



15 July 2021

P210714

## Critical analysis of the law’s response to asylum seekers who are in danger from non-state actors

**Fadel Abdul Ghany**

### Contents

First: The consistency of international law as asylum seekers fleeing from outside the state, deserve refugee status. ....	2
Second: Response of International Humanitarian Law to the Rights of Persons Seeking Asylum Fleeing from Outside the State .....	6
Third: Response of International Human Rights Law to the Rights of Persons Seeking Asylum Fleeing from Outside the State .....	7
Fourth: Response of International Customary Law to the Rights of Persons Seeking Asylum Fleeing from Outside the State .....	10
Fifth: Asylum seekers fleeing from non-state groups, The Syrian Conflict Practical Application, Case study .....	11
Sixth: Conclusion .....	13

## **First: The consistency of international law as asylum seekers fleeing from outside the state, deserve refugee status.**

The Convention relating to the Status of Refugees<sup>1</sup> was a qualitative leap in relation to the legal status of refugees, providing, for the first time, a legal definition of refugees in international law in its first article<sup>2</sup> as being a person who, "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, 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."

The Convention initially defined a specific geographical area for refugees from European States, since this was the largest refugee population after World War II, but the framework of the geographical and temporal agreement was expanded to include all refugees in the world in a Protocol to the Convention in 1967<sup>3</sup>.

The term "persecution"<sup>4</sup> has recently been defined in the Statute of the International Criminal Court 1998 as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." This includes, "The persecution of any specific group of people on political, racial, national, ethnic, cultural, religious, gender or other grounds that is universally recognized as unacceptable by international law." This is considered a crime against humanity, and is the basic justification for qualifying individuals, according to the prior definition, to refugee status.

The 1951 Convention saw an ambiguity in the definition of the term refugee. This ambiguity prompted some States to interpret it as including individuals fleeing serious persecution by or permitted by a state government. As such, this interpretation does not include persons who flee in small or large groups because of war or loss of security, but only individuals, with some States asserting that it includes only civilians fleeing persecution committed by the national Government, or any other groups or militias supported by the Government to establish them as contingent forces of the regular forces. Any force whose formation the State contributes to or brings from outside the state to support its formal armed forces is effectively an adjunct, meaning that it does not include civilians fleeing persecution by non-state actors such as rebels or terrorists or any other non-state group or militia. This uncertainty may or may not be accidentally ambiguous, as it may have been intentional in the minds of those responsible for formulating this definition at the time, meaning that they only intended it to include those fleeing persecution by the State.

A number of legal experts around the world have noted this ambiguity and the inadequacy in this definition of a refugee and have become aware of not including conflicts specifically in the 1951 Convention. This led to several regional attempts to formulate a definition, which would be

<sup>1</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

<sup>2</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1

<sup>3</sup> Convention Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) UNTS 606

<sup>4</sup> Rome Statute of the International Criminal Court 1998, Article 7 (2-g)

simultaneously more comprehensive on the one hand, and more specific on the other, and would reflect the circumstances experienced by the region in question, all of which contributed to the advancement of the debate on the concept of defining refugee status. Gradually and collectively developed as regional initiatives, these contributed to the crystallization of this concept better, and the following sequence shows the most prominent stages of discussion and evolution of the concept up to the current time:

#### **A- Organization of African Unity:**

On September 10, 1969, the Organization of African Unity (OAU) drafted a treaty, "The OAU Convention on the Problems of Refugees in Africa"<sup>5</sup>. This took place against the background of the internal conflicts and widespread civil wars in Africa after the Second World War and the subsequent departure of the colonialist occupying forces. The treaty defined the term refugee in its first article<sup>6</sup> and adopted the provisions of the 1951 Convention. However the treaty clearly added in the second part of its definition: "The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

In this definition we see a clear expansion of the previous one, with factors added, such as; Occupation, foreign domination, events threatening public security in part or all of the country, these are likely references to situations where rebels or other non-state actors gained control over parts of the territory of the State in various African nations following the outbreak of non-international armed conflicts<sup>7</sup> or civil wars, thereby causing intimidation and terrorizing civilians, a feature common to most conflicts, which has also been clearly seen in the Syrian conflict, lead civilians to flee outside the border, where they must be granted asylum.

#### **B- Cartagena Declaration on Refugees 1984<sup>8</sup>:**

The same issue has been addressed in Latin America, which has seen internal non-international wars and civil strife that have displaced millions outside their country. In November 1984, the Conference on the International Protection of Refugees in Central America, Mexico and Panama adopted the Cartagena Declaration on Refugees, who were defined as follows: "Persons fleeing their country because of threats to their lives, security or freedom due to acts of violence, external aggression, internal conflicts, general human rights violations, or other circumstances which have seriously violated public order in their country."

<sup>5</sup> Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45

<sup>6</sup> Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, Article 1

<sup>7</sup> Cullen A, The Concept of Non-International Armed Conflict in International Humanitarian Law (Cambridge University Press 2010).

<sup>8</sup> UNHCR, Cartagena Declaration on Refugees, 22 November 1984.

This declaration provided the most comprehensive of all definitions given by previous conventions, including refugees fleeing foreign aggression, internal conflicts and fugitives from widespread human rights violations. It is true that the Carthage Declaration does not constitute a treaty being simply a declaration specific to a particular time, place and geographical region. However it is respected throughout Central America and has been included in several legislative articles in El Salvador and Mexico, becoming undoubtedly part of a regional refugee protection system that complements the international system and, in its entirety, reflects the concept of international law on refugees.

### **C- Mexico Plan of Action 2004:**

The Mexico Declaration and Plan of Action<sup>9</sup> recognized, for the first time, the compulsory nature of the principle of non-refoulement, including non-refoulement at the border, and non-prosecution when entering the country illegally. The plan, which recognized the existence of mixed migratory movements<sup>10</sup> containing persons who may qualify for refugee status, was approved by most South American countries (and adopted by 20 countries).

### **D- Brasilia Declaration 2010:**

This declaration<sup>11</sup> emphasized several provisions relating to refugees and concerning the situation of asylum-seekers fleeing persecution by non-state groups. The Brasilia Declaration, which urged all Latin American countries to adopt mechanisms to deal with the new situations of displacement not included in the 1951 Convention relating to the Status of Refugees, was adopted on 11 November 2010 by 18 Latin American States. The United States of America and Canada also participated as observers.

In 1997, the European Court of Human Rights ruled that refugee status would be granted to those who had fled the persecution of non-state actors<sup>12</sup>.

In addition to the above, the UNHCR<sup>13</sup>, the international organization that, according to its mandate, is concerned with the category known as "persons of concern to UNHCR<sup>14</sup>", which includes refugees in general, asylum seekers, returnees and stateless persons, as well as IDPs in some cases. In other words, its mandate is broader than the obligations of States to the 1951 Convention and its Protocol, because it includes conventions, treaties and norms in international human rights law, international humanitarian law and international criminal law with respect to such persons.

---

<sup>9</sup> Regional Refugee Instruments & Related, Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America, 16 November 2004.

<sup>10</sup> Mixed Migration Flow <<[https://ec.europa.eu/home-affairs/content/mixed-migration-flow\\_en](https://ec.europa.eu/home-affairs/content/mixed-migration-flow_en)>> [accessed 9 July 2019]

<sup>11</sup> UN High Commissioner for Refugees (UNHCR), Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, 11 November 2010

<sup>12</sup> The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights Refugees, asylum-seekers, and stateless persons << <https://www.refworld.org/pdfid/558803c44.pdf> >> [9 July 2019]

<sup>13</sup> United Nations High Commissioner for Refugees <<<https://www.unhcr.org/about-us.html>>> [9 July 2019]

<sup>14</sup> Persons of Concern to UNHCR << <https://www.unhcr.org/ph/persons-concern-unhcr>>> [9 July 2019]

This means that the UNHCR's interpretation of refugee rights is the norm in international law. Volker Türk<sup>15</sup>, the UNHCR's Assistant High Commissioner for Protection, explained the definition of refugee in the Convention, saying<sup>16</sup>: "It was clear that the definition applies to people who flee persecution because of what happened to them in their individual type of circumstances, but it also meant that it applies to people who flee armed conflict and violence. Let's not forget that most situations of violence and conflict specifically target civilians in certain circumstances - they target minorities, they target opposition groups who are in civilian areas. So there is this element of clear linkage between the refugee definition of persecution, conflict and violence. That's what the guidelines are trying to address - to actually show that the refugee definition as contained in the 1951 Convention applies to people fleeing armed conflict and violence. And what we see in the definition today is as relevant as it was when it was crafted in the wake of the Second World War.

Most people who flee the conflict in Syria, for example, would be recognised under the 1951 Convention. With over 1,000 different armed groups and the absence of state protection, it is clear that there is a compelling case to be made for refugee recognition under the Convention. But, quite frankly, almost each and every conflict that we're dealing with today would make the case for the 1951 Convention."

This clearly means that UNHCR, which is the custodian of States' implementation of the 1951 Convention, recognizes that civilians fleeing for fear of persecution by non-state actors following an internal armed conflict or civil war should be considered as refugees, and that the definition of refugee in the 1951 Convention should be taken as expressing a fear of persecution in a general sense, whether from the government or non-state actors.

In December 2016, the UNHCR issued new directives<sup>17</sup> aimed at ensuring that States consider persons fleeing armed conflict and other violent crises to be refugees. Volker Türk stressed<sup>18</sup> that the insistence of some States that individuals fleeing war should prove that they were individually targeted is an unreasonable request. As he stated that most conflicts today target groups of civilians because of their ethnic, religious, social or political affiliation, whether certain or uncertain. There is no doubt that those fleeing the devastating consequences of the armed conflict may indeed be refugees. This is a positive development provided by international refugee rights law.

<sup>15</sup> Senior Executive Team << <https://www.unhcr.org/senior-executive-team.html> >> [9 July 2019]

<sup>16</sup> Q&A: The 1951 Refugee Convention 'is as relevant today as it was at the time' << <https://www.unhcr.org/news/latest/2016/12/584036047/qa-1951-refugee-convention-relevant-today-time.html>>> [9 July 2019]

<sup>17</sup> UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions, 2 December 2016

<sup>18</sup> Q&A: The 1951 Refugee Convention 'is as relevant today as it was at the time' << <https://www.unhcr.org/news/latest/2016/12/584036047/qa-1951-refugee-convention-relevant-today-time.html>>> [10 July 2019]

Regional instruments such as; the OAU Convention on the Problems of Refugees in Africa, 1969, the Cartagena Declaration on Refugees of Latin America 1984, the European Court of Human Rights decision 1997, the Mexico Plan of Action 2004, the Brasilia Declaration 2010, as well as the Office of the High Commissioner for Human Rights, have all helped to form the basis of international law in our time, defining civilians fleeing from non-international armed conflicts and civil wars, and therefore from the actions of non-state actors, as refugees with all the rights of other refugees, particularly under international humanitarian law, international human rights law and international customary law.

## **Second: Response of International Humanitarian Law to the Rights of Persons Seeking Asylum Fleeing from Outside the State:**

International humanitarian law<sup>19</sup> defines refugees as civilians whose governments no longer afford them protection. It mainly focuses on the displacement of civilians by international or non-international conflicts, establishing the right of these displaced persons regardless of who caused their displacement (government forces or non-state actors) to obtain international assistance as long as the conflict continues, and does not interfere with the obligation of the countries to which they have fled to require them to be granted refugee status.

Extrajudicial killings, indiscriminate shelling, torture, enforced disappearances, blockades, starvation of populations, sexual violence and other abuses that may be practiced by State or non-state actors are the main reason for people to flee, with internal displacement<sup>20</sup> a first stage in this process, usually followed by efforts to cross the border and seek protection from another country in a second phase. The right to escape persecution or danger is a fundamental human right, and the closure of borders in the face of individuals or groups is a violation of this right.

International humanitarian law governs the state of armed conflict, both international and non-international. What concerns us here is non-international armed conflicts and civil wars where armed groups are formed outside the state's control. Civil wars and non-international armed conflicts often cause major human displacements, beginning internally and then moving towards the border to flee abroad. One party to an internal armed conflict may aim to uproot a part of society on ethnic or religious grounds. Special provisions for the protection of internally displaced persons most notably include<sup>21</sup>; Granting them the same protection as civilians, with international humanitarian law prohibiting methods of warfare whose primary purpose is to spread terror among the civilian population and regulating the conduct of hostilities to prevent military harassment of the civilian population in general or, in particular, from causing large-scale migration or displacement; at any time or place, IDPs in their countries should enjoy the basic guarantees provided by international humanitarian law.

<sup>19</sup> International Humanitarian Law, << [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf) >> [9 July 2019]

<sup>20</sup> Francois Bugnion, 'Refugees, Internally Displaced Persons, And International Humanitarian Law', (2004) Fordham International Law Journal, Volume 28, Issue 5, Article 4

<sup>21</sup> UNHCR, Handbook for the Protection of internally displaced persons << <https://www.unhcr.org/4c2355229.pdf> >> [9 July 2019]

International humanitarian law also prohibits the forcible expulsion of the population, as well as recommending that the States to which the displaced have fled and become refugees should be able to secure shelter on their territory, and that refugee camps should be established within a reasonable distance from the border<sup>22</sup>. The International Committee of the Red Cross will contribute to the implementation of these laws.

Accordingly, international humanitarian law has a central role to play in addressing one of the root causes of the refugee issue, some of which are classified as war crimes. These violations lead people to flee beyond the borders of the state after they have been displaced several times within their borders due to non-compliance by government forces or Forces outside the scope of government rules with international humanitarian law.

### Third: Response of International Human Rights Law to the Rights of Persons Seeking Asylum Fleeing from Outside the State:

The traditional approach to this issue was that States were bound by international human rights law, with most human rights being individually decided by governments.

Whilst conventions are ratified by States, this has changed with the evolution of the UN Security Council's practices<sup>23</sup>. As some resolutions included recommendations to non-state actors, and some reports issued by some special rapporteurs, as well as to some conventions, a view has been formed that non-state actors are bound by specific circumstances under international human rights law, to respect and fulfill the human rights of individuals. For example: Article IV, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict<sup>24</sup> states that "armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years". In a number of its resolutions, the Security Council also addressed non-State actors to abide by fundamental human rights principles<sup>25</sup>. The application of international human rights law becomes more urgent by non-state groups when they control territory that contains populations. In this case, the groups become an effective governing authority. In this context, non-state groups must respect the rights of refugees fleeing the persecution of a state or other armed groups to the territory they control, or in territory where refugees reside over which these groups extend their control over territory. International humanitarian law as well as international human rights law must be respected in accordance with a number of conventions, declarations and principles in international human rights law, most importantly the following:

---

<sup>22</sup>UNHCR, Conclusion on the civilian and humanitarian character of asylum Conclusion on the civilian and humanitarian character of asylum No. 94 (LIII) - 2002, << <https://www.unhcr.org/excom/exconc/3dafdd7c4/conclusion-civilian-humanitarian-character-asylum.html> >> [9 July 2019]

<sup>23</sup>Soltani, Rasool & Moradi, Maryam. (2017). The Evolution of the Concept of International Peace and Security in light of UN Security Council Practice (End of the Cold War-Until Now). Open Journal of Political Science. 07. 133-144.

<sup>24</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Article 4, Para 1.

<sup>25</sup>HRW, Under Kurdish Rule, <<<https://www.hrw.org/report/2014/06/19/under-kurdish-rule/abuses-pyd-run-enclaves-syria>>>

## **1- Universal Declaration of Human Rights of the United Nations General Assembly on 10 December 1948<sup>26</sup>.**

Article 13 paragraph 2<sup>27</sup> provides that: "Everyone has the right to leave any country, including his own, and to return to his country."

Article 14 paragraph 1<sup>28</sup> states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

## **2- 1951 Convention relating to the Status of Refugees and its Additional Protocol.**

145 States have ratified the Convention and 146 have signed its Additional Protocol, with 142 ratifying both<sup>29</sup>, by April 2015.

In the event that refugees arrive in one of those States, the Governments there have a responsibility to protect them and to secure their fundamental rights included in the Convention, such as; housing, employment, education, creed, mobility, access to a document of identity and travel, access to the courts, the protection of industrial and technical property rights, the right to belong to associations, safe return to the country of origin, and prohibition of expulsion or return to a country where they fear persecution.

The Office of the High Commissioner for Refugees (UNHCR) oversees the extent to which States have complied with the provisions of the Convention, which they have ratified.

## **3- International Covenant on Civil and Political Rights, 1966<sup>30</sup>.**

All the rights provided for in the present Covenant also apply to refugees, including the right to citizenship, with only the rights to participate in public affairs, voting, elections and the opportunity to hold public office being restricted solely to citizens, meaning that the rights granted to refugees have been significantly expanded.

The Covenant prohibits States from exposing any person to real threats to his or her life, slavery, forced labor or violation of freedom of thought, conscience or religion. In the case of *Kindler v. Canada*, the United Nations Human Rights Committee, which monitors the implementation of the International Covenant, said<sup>31</sup>: "If a State Party surrenders a person within its jurisdiction in circumstances that may pose a real risk of violation of that person's rights under the Covenant in another judicial authority, the State itself may have violated the Covenant"<sup>32</sup>.

<sup>26</sup> Universal Declaration of Human Rights, << <https://www.un.org/en/universal-declaration-human-rights/>>> [10 July 2019]

<sup>27</sup> Universal Declaration of Human Rights, Article 13, Para 2, << <https://www.un.org/en/universal-declaration-human-rights/>>> [10 July 2019]

<sup>28</sup> Universal Declaration of Human Rights, Article 14, Para 1, << <https://www.un.org/en/universal-declaration-human-rights/>>> [10 July 2019]

<sup>29</sup> UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, <<<https://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>>> [10 July 2019]

<sup>30</sup> OHCHR, International Covenant on Civil and Political Rights, <<<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>> [10 July 2019]

<sup>31</sup> *Kindler v. Canada* (Minister of Justice), [1991] 2 S.C.R. 779, Canada: Supreme Court, 26 September 1991

<sup>32</sup> HRW, Human Rights Watch Report To The Canadian Commission Of Inquiry: Diplomatic Assurances, <<<https://www.>>>

#### 4- International Covenant on Economic, Social and Cultural Rights, 1966<sup>33</sup>.

In this Covenant also, all the rights provided for apply equally to refugees and asylum seekers, according to the interpretation of the Committee concerned with its interpretation. The most important rights covered by the Covenant include<sup>34</sup> access to education, fair working conditions, the possibility of forming trade unions, social security and the need to protect refugees and asylum-seekers.

#### 5- International Convention on the Elimination of All Forms of Racial Discrimination 1965<sup>35</sup>.

Under article 1<sup>36</sup> of the Convention, international law prohibits discrimination on grounds such as religion, race, national origin or other status. Article 5<sup>37</sup> guarantees the right of everyone to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, and to a fair and satisfactory remuneration. In 2004, the Convention recognized the right of States to distinguish between citizens and non-citizens, but said that human rights should in principle be enjoyed by all persons and that the expulsion of refugees could constitute discrimination based on nationality, religion or color. Many violations of the rights of refugees have occurred which fall into the category of discrimination<sup>38</sup>.

#### 6- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984<sup>39</sup>.

Article 3, paragraph 1<sup>40</sup>, of the Convention against Torture states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

---

[hrw.org/legacy/backgrounder/eca/canada/arar/5.htm](http://hrw.org/legacy/backgrounder/eca/canada/arar/5.htm)>>

<sup>33</sup> OHCHR, International Covenant on Economic, Social and Cultural Rights, << <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>>> [10 July 2019]

<sup>34</sup> OHCHR, International Covenant on Economic, Social and Cultural Rights, << <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>>> [10 July 2019]

<sup>35</sup> OHCHR, International Convention on the Elimination of All Forms of Racial Discrimination, << <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>>> [10 July 2019]

<sup>36</sup> OHCHR, International Convention on the Elimination of All Forms of Racial Discrimination, Article 1, << <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>>> [10 July 2019]

<sup>37</sup> OHCHR, International Convention on the Elimination of All Forms of Racial Discrimination, Article 5, << <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>>> [10 July 2019]

<sup>38</sup> OHCHR, The Rights of Non-citizens, << <https://www.ohchr.org/Documents/Publications/noncitizensen.pdf> >> [10 July 2019]

<sup>39</sup> OHCHR, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, << <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>>> [10 July 2019]

<sup>40</sup> OHCHR, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 3, Para 1, << <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>>> [10 July 2019]

## 7- The Convention on the Rights of the Child 1990<sup>41</sup> and the Convention on the Elimination of All Forms of Discrimination against Women, 1979<sup>42</sup>.

The States that have ratified these conventions, which are most of the world's nations, are obliged to treat refugees on their territory under these conventions guaranteeing fundamental human rights. International human rights law remains in force in all situations in non-international armed conflicts and civil wars at all times, while there are conventions that apply even in emergency situations, as in the Convention Against Torture. Emergency situations only limit the application of certain rights contained in the International Covenant on Civil and Political Rights rather than eradicating them, all of which apply to refugees and asylum seekers.

### **Fourth: Response of International Customary Law to the Rights of Persons Seeking Asylum Fleeing from Outside the State:**

The obligations of States that have ratified the Refugee Convention are undoubtedly broader and better in favor of human rights and refugees than those that have not ratified them, but States that have not ratified the Convention are not absolutist in dealing with refugees. There are rules that protect refugees which are binding on all States and offensives outside the State and which apply in all circumstances and conditions of peace and war under customary international law. For example, all States are prohibited from returning a refugee to territory where his or her life or liberty is threatened<sup>43</sup>, or where he or she may be subjected to torture, inhuman treatment or persecution. This includes refugees and asylum-seekers. The prohibition on coercion of asylum-seekers to return to places where they may face deprivation of their legal status and of basic human rights principles remains in place in all circumstances. The right to family reunification is also a norm of customary international law; according to a study published by the International Committee of the Red Cross in 2005<sup>44</sup>, family life should be respected as much as possible<sup>45</sup>. In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated<sup>46</sup>. This right

<sup>41</sup> OHCHR, Convention on the Rights of the Child, << <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>> [10 July 2019]

<sup>42</sup> OHCHR, Convention on the Elimination of All Forms of Discrimination against Women, << <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>>> [10 July 2019]

<sup>43</sup> UNHCR, Note on Non-Refoulement (Submitted by the High Commissioner) Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2 << <https://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> >> [10 July 2019]

<sup>44</sup> International Committee of the Red Cross, 'International Review of the Red Cross- Customary Law', (2005) Vol 87, No. 857

<sup>45</sup> International Committee of the Red Cross, Customary International Humanitarian Law, Rule 105 << [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule105](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105) >> [10 July 2019]

<sup>46</sup> International Committee of the Red Cross, Customary International Humanitarian Law, Rule 131 << [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule131](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule131) >> [10 July 2019]

is also included in the Convention on the Rights of the Child<sup>47</sup>, International Covenant on Civil and Political Rights<sup>48</sup>, and the International Covenant on Economic, Social and Cultural Rights<sup>49</sup>.

### **Fifth: Asylum seekers fleeing from non-state groups, The Syrian Conflict Practical Application, Case study:**

The popular movement in Syria in 2011 turned into a non-international armed conflict in April 2012<sup>50</sup>. The conflict has continued, leading to the worst wave of mass displacement and refugees seeking asylum known to humanity since the Second World War, according to the United Nations High Commissioner for Refugees<sup>51</sup>, Statistics from the United Nations Office for Humanitarian Affairs indicate that there are currently 5.6 million Syrian refugees outside the country, and 6.6 million IDPs in Syria<sup>52</sup>.

The Security Council's neglect of the Syrian conflict has resulted in the creation of a large number of non-state actors, all of which can be grouped into four main groups:

- a- A large number of armed opposition factions have been formed since the end of 2011.
- b- Al-Nusra Front an affiliate of Al-Qaeda Organization, 24 January 2012.
- c- Forces of the Kurdish Democratic Union (People's Protection Units) July 2012.
- d- ISIS 13 April 2013.

Hezbollah militia and a large number of Iranian and Iraqi factions, whose entrance was facilitated or requested by the Syrian regime. These forces are considered part of the government forces.

The aforementioned four groups have varied according to the extent of their respective violations, displacing hundreds of thousands of Syrians internally<sup>53</sup>. Some of these were displaced within Syria and threatened by more than one side, while others were forced to

<sup>47</sup> OHCHR, Convention on the Rights of the Child, (Arts. 9, 10, and 22) <<<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>> [10 July 2019]

<sup>48</sup> OHCHR, International Covenant on Civil and Political Rights, Art 23, Para 1, <<<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>> [10 July 2019]

<sup>49</sup> OHCHR, International Covenant on Economic, Social and Cultural Rights, Art 10, para 1, <<<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>>> [10 July 2019]

<sup>50</sup> Reuters, Exclusive: Red Cross ruling raises questions of Syrian war crimes, <<<https://www.reuters.com/article/us-syria-crisis-icrc/exclusive-red-cross-ruling-raises-questions-of-syrian-war-crimes-idUSBRE86D09H20120714>>> [10 July 2019]

<sup>51</sup> UNCHR, Forced displacement worldwide at its highest in decades, <<<https://www.unhcr.org/news/stories/2017/6/5941561f4/forced-displacement-worldwide-its-highest-decades.html>>> [10 July 2019]

<sup>52</sup> UNCHR, Syria emergency, <<<https://www.unhcr.org/syria-emergency.html>>> [10 July 2019]

<sup>53</sup> UNOCHA, Syria: Hostilities continue to displace hundreds of thousands of people, <<<https://www.unocha.org/story/syria-hostilities-continue-displace-hundreds-thousands-people>>> [10 July 2019]

flee outside Syria. I spoke with a large number of asylum-seekers fleeing the persecution of one or more of these four forces, especially those who arrived in Europe; all those who I spoke to had been granted refugee status only after being investigated for the reason that led them to flee Syria.

European states have generally committed themselves to give refugee status to those who have managed to escape persecution by non-state actors<sup>54</sup> and to access their territories. Thousands of fugitives fleeing persecution by non-state groups have also been registered with the Office of the High Commissioner for Refugees as refugees in Jordan, Iraq, and Lebanon.

Perhaps the most notable indicator of the treatment of the refugees fleeing persecution by the Syrian government and non-state actors is that, after some of the non-state actors lost parts of their territories to the Syrian government or its allies in the Russian or Iranian regimes<sup>55</sup>, or to a non-state actor different to the one whose persecution they initially escaped<sup>56</sup>. None of these refugees requested to return to their areas of origin even after the areas they had fled became, theoretically, "safe". For example: between the establishment of the terrorist ISIS group in April 2013 and start of 2015, this group controlled almost 58 percent of Syria's territory<sup>57</sup> (most of the territory it controlled is in the northeast of Syria, as well as in desert areas of Homs, some villages in Hama eastern suburbs, Yarmouk Palestinian Refugee Camp in Damascus suburbs and some villages in Daraa's western suburbs). The terrorist group perpetrated massive violence and discrimination based on sectarianism, faith and ethnicity, as well as forcing Muslims to practice the group's extremist version of Islam, as well as inflicting torture, extrajudicial killing, and other violations that pushed hundreds of thousands of Syrians into internal displacement and seeking asylum. These people stated clearly that they had been displaced due to ISIS persecution.

In March 2019, the United States and Syrian Democratic Forces (mainly Democratic Union Party forces) announced that ISIS has been defeated<sup>58</sup>, with ISIS' control over the territories it previously occupied ending when some of these areas became part of the SDF-controlled territory, while the Syrian regime gained control in others. However, no country has asked the refugees who fled the conflict to return. These countries, as well as the UNHCR, consider that the Syrian conflict is still ongoing, with the attendant threat and danger from the Syrian government and from the other group controlling the territory still existing despite the end of the original cause for displacement and asylum. I believe

<sup>54</sup> UNHCR, Asylum in the European Union a Study of the Implementation of the Qualification Directive << <https://www.refworld.org/pdfid/473050632.pdf> >> [10 July 2019]

<sup>55</sup> BBC, Syria war: Army takes full control of Damascus after ousting IS, << <https://www.bbc.com/news/world-middle-east-44198304> >> [10 July 2019]

<sup>56</sup> Reuters, Kurdish-backed body aims to widen authority in Syrian northeast, << <https://www.reuters.com/article/us-mid-east-crisis-syria-northeast/kurdish-backed-body-aims-to-widen-authority-in-syrian-northeast-idUSKBN1K612B> >> [10 July 2019]

<sup>57</sup> Almasdr News, Comprehensive map of Syrian conflict: December 2016, << <https://www.almasdarnews.com/article/comprehensive-map-syrian-conflict-december-2016/> >> [10 July 2019]

<sup>58</sup> BBC, Islamic State group defeated as final territory lost, US-backed forces say, << <https://www.bbc.com/news/world-middle-east-47678157> >> [10 July 2019]

that this is the proper policy to adopt since armed conflicts and civil wars mean a high probability of danger, especially when the government itself is a or even the key party in committing crimes and violations and fueling the conflict. The vast majority of Syrian refugees fled the persecution of the Syrian government rather than that of armed non-state actors, despite the diversity and abundance of the latter, with the Syrian government reportedly committing the greatest number of crimes against humanity and war crimes, according to reports by the United Nations International Independent Commission of Inquiry on the Syrian Arab Republic<sup>59</sup>. In addition to this, the Syrian Government has arbitrarily arrested dozens of refugees who had returned to areas the government had seized from armed groups<sup>60</sup>. Similarly, the Kurdish Syrian Democratic Forces, which are collectively considered a non-state force, pose a threat and danger to the lives of hundreds of refugees who have fled the intimidation of ISIS if they wish to return. The Syrian Democratic Forces have carried out a large number of arrests and enforced disappearances without fair trials of dozens of people on fabricated and slanderous charges of being part of the ISIS organization<sup>61</sup>. Therefore, the choice by the makers of international law not to distinguish between refugees from persecution by state and by non-state forces is, in my view, an important step forward in human rights. Moreover, it is vital to uphold international law concerning the non-refoulement of refugees who fled persecution by either state or non-state actors' forces to any state where armed conflict is still ongoing and they face danger; it is vital to ensure that any returnee will be safe. The UN's Independent International Commission of Inquiry on the Syrian Arab Republic has stated in several reports that the situation in Syria continues to be unsafe for Syrian refugees to return<sup>62</sup>.

## Sixth: Conclusion

This paper reviewed how the definition of a refugee has evolved in international law, following earlier confusion over the definition provided by the Convention Relating to the Status of Refugees in 1951, which restricted the definition of refugees solely to those fleeing persecution by the Government or its affiliated groups. This ambiguity remained in the UN's 1967 Protocol and failed to guarantee the safety or refugee status of those fleeing the persecution of non-state actors. However, many regional conventions and declarations, as well as the UNHCR have contributed effectively, over the years, to ensure that international law includes protection for groups fleeing from persecution by non-state actors and to broaden the definition of refugees to include people in this category. This paper also reviewed the response under international law to asylum-seekers displaced by

<sup>59</sup> UNGA 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (16 August 2012) A/HRC/21/50

<sup>60</sup> The Washington Post, Assad urged Syrian refugees to come home. Many are being welcomed with arrest and interrogation, << [https://www.washingtonpost.com/world/assad-urged-syrian-refugees-to-come-home-many-are-being-welcomed-with-arrest-and-interrogation/2019/06/02/54bd696a-7bea-11e9-b1f3-b233fe5811ef\\_story.html?fbclid=IwAR2rlno-4imUCorV92u2\\_q4-VaDWT4vGHFfu60fk-M5knxUrxmHP6fo5ewzY&noredirect=on&utm\\_term=.ff7d4a14fd16](https://www.washingtonpost.com/world/assad-urged-syrian-refugees-to-come-home-many-are-being-welcomed-with-arrest-and-interrogation/2019/06/02/54bd696a-7bea-11e9-b1f3-b233fe5811ef_story.html?fbclid=IwAR2rlno-4imUCorV92u2_q4-VaDWT4vGHFfu60fk-M5knxUrxmHP6fo5ewzY&noredirect=on&utm_term=.ff7d4a14fd16) >> [10 July 2019]

<sup>61</sup> Human Rights Watch, Syria Events of 2018, << <https://www.hrw.org/world-report/2019/country-chapters/syria> >> [10 July 2019]

<sup>62</sup> UN Commission of Inquiry on Syria, UN Commission of Inquiry on Syria: The siege and recapture of eastern Ghouta marked by war crimes, crimes against humanity, <<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23226&LangID=E>>> [10 July 2019]

non-State actors, in the three fields of international humanitarian law, international human rights law, and international customary law.

Finally, the paper explained how States have responded, in practice, to the Syrian refugees fleeing the persecution of non-state actors, and how the UNHCR and countries worldwide have committed themselves not to discriminate between Syrian refugees fleeing the persecution of the state and those fleeing persecution by non-state actors. The paper showed that the states did not return the Syrian refugees or ask them to return despite the end of the control of some non-state actors, and the government regaining control. The development of international law has protected tens of thousands of Syrian refugees who have fled the persecution of non-state actors from being forcibly returned, protecting them from an even greater threat.

[Published on the Euro-Mediterranean Human Rights Monitor.](#)

-

-

