining Power in its responsibilities with respect to the prisoners of war who claim for protection before

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[10] ICRC. *Convention III relative to the Treatment of Prisoners of War, 12 august 1949, Commentaries:* www.icrc.org.

[11] *Vid. inter. alia,* MARIÑO MENÉNDEZ, Fernando M. <<*La singularidad del asilo territorial en el ordenamiento internacional y su desarrollo regional en el derecho europeo*>>, (Mariño Menéndez, F.M. edit.) *El Derecho internacional en los albores del siglo XXI. Homenaje al Profesor Juan Manuel Castro-Rial Canosa,* Editorial Trotta, Madrid, 2002, pp. 467-469.

their State of origin. The interplay between both humanitarian agencies is not only detrimental but it is coherent with the need of avoiding gaps in the protection.

Identical responsibilities can be advocated not only from the States at war but also from the neutral State at which the ex-combatant could have been interned. In the application of laws shown in the V Hague Convention and in the international customary law in general, as it happens with Detaining Power, the State or Neutral Power has the obligation of disarming and restricting the movement of combatants in order to prevent seeing them involved in hostilities. Although its statute is not formally the statute of prisoner of war, it is guaranteed an equivalent treatment —unless that according to article 4.2.B they resolve the concession of a more favourable treatment— including the principle of *non refoulement* and reception of the asylum claim at the end of the conflict, previously to the repatriation.

II. Fundamental requirements: «Inclusion and exclusion tests»

Once analyzed the procedural moment to enforce the asylum claim and the subject responsible for starting the process, the most important criteria are studied, those requirements *sine qua non* that have to be satisfied and that make them become authentic refugees. It has to be kept in mind that a person becomes a refugee as soon as he or she fulfils all the requirements stated in the definition, what takes place necessarily before being determined officially its condition. So recognition of the condition of refugee has not an establishing character but declaratory[12].

It is a question of overcoming the double filter of the «inclusion test», criteria to which a person must answer in order to be considered as a refugee, in a second place and specially in the case of persons who took part in armed conflicts, the «exclusion test» through which it can be proved that there are no reasons to consider that the subject could have committed any serious criminal act listed in the article 1F of the 1951 Convention.

With respect to the inclusion test, it will have to be proved under the article 1.A2 of the Geneva Convention that the prisoner of war is a person who

[12] UNHCR. *Handbook on Procedures and Criteria for Determining Refugee Status under 1951 Convention and 1967 Protocol relating to the Status of Refugee,* Geneva, re-edited 1992, para. 28.

<<(…) 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 (…)>>.

Without focussing on the wide and complex problems of interpreting the reasons shown and so the meaning of persecution[13], the truth is that the States are obliged to receive the claims of asylum presented before its authorities and to examine them in a procedure of individual eligibility designed in the internal legal system —the Convention does not provide any disposition to this respect but so it is deduced from its articles and it has been interpreted like this by the State Member—; the person has the right to have a petition examined and be authorised the statute if, as it has been pointed out, fulfil the requirements established to obtain it, that is to say, it results a person individually persecuted by the exposed reasons —a right to obtain refuge like this, it is not guaranteed nowadays, it is still in the hands of the supreme will of the State—.

The refuge is confirmed as a particular kind of asylum given to an alien persecuted for specific reasons determined in Geneva. The reasons are characterized by the individualized persecution that they fear to suffer. A study of the objective circumstances will be made (persecution reasons) and a study of subjective circumstances (well-founded fear).

According to social and political circumstances arisen from the resolution of the conflict, the prisoners of war could be afraid of suffering persecution because of any of

[13] The fact that the interpretation of the definition is not a direct competence of any international mechanism instituted to this effect by the Convention has become a differing description of the refugee according to the State affected and it is a competence of its organs the interpretation of the term. In any case, the High Commissioner in the application of its statute and competencies established to this effect in article 35 of the Convention has assumed that competency of controlling the performance and searching of a harmonized application of it, especially through the work undertaken by the Executive Committee.

See: UNHCR. *Handbook on Procedures and Criteria for Determining Refugee Status under 1951 Convention and 1967 Protocol relating to the Status of Refugee, op. cit.*; Conclusions of the Executive Committee from 1975; and finally, the most important Conventions: GOODWIN-GILL, G.S. *The Refugee in International Law*, Clarendon Press, Oxford, 1996. GRAHL-MADSEN, A. *The Status of Refugee in International Law*, 2 vol.: A.W.Sijthoff-Leyden, 1966-1972. HATHAWAY, J. *The Law of Refugee Status*, Butterworths. Toronto-Vancouver, 1991.

the five reasons listed; however, it can be usual due to their condition of former soldiers the «membership of a particular social group».

It is, with no doubt, one of the most complex reasons, the least clear reason of the Convention[14]. Without going into the vicissitudes of its practical application; note that a particular social group usually is composed by people with a similar background, habits or social status. They are people who share common characteristics which make them different from the others, apart from the risk of being persecuted (in our case, the quality of being former combatants, prisoners of war)[15]. According to the High Commissioner, the membership to that particular social group can be a fundamental cause of persecution because the loyalty of the group before the public powers is unreliable —think about the consideration of the prisoners of war like collaborators of the State enemy where they were interned— because it is considered that political opinions, the background of its members or the mere existence of a group like that, are an obstacle for the policy of the government[16].

However, the prisoners of war who meet such requirements will be beneficiary of the refugee status provided that the exclusion clause of the article 1F of the Convention is not applicable.

Through the exclusion test, the enjoyment of international protection is prevented to some people who, due to their behaviour, are not considered to be worthy of such protection or safeguard. Such impediment becomes a qualified sanction for

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[14] The fifth ground of persecution was introduced with little explanation by the Swedish delegate as a last minute amendment to the Refugee Convention: << (…) experience has shown that certain refugees had been persecuted because they belonged to particular social group (…) such cases existed, and it would be as well mentioned explicitly>>.

Difficulties in its interpretation have been manifested again, recently marked by the study made to this respect in the context of Global Consultations. *Vid.* UNHCR. *Membership of a Particular Social Group,* Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, Conclusion nº 1. The discussion was based on a background paper by Professor Aleixader T. Aleinikoff: ALEINIKOFF, A.T. *"Membership in a particular social group": Analysis and Proposed Conclusion,* Background Paper for the "Track Two" of the Global Consultation.

[15] It refers to "a group of persons all of whom share a common, immutable characteristic". That characteristic might be "an innate one such as sex, colour or kinship ties" or "a shared past experience such a former military leadership or land ownership". *Case of Matter of Acosta, Board of Immigration Appeals (United States), apud*., ALEINIKOFF, A.T. *"Membership in a particular social group": Analysis and Proposed Conclusions, op. cit.,* p. 333. Jurisprudence analyzed in the study does not depict any contemporary case of soldiers member of a particular social group.

Vid. UNHCR. *Membership of a Particular Social Group,* Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, Conclusion nº 5.

[16] UNHCR. *Handbook on Procedures and Criteria for Determining Refugee Status under 1951 Convention and 1967 Protocol relating to the Status of Refugee, op. cit.,* para. 78.

those who committed serious crimes beyond direct consequences of the same tort, it is considered that they violate the interests of the international community itself and, therefore, in any case such people can be honoured with any protection. The humanitarian nature of the statute of refugee is not compatible with behaviours of such importance. The exclusion clause is the most extreme sanction envisaged by this legal instrument. Due to this, it is fundamental to know exactly which the punished behaviours are, that is to say, which are the reasons that can make a person be excluded from the international protection.

What it is out of interpretation and appreciation margin of the State is that these people, despite the application of the exclusion clause still count with determined safeguards. They are protected against any *refoulement* which could violate the principle of *non refoulement* and, with the article 3 of the European Convention on Human Rights (ECHR) and the Convention against Torture, they have a right for not being returned to their country where they could fear from suffering torture, inhuman or degrading treatment, to this respect there is an important jurisprudence to guarantee it. This obligation that becomes a customary law and has a character that can be advocated as *ius cogens* does not admit any kind of abrogation or exceptions, in consequence, the prisoner of war in that frame of mind could not obtain the statute of refugee but if they run such risk, it will be prohibited to make effective the article 118 of the III Geneva Convention and proceed to their repatriation.

The Article 1 f of 1951 Convention provides that:

<<The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

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

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

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

The article 1F a) it refers to the so-called core of the offences of the International Law: crimes against peace, war crimes, crimes against humanity and the crime of genocide. According to this law, its interpretation has to respond to the definition

included in the international instruments drawn up in order to punish such crimes. In this sense, it is essential to add to classic conventions on this matter, the new developments of rules produced to this purpose recently either by a jurisprudence via (national or international) or by a conventional via. In this section it has to be specially mentioned the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and the Statute of International Criminal Court.

Concerning the article 1F c) according to the dispositions of the Charter — addressed to the States as individuals in their coexistence with the rest of the international community—, it makes difficult to interpret in which cases an individual can commit a criminal action which violates the aims and principles of the Charter and consequently, be excluded from the international protection[17].

The commission of acts contrary to the purposes of the United Nations usually coincides with the commission of crimes against peace, war crimes, crimes against humanity or crimes of genocide. In any case, the vague remark of its terms and consequently, the appreciation margin which allows the States, has to be corrected with the general principle that imposes a strict and motivated interpretation.

Finally, the supposition that more difficulties has generated, the article 1F b) the main dilemma rests on specifying what has to be understood by «serious non political crime» and therefore, on existing differences between common serious crimes and political crimes, crimes that are supposed to be a persecution threat of the individual after the commission of them and his subsequent need of protection.

In general, it has been considered that in order to distinguish between both concepts, their nature will have to be studied and the aim of it, having a tight reasons

[17] The Travaux Préparatoires reflects a lack of clarity in the formulation of this clause introduced by the Yugoslav representative. By their nature, it is suggested that these purpose and principles can only be violated by persons who have been in a position of power in their countries or in state-like organisation «The case-law of some States proves that it has been used whit officials and with individuals when they are guilty of human rights violations». The broad wording of Article 1F c) is rarely used. *Cfr.* PETERSEN, M. <<Exclusion Clauses>>, en *Refugee and Asylum Law: Assessing the Scope for Judicial Protection*, International Association of Refugee Law Judges. Second conference, Nijmegen, January 9-11, 1997, p. 89 .This study is of great importance because of the practical perspective of analysis of more of sixty refugee law judges.

In the opinion of Professor Goodwin-Gill the UN Charter has a dynamic aspect, and in certain areas the practical content of the declared purposes and principles must be determined in the light of more general development. See: GOODWIN-GILL, G.S. *The Refugee in International Law, op. cit.*, p. 109.

link, not admitting in any case the perpetration of atrocities[18]. This way, especially cruel acts, even if they were committed with a political aim, could be qualified as common serious crimes. This is worthy for the people who took part in the crime and also for instigators. With this description they would be excluded automatically from the international protection and according to the circumstances of their country —taking into account limitations established by the principle of *non refoulement*—, they could be expelled or extradited if a claim to this respect exists.

The aim consists in striking a humanitarian balance between potential danger for the refuge community and the needs of the individual who has fled in view of serious dangers. According to basic rules of the general theory of the Criminal Law which are common to every State in our orbit, every personal circumstance will have to be considered —aggravating and alleviating circumstances— in order to appraise the crime committed.

Among serious common crimes and political crimes, terrorist acts that often enjoyed the clemency of the States depending on the purpose pursued (think of those crimes committed to protect human rights or fundamental freedoms and not for reasons of pure own interests or profit motives) are the objective of the international community that does not pretend to admit any barbarity acts no matter the reasons of the fight. In a matter in which terms are not clearly defined, where there is a great appreciation margin by the States, where reaffirming the mainstays of the protection of the asylum seekers in a wide sense results more urgent than ever: presumption of innocence, proportionality and so on; that terrorism has become the biggest threat of the new millennium international community, it can suppose or it is already supposed to be the new threat for the asylum institution.

The terrorists attracts in the United States last September 11th, have supposed a sharp shock, the consequences of which were swift to react. The terrible terrorists attacks not only left an indelible trace at human level in the whole world but they also have had important and unavoidable consequences for the International Law and in particular, for our matter. The general perception of the potential danger of migrations for internal security of the States has increased, what produces a legitimate political

[18] UNHCR. *Handbook on Procedures and Criteria for Determining Refugee Status under 1951 Convention and 1967 Protocol relating to the Status of Refugee, op- cit.,* para 152.

reaction and more restrictive rules justified in the fight against the international terrorism[19].

After the serious terrorist attacks, the asylum seekers have become suspicious due to the simple fact of having entered illegally in the country or being a member of the same ethnic group or religion of those who have committed crimes. The «benefit of the doubt» and the inclusion as a principle, have given place to the criminalization of refugees and the exclusion as a starting point. The lack of precision in the term terrorism can suppose that some acts usually considered common of dissident groups could be qualified of serious common crimes favoured by this threat climate.

This situation produced important reactions in the UNHCR that, never wavers in his endeavour of condemning every attempt to life or freedom of people, must have attracted the States to avoid insofar as able this new perception of suspicion over those who are forced to exile[20].

The message has been clear: «the law is enough». A right application of the exclusion clauses results quite adequate for the terrorist's activities not to be received through the international protection which secures asylum. If the former combatants or

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[19] In the context of International Law, see, as an example, some provisions of the Resolution 1373 (2001) of United Nations Security Council.

<<The Council of Security acting under chapter VII of the Charter of the United Nations,

Decides that all States shall: 2 c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; Calls upon all States to: 3 f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seekers has not planned, facilitated or participated in the Commission of terrorist acts; G) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing request for the extradition of alleged terrorists; 5. Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorism acts are also contrary to the purposes and principles of the United Nations>>. UNITED NATIONS. SECURITY COUNCIL. *Resolution 1373 (2001),* S/RES/1373 (2001), 28 September 2001.

Especially the last provision has been disputed by doctrine: see ALLAIN, J. <<The ius cogens nature of non-refoulement>>, en *International Journal of Refugee Law,* vol. 13, nº 4, 2002, pp. 533-558.

In the context of European Community Law: The rules established as an answer to the compromise of anti-terrorist fight have adopted a much territorialized strategy which can make difficult the access to the territory of the asylum seeker. Assistant Professor Morgades goes beyond, in relation with the development of a common European system of asylum. Especially with respect to the creation of a subsidiary protection, the attempts and subsequent policy has been and inflection point manifested in a restriction of rights. *Vid.* MORGADES GIL, S. <<Consecuencias del desorden internacional en la formulación de un régimen armonizado de protección subsidiaria en la Unión Europea >>, *Paper presentado en el II Congreso de Jóvenes investigadores en Derecho de Inmigración y Asilo,* Barcelona, 17-18 diciembre de 2004, pp. 13-19: see: www.ub.es/facdt/nov.336.html.

[20] UNHCR. *Addressing Security Concerns without Undermining Refugee Protection-UNHCR perspective*

armed elements in non international conflicts had committed terrorists' attacks in the course of their military activities they could arrive to have place not only relating to the article 1 b) but relating to the three suppositions.

The refugees and asylum seekers *bona fide* must not be victims of the latest events at the same time that the States must not make easy in any case the access to the territory of those who support or commit terrorist's acts.

It is an obligation to highlight the eventual risks of deviation in the application of those rules as a consequence of the crisis in which we are immersed.

III. - The challenge of armed conflicts of non international character.

The interplay between the IHL and the IRL becomes a challenge, particularly in relation with armed conflicts of non international character.

The legal deficiencies covered by the Humanitarian Law concerning internal conflicts, give a special importance to the convergence of rules of other legal systems that could contribute to avoid gaps in the protection. Whether legal difficulties are met with particularities inherent to this type of conflict, it results really difficult in theory and in practise to delimitate the right to asylum in those armed militias that fight against governmental forces violating legality in force: the armed elements.

The fragmented nature of conflicts in disorganised or failed States that gives place to an increase of armed elements makes difficult to proceed to the unavoidable distinction of them with the civilian population. The situation becomes considerably worse when the conflict produces a mass movement. The mixed character of the exile includes people who are in need of protection and other people who do not deserve it, risking the civil character of the asylum and taking into account difficulties of these cases in order to carry out an adequate determination of the statute, it becomes a serious threat for the security of the States that see themselves tempted to take preventive measures against the consequences of asylum, refusing it.

The same basis has to be taken as starting point, with respect to combatants in international armed conflict: the principle of incompatibility of statutes between the IHL and the IRL when it deals with people who have taken up arms. An armed element cannot claim asylum and therefore the refugee (the so-called refugee warrior has not a

right of action in the IRL[21]). Only the ex-combatant who have renounced definitively to arms can claim asylum and having passed the double filter of the inclusion and exclusion tests, becoming a refugee. Here it is the main and more difficult responsibility of the host State in relation with exiles in its territory: reliable identification between civilian population and those who have taken part in hostilities, that is: *screening and identification of military elements from the civilian population.*

The members of non governmental armed groups or local militias usually appear merged with civilian population and rarely they wear uniforms or distinctive. When they cross an international border, often they introduce themselves before the authorities as civilians. It is impossible for the host State to distinguish them when they arrive rounded by women and children. However, the presence of armed elements supposes an important threat, not only for the internal security of the settlement but according to the magnitude of the presence and the consequences of it, it can suppose a threat to peace and region security.

In this situation the State not only has the right but the duty to adopt the necessary measures to separate and disarm armed elements in order to prevent its territory to be used to commit subversive actions against other State[22].

The Executive Committee of UNHCR:

> <<*Acknowledges* that host States have the primary responsibility to ensure the civilian and humanitarian character of asylum by, inter alia, making all efforts to locate refugee camps and settlements at a reasonable distance from the border, maintaining law and order, curtailing the flow of arms into refugee camps and settlements, preventing their use for the internment of prisoners of war, as well as through the disarmament of armed elements and the identification, separation and internment of combatants>>[23];

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[21] JAQUEMET, S. *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or Non–International Armed Conflict Become an Asylum Seeker, op. cit.,* p. 21.

[22] Jacquemet underlines that while this possibility was not so significant at the adoption of 1951 Convention, it was prominently on the agenda of the 1969 OUA Convention. See Preamble and Article 3. JAQUEMET, S. *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or Non–International Armed Conflict Become an Asylum Seeker, op. cit.,* p. 36.

[23] EXCOM. *Conclusion on the civilian and humanitarian character of asylum,* nº 94 (LIII), 2002, para. a).

However, Professor Fernandez Sanchez points out that the scope of the obligations for maintaining the civilian character of the movement camps affects, beyond the territory of the State to all factions in conflict[24].

In the application of the article 11 of the V 1907 Hague Convention (designed to be applied to international conflicts, although by virtue of developments of the Law of Neutrality it has been considered to be applicable to any type of conflict[25]), the Neutral Power is obliged to separate armed elements from refugees and keep the troops far away from the hostilities. Such internment pursued a double aim of guaranteeing security either in the site or the people protected in it, and so preserving the civilian character of the asylum at any time and place. The application of this measure of internment should agree with the international standards of protection of human rights, especially in relation with the possibility of finding child soldiers. The forced recruitment of minors, although it is a prohibited by the International Law goes on taking place, specially in the framework of internal armed conflicts, in these cases and in the application of the Optional Protocol to the Convention on the Rights of the Child, it has to be understood that children who are forced to take up arms although they do it on their own free will, are considered as minors not responsible for their action, so that this not hamper the enjoyment of protection in the asylum framework[26].

Only when these internees genuinely, sincerely and durably lay down their arms can claim asylum and are considered refugees after passing the double refugee test of inclusion and exclusion. This asylum concession will not be able to be qualified as a non arbitrator action by the State of origin. The Preamble of the 1951 Convention shows the desire of << (…) all States, recognizing the social and humanitarian nature of the

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[24] FERNÁNDEZ SÁNCHEZ, P.A. <<El caracter civil del refugiado>>, en (Fernández Sánchez editor), *La revitalización de la Protección de los Refugiados,* Universidad de Huelva Publicaciones, Huelva, 2002, p. 52.

[25] See. JAQUEMET, S. *Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or Non–International Armed Conflict Become an Asylum Seeker, op. cit.,* p. 31.

[26] Recruiting a child under 18 years old is a violation of the International Law, without taking into account if the minor is volunteer or was recruited, it is an international or civil war or he is part of the governmental army or not. The optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: A/RES/54//163, 25 May 2000 entered in force on 12th day of February, 2002.

In case of violation of the IHL by these minors during hostilities, it has to be taken into account that they could be judged by the Juvenile Court of the host State, as the International Criminal Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime (Art. 26 of Roma Statute).

problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States>>. In short, asylum is a humanitarian, amicable and peaceful action.

Separation of armed elements from the civilian population, the protection of the civilian character of the asylum and the internment of armed militias become more complicate when former soldiers who claim for protection are part of a mass influx of displaced people.

The mass movements of population in an emergency crisis usually are characterized by a mixed nature. We can find people who escape due to a persecution motivated by any reason envisaged in article 1 A2 of the 1951 Convention; people who face serious dangers entailed to armed conflicts but who do not bring cause of an individualized persecution; armed elements who have fled as a consequence of a fear of persecution for having been part of the military uprising against the established power; but also armed elements who do not pretend to stop their military activities and seek protection in asylum fraud or those who have committed serious crimes and do not deserve such safeguard.

Although the presence of the last groups supposes a serious threat for the security of the host State, it cannot be forgotten that in the case of mass movements, admittance is always put before separation. The duty of separating armed elements from civilian population, the disarmament and internment are not the priority but providing assistance and protection to all those who flee. The first responsibility of the host State in application of the principle of *non refoulement* has to be to allow the entry in its territory and giving, at least, temporary admittance for which international assistance could be required (considering n_o4 of Preamble of 1951 Convention and the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugee and Stateless persons, Recommendation D).

However, even if a collective decision *prima facie* is applied or temporary protection models, it will be proceed as soon as possible to the separation and disarmament of the armed elements for which, in most extreme cases, the Refugee International Law allows the adoption of essential measures for the national security — like those restrictive measures on freedom— in serious or exceptional circumstances (Art. 9 of 1951 Convention).

According to Professor Fernandez Sanchez, it would have to be established a clear procedure for disarmament and subsequent separation of armed elements; and another procedure of individual character for each armed element can be submitted to the established procedure of individual eligibility. Therefore, the UNHCR should reinforce its protection staff without prejudice of its assistance staff in these situations, always in cooperation with the host State and the laws of the territorial State where it is located, unless the protection areas are delimited and these are a responsibility of the competent international organization. Especially the High Commissioner should be coordinated with the ICRC[27].

It is known how difficult it is the individual determination of the statute of refugee in situations of mass movements. The individualized procedure which has been produced in Europe often has run the risk of collapsing before situations of massive exile. However it has not to be a protection paradise for those who having committed serious crimes had to be the object of the exclusion clause. So, for instance in the Communitarian Europe, the Directive 2001/55/EC has been adopted by virtue of which a model of temporary protection is designed for cases of mass movements of people who cannot return to their country of origin[28]. Once decided to activate the dispositive of the Council, the State Members are obliged to provide asylum to displaced people in its territories, and once in there proceed to the application of the exclusion clause that, in analogical application with respect to the International Refugees Law, incorporates in article 28 «that almost reproduces the article 1F and 33.2 of the 1951 Convention». Consequently, the concession of asylum in a situation of mass movement has not to be equivalent to impunity. Moreover, whether the State suspects about the perpetration of such crimes, it is obliged to restrict them exercising the *ius puniendi* on the movement. By virtue of the principle of *aut debere aut iudicare,* either surrendering the exiled

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[27] FERNÁNDEZ SÁNCHEZ, P.A. <<El carácter civil del refugiado>>, *op. cit.,* p. 58. It is stressed in *The Niebla declaration on Revitalizing the Protection of Refugees,* Declaration nº 3: <<States, international institutions, including The United Nations High Commissioner for Refugees, and in general all persons responsible for armed elements must preserve the civil nature of asylum. To safeguard the physical security of refugees, displaced persons, and humanitarian personnel, armed elements must be kept separate from civilian population. This separation requires the cooperation of the entire international community>>. See the *Niebla Declaration* in: www.unhcr.ch and FERNÁNDEZ SÁNCHEZ, P.A. (editor), *Revitalization of the Protection of Refugees, op. cit.,* p. 345-347.

[28] Council Directive 2001/55/EC dealing with the minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States to receive such persons and bearing the consequences thereof. *OJ* L 212 de 07/08/2001, pp. 0012-0023. According to art. 33, the Directive did enter in force the same day of its publication in the *Official Journal of the European Community*

person if the other State request him or judging him under its national system. In case of the most serious crimes, the national repression is joined to the international repression of the International Criminal Court.

Epilogue: The need to find balances between security exigencies and the unavoidable protection of human rights.

The years following the Cold War are characterized by a serious humanitarian crisis produced in the context of armed conflicts, specially with a national character in a terrible framework of massive and repeated violations of human rights by governmental factions or armed elements of non governmental character, perpetration of summary executions, forced disappearances, torture and other inhuman or degrading treatment, arbitrary arrests, deliberate attacks against non combatants in the middle of systematic plans of ethnic cleansing that involve deportation and forced mass movements in a flagrant violation of the IRL. The serious humanitarian crisis in the region of Darfur is a tragic example of the current situation[29].

These non structured conflicts in which an unusual violence is used against victims, specially civilians, where arms and non conventional methods are used to fight, including terrorism, have brought to the international community to take up the fight to avoid any escape mean of its authors from the justice, putting the right to asylum between the objects of prevention and control.

However, it has to be highlighted that not every people who have taken part in hostilities as a combatant or armed element, have to be excluded from the refugee

[29] In this internal conflict located in occidental Sudan, guerrillas and militias integrated by combatants with Arab ancestry with the support of the government fight, with a wild use of the violence which often includes the ethnic cleansing of the black and poor majority. In the report of the Commission on Human Rights these attempts are described as possible war crimes or against humanity. COMMISSION ON HUMAN RIGHTS, *Report of the United Nations high Commissioner for Human Rights and Follow-up to the World Conference on Human Rights. Situation of Human Rights in the region of Sudan*. E/CN. 4/2005/3, May 2004. In fact, Security Council Resolution 1564 adopted on 18 September 2004 under Chapter VII of the United Nations Charter requested the Secretary-General to "rapidly establish an international commission of inquiry in order to immediately investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred and to identify the perpetrators of such violations with a view to ensuring that the those responsible are held accountable." On 7 October 2004, the Secretary General announced the establishment of a five-member Commission on Inquiry and named its members: Mr. Antonio CASSESE – Chairperson; Mr. Mohammed FAYEK; Ms. Hina JILANI; Mr. Dumisa NTSEBEZA; Therese STRIGGNER SCOTT.

statute *per se*. As we could see in previous lines, former soldiers can become asylum seekers provided that they have laid down their arms definitively and can acquire the statute of refugee if they pass the double filter of inclusion and exclusion clauses. Although contemporary reality shows numerous cases of combatants who can have committed serious violations of the HIL, acts that deprive them of such humanitarian statute, this decision has to be made case by case, applying the principle of restrictive interpretation of the exclusion clauses. Even in situations of mass influx of displaced people, the European Directive on Temporary Protection is a clear example of analogical application of the main principles of the IRL in front of the belief that the asylum can suppose a form of impunity.

The most important legal challenge that the international community has to face actually can be resumed in the search of new laws to stop violence preserving the existing laws on protection provided by the International Law. Reaching a balance between the unavoidable obligation of the State of guaranteeing its security and the security of its citizens without damaging the protective legate in human rights is the fundamental landmark of the preceding XX century. This challenge is just a reflect of the usual dichotomy between the two constitutional principles of the International Law: sovereignty of the States and recognition of the international protection of human rights of which probably Professor Carrillo Salcedo —object of the homage during this days— is who, to the greatest extend and special brilliance, has deepen in the study of this dialectics of international order. Make use of his scientific legate for this unfinished task.