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Chair of International Law

The Protection of Refugee Women under International Law:  
Achievements ad Challenges

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## Introduction

The first official international definition of *refugee* and the recognition of refugees as a specific category both date back to 1951, when the Refugee Convention was ratified by 145 states, during a United Nations conference in Geneva. The previous year, the UNHCR (United Nations High Commissioner for Refugees) was created with the purpose of favoring international refugees' protection, and it became the guardian of the Convention as well. Almost 30 years later, on 1979, the General Assembly adopted the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), whose application was placed under the supervision of the Cedaw Committee.

These Conventions laid the basis for fighting two major problems that have affected – to a different degree – all the countries throughout the history of all societies: respectively refugees assistance and women discrimination. Since the adoption of the conventions, an international commitment towards these challenges have started, but both issues are still far from resolution. Indeed, as we will see throughout this dissertation, women are often prey of violence based on their gender, especially in the case of refugee women, who often fall victim of rape, sexual abuse, genital mutilation, and other forms of physical and mental violence. These episodes are more frequent in developing countries, where there is less stability and a low level of security control, but it would be a mistake to exclude developed countries from the picture. Indeed, as it will be better explained in chapter 3, states often refrain from investing in international operations aiming at the improvement of female refugee life conditions and safety. Furthermore, nationalism and populism are spreading nowadays and are affecting political campaigns and elections in many Western countries, where citizens demand policies to block new immigrants and refugees from entering their territory. Because of my indignation for the behavior of the world community and for the general apathy of states towards operations in favor of these important humanitarian issues, I decided to dig deeper. Therefore, through this dissertation I aim at clarifying the characteristics of the related international legislative system and the agencies protecting female refugees, then I will try to investigate in the dynamics taking place on the international scenario. Through this process, I will find out how the international bodies, the national states, and the legal system intertwine and determine the real situation lived by female refugees. Finally, I will express my personal conclusions on the issue, based on the analysis developed through the dissertation and the information taken from the authoritative sources utilized. The goal is to reveal the flaws existing in the system that governs female refugees' protection, and to propose possible solutions and changes to be applied in order to improve the international defense of refugee women.

First of all, I believe that an exhaustive presentation of the legislative system concerning refugees and women is necessary, before entering in the description of the dynamics characterizing the action of the different international bodies and their interaction among them and with state entities. For this reason, chapter one is dedicated to the history of international legislative instruments instituted for the protection of refugees and women. Special relevance will be given to 1951 Refugee Convention and the annexed 1967 Protocol,

especially in regard to the definition of refugee status and the core principle of *non-refoulement*. Moreover, a brief explanation of the rights and obligations accorded to refugees by other conventions will be included, together with the possibility of asylum request. The second part of the chapter looks closer at the position of women in the Refugee Convention, where they do not enjoy a specific attention in reason of their absence as social group on their own. The last subparagraph focuses on violence against women, by presenting the CEDAW first, and then other legal instruments concerning violence against women, especially sexual violence.

The second chapter connects directly to the first, as it gets back to the theme of gender violence, discussing the lack of protection provided by 1951 Convention for the victims of this abuse. In respect to this aspect, expert writers such as Deborah Anker criticized the exclusion of violence against women from the grounds for persecution. While violence against women during conflict was recognized quite early by legislative systems, the violence occurring in reason of gender had to wait longer before being instituted both at the national and international level. Given this premise, the discussion of the first subparagraph aims at proving the importance of treating violence against women as a specific form of persecution. The second subparagraph detects the space left by 1951 Convention for non-application in the recognition of rights accorded to refugees. In this context, the right to access the court becomes the only possibility, but women refugees face additional difficulties before the courts, as underlined by Susan Forbes. At this point, given the importance of access to justice, I will discuss the impact of international Criminal law and its main body, the ICJ, in cases concerning refugees. Here, a close connection among Refugee law and Criminal law will be highlighted, and it will give the possibility to show how the two areas of international law affected one another despite their differences, and how this aspect had an impact in the defense of refugee women.

The third chapter describes one by one the different authorities involved in female refugees' protection. As a matter of fact, those entities are cited throughout the previous chapters but without a specific analysis of their respective competences and work. I will start describing UNHCR, Cedaw, and CAT, with a special focus on the second and the third. But the most interesting and controversial part of the chapter is the discussion about the other actor involved in the defense of refugees: the State. Therefore, most of the chapter gives space to the analysis of the application of international law by any country and the interactions among international and national systems. Specifically, the subparagraph will start from the international obligation of non-refoulement, and it will proceed discussing the responsibilities of all the countries in the world in working for the guarantee of rights to female refugees. This reflection will give the opportunity to denounce states' apathy and their disinterest in investing for improving the international system defending this vulnerable category. Obviously, to support the claim, I will report events occurred in some of the main refugee crisis, such as the one involving Rwandan people in Zaire and the recent one concerning Syrian refugees.

After having discussed all these aspects of international law in its protection of women refugees, I will finally draw my conclusions and I will interpret the findings and the present real conditions as the basis of departure for strengthening the international system concerned.

# 1951 Convention and the problem of Violence Against Women

## 1.1 Definition of *refugee*

The term *Refugee* in International Law serves as indication for distinguishing a category to which a specific legislation applies, different from the one regulating other forms of migration. As a result, the refugee in law terms has a narrower meaning compared to the general use, but it still derives from the latter<sup>1</sup>. Indeed, in an ordinary context, the refugee is a person who tries to escape intolerable conditions to find freedom and safety, without a specific destination. The reasons behind the flight may include unreasonable and inhuman deprivations, or specific situations such as wars and natural disasters. Automatically, this general connotation suggests an implicit right of the person to be protected and assisted<sup>2</sup>. Similarly, in the definition adopted in International Law, the refugee is "a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"<sup>3</sup>. It is obvious then, that criminals who escape justice are excluded from this group, as they have caused damage instead of being the victim. In their monograph, *The Refugee in International Law*, Goodwin-Gill and McAdam explain how States have further restricted the category of *refugee* for the international law domain, excluding the so called *economic refugee*, in reason of the different nature of the help needed by the latter, which would lie in the international aid and development, rather than in the institution of asylum, meant as protection on the territory of another State<sup>4</sup>. In the end, the refugee under international law is only that person who escapes in reason of natural calamities or disasters with a human origin. For the purpose of clarifying which subjects can be considered as refugees, 1951 Conventions and 1967 Protocol Relating to the Status of Refugees have concurred to establish specific requirements to be satisfied in order to qualify as a member of the category. These criteria are fundamental when trying to guarantee rights and benefits to those who deserve it. Before arriving to the UN's adoption of these instruments though, the conditions described below created a breeding ground for the development of the discussion around refugees' protection.

The definition of refugee firstly appeared on the international scenario in treaties and arrangements concluded under the League of Nations in the 1920s, and later in some 1936's arrangements applying to those fleeing Germany, which were then codified in 1938 Convention concerning the Status of Refugees coming

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<sup>1</sup> Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, (1983). Reprint 3 ed., Oxford University Press, 2007), 15

<sup>2</sup> *Id.*

<sup>3</sup> United Nations, *1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees*. Available at: <http://www.unhcr.org/3b66c2aa10> [accessed 10 October 2017]

<sup>4</sup> Goodwin-Gill & McAdam, *supra* note 1

from Germany<sup>5</sup>. But, the most important step in the definition and protection of refugees was taken when the General Assembly of the UN established the UNHCR (United Nations High Commissioner for Refugees) in order to provide “international protection and to seek permanent solutions for the problems of refugees”<sup>6</sup>. Probably, the importance of finding solutions is the reason why the Statute of this organ has the purpose of granting a humanitarian and social power of action to the Office, rather than one of a political kind<sup>7</sup>. Moreover, the provisions listed in the Statute can be applied only to refugees considered as groups and categories, in other words only those defined as refugees in some previous treaties and arrangements. To this classification, the Statute added “refugees resulting from events occurring before 1 January 1951, who are outside their country of origin and unable or unwilling to protect themselves, owing to fear of persecution or for reasons different from personal convenience”<sup>8</sup>. Later the Statute was extended further, including people with no nationality unable to return to the country of its former residence. The Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee problems in Africa, a regional treaty adopted in 1969, added an objective consideration, including in the refugee category any person “compelled to leave his/her country 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”<sup>9</sup>. Following a similar line, a colloquium of Latin American government representatives and distinguished jurists adopted the Cartagena Declaration in 1984, a non-binding regional instrument for the protection of refugees in 10 Latin-American countries. The criteria adopted here is more objective because it considers persons who flee their countries “because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”<sup>10</sup>.

Besides the undiscussed innovation represented by 1951 Convention in Refugee Law, some perplexities remain about the broad room for interpretation that the Convention leaves to states and judges, as professor Goodwin-Gill comments. On the one hand, the refugees need to prove a “*well-founded fear*” of persecution, on the other hand the proof of a “*lack of protection*” is still debatable<sup>11</sup>. Therefore, despite this formal definition, there is a certain space for discussion in determining who is entitled to the protection provided by the United Nations, which have traditionally applied the lack of protection by the government as the essential factor for the distinction between *refugee* and *alien*<sup>12</sup>. However, this individualistic definition of

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<sup>5</sup> League of Nations, *Convention concerning the Status of Refugees Coming From Germany*, League of Nations Treaty Series, Vol. CXCII, No. 4461, (10 February 1938), available at: <http://www.refworld.org/docid/3dd8d12a4.html> [accessed 29 September 2017]: 59

<sup>6</sup> General Assembly, *Resolution 428(v): Statute of the United Nations High Commissioner for Refugees*, (Geneva, 14 December 1950), art.1

<sup>7</sup> Goodwin-Gill and McAdam, *supra* note 1, at 17

<sup>8</sup> General Assembly, *supra* note 5, at art.6a

<sup>9</sup> Assembly of Heads of States and Governments, *Convention Governing the Specific Aspects of Refugee problems in Africa*, (Addis-Ababa, 10 September 1969): art. I(2), available at: <http://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html> [accessed 3 October 2017]

<sup>10</sup> Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees*, (22 November 1984), art. III(3), available at: <http://www.refworld.org/docid/3ae6b36ec.html> [accessed 3 October 2017]

<sup>11</sup> Goodwin-Gill & McAdam, *supra* note 1, at 18

<sup>12</sup> *Id.*

refugee seems to suggest a case by case evaluation of the situation, in contradiction with the purpose of the Convention, which should refer to groups and categories of refugees. Such apparent divergence, together with the large-scale refugee crises demanding immediate intervention, resulted inevitably in the flexibility and broadening of the UNHCR mandate. It is sufficient to think that at its birth the UNHCR was a small specialized agency, but after three years it counted already 4000 staff members dislocated in about 120 countries, and a budget of US\$ 1 billion<sup>13</sup>. The level of expansion of UNHCR is given not only by numbers, but mostly by the broadening of its activities and the diversity of the situations in which this organ took the right to intervene. For instance, in the late '50s, the General Assembly authorized the UNHCR to raise funds for assistance of refugees whose situation did not fall completely under the definition of the Statute, but who were considered "in concern of the international community"<sup>14</sup>. This approach became known as "good offices" and it was applied for the first time in 1957, for the help of Chinese refugees in Hong Kong. In the same period, the High Commissioner of that time, Lindt, initiated the Office expansion into the developing world, accepting the call for help from Tunisia, which needed material assistance for Algerian refugees who had fled their country<sup>15</sup>. Finally, given the diversity of the situations in which the UNHCR claims the right and duty to intervene, the language of the rule was changed. While the 1965 Resolution worded the criteria for intervention of the High Commissioner in terms of its "competence", in which the refugees help would fall, the rule was modified and framed to reflect the notion of refugees "of concern" to UNHCR<sup>16</sup>. By the 1980s UNHCR's responsibilities for refugees had been clearly defined in the language of the General Assembly, and they have remained the same, with the addition of other classes of people deserving protection. Now the UNHCR's mandate include protection and assistance for returnees, asylum seekers, children, and women<sup>17</sup>.

Refugee-specific legislation did not undergo a quick development in the years following 1951 Convention, but fortunately it was affected and completed by the huge progress registered in Human Rights law. The 1966 Human Rights Covenants<sup>18</sup> and regional human rights regimes were signed in Europe, America, Africa. The most important contribution given by human rights law consists in the interpretation that the regulation has recently acquired. The UNHCR explains the approach towards human rights by affirming that the modern duty of protection goes beyond respecting the norms of human rights law; rather it includes the obligation to adopt all necessary measures for the guarantee of an effective protection of refugees.<sup>19</sup>

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<sup>13</sup> Inter-parliamentary Union & UNHCR, *Refugee Protection: A Guide to International Refugee Law*, (2001) available at: <http://www.unhcr.org/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html> [accessed 29 September 2017]: 21

<sup>14</sup> Gil Loescher, "UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy", *International migration review*, Vol.33 N.1, (March 2001), available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-7379.2001.tb00003.x/full> [accessed 2 October 2017]: 78

<sup>15</sup> *Id.* at 80

<sup>16</sup> UN General Assembly, *supra* note 3

<sup>17</sup> See UN General Assembly, *Res.3143 (XXVIII) 1973, Res. 1673(XVI) 1961, Res.2294(XXII) 1967, Res.31/55 1976, Res.36/125 1981, Res.44/150 1988, Res. 48/118 1993.*

<sup>18</sup> See UN General Assembly, *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, 1966.

<sup>19</sup> *Supra* note 6, at art.8

## 1.2 International law vs. State law:

### a. UNHCR vs. State parties to the Convention and Protocol

The previous section illustrated the various steps that led to the determination of the refugee status as established by the UNHCR. However, it should not be forgotten that each individual is subject to State rules as he/she lives and moves on States' territory. As a result, problems may arise where States and UNHCR reach different conclusions on the determination of individuals and groups as refugees. In other words, the status of refugee may be accorded by the UNHCR Statute or on the basis of the 1951 Convention: the refugee would so be considered a "*mandate refugee*" or a "*Convention refugee*" respectively. *Mandate refugees* are those people who classify as such under UNHCR's Statute or under the broader mandate given by the General Assembly<sup>20</sup>. Thus, this definition does not take into account the country of asylum, which can be party to the Convention or not. On the contrary, *Convention refugees* are accorded this status by the authorities of the States being parties to the Convention and/or Protocol. In this case, the refugees have all rights and benefits that the State accepted to grant them when it signed the Convention/Protocol<sup>21</sup>. As a result, there is a considerable gap between the protection guaranteed to Convention refugees compared to mandate refugees, and this is one of the main challenges faced by UNHCR in refugee protection. In fact, an essential element to make the Refugee Convention effective, as well as agreements related specifically to women refugees (which will be presented in the following chapters), resides in the acceptance of those agreements by State parties and in their action to support UNHCR and its agencies.

### b. *Non-Refoulement* Principle, Asylum, Refugees' rights and obligations

This principle is the first evident example of direct State's involvement in the protection of refugees. *Non-refoulement* translates with the obligation not to return any refugee to any country where he/she is likely to face persecution, other ill-treatment, or torture. The principle is expressed in 1951 Convention, Art.33, which affirms that "*No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*"<sup>22</sup> More precisely, the term "*non-refoulement*" derives from the French *refouler*, meaning "to drive back" or "to repeal". It is important to distinguish *refoulement* from expulsion or deportation, because the former refers to immigrant who are sent back to the frontier after having entered another country illegally, while the latter identify the situation in which a lawfully resident alien is required to leave a State<sup>23</sup>. The prohibition of *refoulement* is also expressed in other international law instruments, specifically in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 3), the Fourth Geneva Convention of 1949 (Art. 45, para. 4), the International Covenant on Civil and Political Rights (Art. 7), the Declaration on the Protection of All Persons

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<sup>20</sup> See *supra* note 16

<sup>21</sup> Inter-parliamentary Union & UNHCR, *supra* note 13, at 22

<sup>22</sup> See *supra* note 3, at art.33

<sup>23</sup> Goodwin-Gill & McAdam, *supra* note 1

from Enforced Disappearance (Art. 8), and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5). Today, even most regional human rights instruments have included *non-refoulement*, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human Rights (Art. 22), the OAU Refugee Convention (Art. 2), and the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Art. 2).

The concept is of a relatively recent origin, and it was born from the popular sentiment that those leaving their country were worthy of protection because were fleeing away from persecution or political turmoil. Considering the situation suffered by these aliens, the sovereign was supposed to accord them protection. The first instrument created to regulate the application of this principle was the UK's 1905 Aliens Act, that affirmed the refusal of entry with the exception of those fleeing persecution for religious or political reasons<sup>24</sup>. *Non-refoulement* is so deeply rooted in international law that it is accepted as a custom, meaning that even States that are not party to the Convention usually respect it, as confirmed by the UNHCR.<sup>25</sup> As a clear consequence, the violation of this principle may trigger important reactions by the UNHCR, up to the point of the intervention of the Committee against Torture, given that *refoulement* is also prohibited under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 3).<sup>26</sup>

The direct consequence of the *non-refoulement* principle is the right to safe asylum, namely one of the international human rights recognized by the Universal Declaration of Human Rights (Art 14.1) and accepted under UNHCR Executive Committee with its Conclusion N°28. The right to asylum has a double function, because it provides the possibility of protection and it ensures the pursuing of solutions for problems that refugees may encounter. Indeed, the right to safe asylum goes beyond physical safety and it serves as guarantee for receiving the same rights and basic help as any other foreigner with a legal residence permit. In other words, refugees enjoy basic civil rights, including freedom of thought, of movement, freedom from torture, etc.<sup>27</sup>. Along with civil rights, refugees have economic and social rights, such as the right to education and work. The success in the application of the right to study and work has a strong meaning when referred to female refugees, because it gives them the possibility to have access to these economic rights for the first time in their life. In fact, it is not to forget that most women refugees come from countries where girls and wives often live in subordinate conditions, which may constitute one of the main reasons for their departure. Therefore, whenever States manage to give to women refugees the access to such rights, they bring the process of asylum to its fullest potential. On the contrary, when the State of asylum struggles to guarantee these rights for a large number of people, the UNHCR intervenes to help filling the gap, providing both financial help and other means of subsistence. On the other side, refugees must respect their obligations, with specific regard to

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<sup>24</sup> *Id.*, at 202

<sup>25</sup> UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, (26 January 2007), para.17, available at: <http://www.refworld.org/docid/45f17a1a4.html> [accessed 2 October 2017]

<sup>26</sup> Inter-parliamentary Union & UNHCR, *supra* note 13, at 14

<sup>27</sup> *Id.* at 16

the laws of their country of asylum and to the measures taken for maintaining the public order<sup>28</sup>.

### 1.3 The 1951 Convention in respect to women refugees:

According to the explanation of the refugee status given in the first section, a claimant to such title must be “outside” his or her country of origin. But the Convention does not specify that the refugee shall have fled by reason of fear of persecution, nor that persecution should have already occurred. The fear as well as the degree to which it is felt are impossible to be quantified, but in order to be accepted it has to be reasonable<sup>29</sup>. However, the evidence required is not so much related to subjective fear, rather it is meant as evidence of sufficient facts (i.e. individual’s beliefs and commitments) that would constitute a reason for persecution and would allow the finding of a well-founded fear. Specifically, the Convention identifies 5 grounds of persecution (listed in art.33), all linked to non-discrimination. Among these 5 there are race, religion, nationality, membership to a particular social group, and political opinion. Particularly relevant to this dissertation is the fourth ground listed, concerning social groups. In fact, one may wonder what were and are the groups included in such category. As 1948 Universal Declaration of Human Rights listed national or social origin, property, birth or other status as prohibited grounds of distinction; it is reasonable to suppose that 1951 Convention meant to include the same classification.<sup>30</sup> In other words, it would have been conceived to protect known categories from known forms of harm. Consequently, it seems that gender was not included in the possible grounds for fear of persecution, as it was not considered a reason for discrimination. Nethertheless, recently the focus has been on different groups, especially women, homosexuals, and people suffering from HIV. So, how has this change occurred?

First of all, it is important to clarify that a social group may be persecuted if there is no confidence in the group’s loyalty, or if the group is considered an obstacle for the Government’s policies. It may occur because of a relation between internal characteristics and external perceptions. For, *linking* characteristics are internal, while the external circumstances are those which may have caused the isolation of the group.<sup>31</sup> By taking this statement into account, it is possible to understand why in 1951 Convention gender seems absent. As a matter of fact, the violence suffered by women was perceived either as “domestic” or as “individual”, excluding the State and any other political unit, national or international. In other words, such violence was considered as falling in a private dimension, rather than a “public” one. “Domestic violence” is usually referred to spousal violence - the harm inflicted to a woman by her husband – but it is not the only kind of violence against women. Furthermore, violence is considered non-attributable to the State even when the responsible are soldiers, policemen, and civil officials. Many societies have taken a laissez-faire approach toward domestic violence, justifying their position stating that it is not a matter for State punishment so far as it is not “excessive”<sup>32</sup>. The obvious reaction has built on the claim that all violence against women is political, unless

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<sup>28</sup> *Id.*

<sup>29</sup> See *supra* note 3

<sup>30</sup> Goodwin-Gill & McAdam, *supra* note 1, at 74

<sup>31</sup> *Id.* at 75

<sup>32</sup> *Id.* at 81

the State provides effective protection. As a result, today being a woman is considered as a sufficient political statement in itself, so far as violence against women, whether domestic or public, is part of the oppression. Unfortunately, the Convention has not been modified to include women as a separate category, but female applicants can still claim the refugee status under other circumstances. In fact, a treaty-based system of international human rights law and some Conclusions and Recommendations issued by the main UN's bodies, have filled the gaps left by 1951 Convention. For instance, Executive Committee Conclusion No. 39 (1985) was the earliest step towards the improvement in women protection, as it allows the state to interpret "social group" as including women who face harsh or inhuman treatment for having violated the social mores of their community. Such persecution may emanate from a government authority or from non-state actors<sup>33</sup>. Additionally, it must be specified that regional and state law often provides women with higher protection in case of transgression of social mores. For example, the European Parliament expressly declared women suffering for this reason as a particular social group<sup>34</sup>, and the same position was adopted in countries such as Australia, Germany, Switzerland, UK. In France, Canada, and US even the fear of genital mutilation is a valid reason to accord the refugee status, and UNHCR supports and encourages more countries to take this stance<sup>35</sup>. Finally, the highest point in the legislation for women protection at the international level was reached with the 1993 UN Declaration on the Elimination of Violence Against Women, which acknowledges the obligation for all States to make efforts for its eradication.

Thanks to this declaration, what was firstly reduced as "domestic" entered the public arena under the refugee domain for any time it falls under the umbrella of State-sanctioned or State-tolerated oppression. In order to determine the qualification for State's concern or not, it may need to call for a value judgement in order to screw out some causes other than gender for the persecution in question, such as religious or cultural causes. For example, it is interesting that rape by a soldier is not characterized as persecution, rather as unauthorized private act of an individual<sup>36</sup>. Even in this case though, by analyzing the context it is possible to prove a manifestation of public State authority, either as responsible for the conditions that allowed such action, or in failing to provide a remedy. For, even when women are raped because of their political opinion, such abuse occurs because they are women and because it causes a specific indignity and it is a manifestation of male power.

However, it is still not clear if the fact that a woman is victim of private or public violence is sufficient to show that she is persecuted for reasons of membership to that social group. Thus, the link between the act and the reasons in the Convention definition constitute a problematic aspect of this case.<sup>37</sup> In order to screw

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<sup>33</sup> UN Executive Committee, *Conclusion N.39: Refugee Women and International Protection (1985)*, available at: <http://www.unhcr.org/excom/exconc/3ae68c43a8/refugee-women-international-protection.html> [accessed 3 October 2017]

<sup>34</sup> See: Parliamentary Assembly of the Council of Europe, *Resolution 1765 (2009)* and *Recommendation 1940 (2010)* on *Gender-related claims for asylum*, *Resolution 1697 (2009)* and *Recommendation 1891 (2009)* on *Migrant women: at particular risk from domestic violence*.

<sup>35</sup> *Supra* note 33

<sup>36</sup> Goodwin-Gill & McAdam, *supra* note 1, at 82

<sup>37</sup> *Id.* at 83

out the doubts concerning this situation, it can be recalled a case involving women applicants holding citizenship in Pakistan<sup>38</sup>. The case needs to be analyzed in the framework of the Islamic religion, recognizing those women as set apart from society for three reasons: gender, accuse of adultery, unprotected status. Indeed, the women in question suffered violence from their husband who wrongly accused them of adultery, therefore they asked for asylum in the UK. They justified their request by explaining the unsustainable situation they would have suffered by returning to Pakistan, given that the lack of male protection and the suspected adultery would have made them victims of physical and emotional abuse by the rest of society. As the local authorities would have not protected them and considering that they were not granted the same rights accorded to the male members of that society, those women were characterized as persecuted for reason of membership to a specific social group. As a matter of fact, their request for asylum was accepted.

Being considered a member of the “women” social group often overlaps with the membership to another important group in refugees’ reality: those affected by HIV. According to the studies of the United Nations Program on HIV/AIDS (UNAIDS), the disease spreads in situations of conflict, instability, food insecurity, poverty, and deprivation<sup>39</sup>. Unfortunately, this picture represents the situation characterizing many refugee camps, in which such conditions lead to forced sexual behavior and sexual abuse. Moreover, women and girls are often coerced into sex to gain access to basic needs, such as food, shelter and physical security. Women and children face a higher risk of violence and rape, as it is exemplified by the episodes occurred in Rwanda in 1993-94, where 80% of women were raped and resulted HIV-positive. Among the causes of the HIV diffusion are counted commercial sex, alcohol abuse, and poor social status of women<sup>40</sup>. In 1996, the UNHCR decided to formally intervene in coordination with the UNAIDS and the WHO and issued the *Guidelines for HIV Interventions in Emergency Settings*. This provision enables governments and agencies to adopt measures for the prevention and treatment of HIV. The first step consists in providing information, especially to women refugees, for preventing the spread of the infection. Then the government or agency in question has to provide refugees with condoms, blood supplies and any necessary means in order to guarantee adequate sanitary conditions<sup>41</sup>. At the same time, the UNAIDS has specified, in its Handbook<sup>42</sup>, the prohibition to discriminate refugees resulted positive to HIV, and UNHCR issued a joint policy statement with the International Organization on Migration in order to oppose mandatory HIV screening and restrictions on asylum for those refugees resulted positive to HIV.<sup>43</sup>

In the end, by synthesizing women refugee-specific and general human rights, it is possible to respond to the most critical threats to the human dignity of women refugees.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 75

<sup>40</sup> Inter-parliamentary Union & UNHCR, *supra* note 13, at 52

<sup>41</sup> UNHCR, WHO & UNAIDS, *Guidelines for HIV interventions in Emergency Settings*, (1996), available at: <http://www.unhcr.org/publications/operations/3bc6e9dd10/guidelines-hiv-interventions-emergency-settings-unhcrwhounaids.html> [accessed 3 October 2017]

<sup>42</sup> UNAIDS-IPU, *Handbook for Legislators on HIV/AIDS, Law and Human Rights*, (1999)

<sup>43</sup> Inter-parliamentary Union & UNHCR, *supra* note 13, at 53

## 1.4 Violence Against Women

Known also as Resolution 48/104, 1993 of the General Assembly, the UN *Declaration on Violence Against Women* represents a fundamental step in the progress of international women law. As a matter of fact, the declaration opens with the acknowledgement of the urgent need to guarantee the most basic rights to women. In other words, the declaration does not add any new principle, but it simply restates the importance of those set in all main international conventions and declarations, starting from the rights to equality, dignity, security, liberty, integrity<sup>44</sup>. The importance of the Declaration lies exactly in the attempt to face the concrete obstacles to the guarantee of women's rights, of which the main one is *violence against women*. The document assumes even higher importance if considered as supporting and completing the 1993 Convention on the Elimination of All Forms of Discrimination Against Women (that will be discussed in later chapters). As explained in the introduction of the official text of Res.48/104, violence constitutes a manifestation of unequal power between men and women, thus it is a form of discrimination, which impedes the full enjoyment of rights and freedom of women<sup>45</sup>. Consequently, the Declaration of Violence Against Women becomes extremely significant in international refugee law, dealing with women who are frequently targeted with violence, with the result of compromising their rights and benefits guaranteed by their refugee status.

Firstly, 1993 Declaration defines violence in terms of physical, sexual, and psychological harm to women, both in the private and public sphere. Therefore, violence is here considered in a wide dimension, along with the line of thought guiding Human Rights law, which often identifies its goal in the guarantee of rights and liberty in all human aspects of life. Art. 2 mentions some of the main forms of violence condemned, including sexual abuse, rape, trafficking in women and forced prostitution<sup>46</sup>. The following articles serves the goal of ensuring States' participation in the fight to eliminate violence against women, by taking measures at a regional, national, and international level. According to the Declaration, any State should provide women with protection and mechanisms of assistance; in addition, reports on female violence should be compiled by all countries and sent to the UN for the monitoring of the application of assistance measures. States' participation was already considered as a vital factor in 1992 General Recommendation No.19 on violence against women, used by the Committee on the Elimination of Discrimination Against Women to affirm that States may be responsible for private acts if they fail to apply protection mechanism and compensation for the victim<sup>47</sup>. Moreover, the Convention obliges States to provide reports about the mechanisms they apply and the efficacy of these measures. This system is the same applied in human rights law as well, because it is the only way to monitor States in their application and adherence to the conventions.

The publication of the Declaration in 1993, suggests another goal pursued by the UNHCR with this document: raising awareness towards female violence after so many years of unreported episodes of abuses

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<sup>44</sup> UN General Assembly, *Res 48/104*, (20 December 1993)

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at art.2

<sup>47</sup> UN Cedaw Committee, *General Recommendation No.19*, (1992), 9, available at:

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> [accessed 3 October 2017]

suffered by many refugees from Bosnia and Herzegovina, Rwanda, Somalia, and Vietnam<sup>48</sup>. Besides coerced under-reporting, another problem consists in the general attitude of covering such episodes by the victims themselves. In other words, the UNHCR realized that a declaration could not be strong enough to solve a problem without creating the social conditions to favor its application. For, women suffering from sexual violence may be reluctant to denounce the crime, because of the concrete social cost in which they incur: stigmatization and shame. Obviously, the guidelines issued by UNHCR are not binding but are used frequently to support those instruments having legal effect. Indeed, the audience targeted does not count refugees, but mostly the social community, as it can have a role in both helping refugees and making pressure on governments to take measures in favor of their assistance. In this case, the adoption of educating and training systems for refugee women by each receiving state would be an important step for solving under-reporting problems.

Sexual violence is considered a violation of fundamental rights and it becomes a grave breach of humanitarian law in the context of armed conflict<sup>49</sup>. With this statement the UNHCR decided to introduce the 1995 *Sexual Violence Against Refugees: Guidelines on Prevention and Response*, then indicating what classifies as sexual violence and as violation of human rights. By taking into account the different definitions attributed by different legal systems, the text clarifies that sexual violence goes beyond rape, and it involves all those cases in which “the victim’s resistance is overcome by force”<sup>50</sup>. The exercise of this act may occur in each different phase of the refugees’ flight: before, during, after, and the responsible can be other refugees as well as local police officers and guards. In the second case, the victim may even decide to come back to the country of origin in order to flee from the insecurity of the country of asylum.

The Guidelines on Sexual Violence discuss also another key topic in respect of violence against women, namely the problem of under-reporting. The UNHCR provides instructions for the creation of better conditions for women denouncing episodes of violence. These simple strategies consist for example in adapting interviews techniques according to the different culture characterizing the society, with the goal of avoiding further risks for the victims. Another advice consists in conducting the investigation in a sensitive and confidential manner. Moreover, among the preventive measures suggested when dealing with the issue of sexual violence, the simplest to be applied is the strategical design and location of refugee camps, which should not isolate the community and should mirror as much as possible the composition of the original population. Female education and training can help in the process as well, by making women become active and conscious members of the society. Also, the Guidelines explain the steps to take in the case of response to a violent act, which triggers the intervention and assistance by the police and by a qualified medical staff. Each one of the main steps discussed by the document provides details and instructions, coherently with the intent of the

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<sup>48</sup> UN High Commissioner for Refugees *Sexual Violence Against Refugees: Guidelines on Prevention and Response*, (Geneva, 8 March 1995), Introduction. available at: <http://www.refworld.org/docid/3ae6b33e0.html> [accessed 3 September 2017]

<sup>49</sup> *Id.* at 1.1

<sup>50</sup> *Id.*

UNHCR of making the 1993 Declaration easier to be applied.

However, many of the points, especially those requiring the cooperation of the country of asylum, result still quite ambitious for some States, in which organization and budget for refugees' assistance make their application problematic.

Besides States' cooperation, the fight of violence against women has seen a deep involvement by IGOs as well. Actually, IGOs played a key role in raising the attention towards a gender-sensitive human rights law, which led to the Declaration of 1993. Specifically, IGOs focused on encouraging introduction of women violence in the work of the Human Rights Commission, the recognition of violence against women as a human rights violation in the Draft Declaration, and the introduction of issues affecting women in the agendas of upcoming international conferences. As a result, the UN sponsored three conferences addressing gender-based human rights violations: 1996 World Conference on Human Rights, 1994 International Conference on Population and Development, 1995 Fourth World Conference on Women. Preparatory meetings were held by UN before the Conference, and the participation was open to NGOs and IGOs, regardless if they had consultative status. These meetings provided a unique forum for advocates of women's rights and gave the opportunity to develop strategies for women's defense and share concerns and resources related to the fight of gender-based violence<sup>51</sup>. The involvement of IGOs and NGOs in the normative process has brought to the increase of documentation on gender abuses, which has helped in formulating norms and specific strategies to face the issue of gender-based violence. For instance, many abuses registered indicate governmental actors as responsible, while some governments also failed to ensure protection against non-governmental actors, such as employers. International legal instruments have been provided on the basis of this documentation. In the framework of gender-sensitive legislation, Refugee law was affected as well, so women were recognized as a "particular social group" among refugees by UNHCR and by Canadian and European administrative bodies. But many countries are facing a slower development in this field of law, including some of the most advanced countries, such as the US.

However, immigration-related disputes fall mostly in the hands of national and regional courts, therefore the influence of the human rights community should bring the principles applied at the international level to the regional level as well. This process has occurred and has grown since the 1990s, when US federal courts started to admit a sensitive approach towards refugee women fleeing gender-based abuses in their countries.

High evidence in international law concerning women security can be attributed to the *Security Council Resolution 1889 (2009)*, as it manifests the intervention of the main body of the UN in reason of its role as guardian of international peace and security. The resolution addresses all women and girls, but certain parts are specifically meant to defend the rights of refugee women, especially those escaping from regions after armed conflict. The Security Council condemns all violation of human rights committed against women during

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<sup>51</sup> Pamela Goldberd & Nancy Kelly, "International Human Rights and Violence Against Women", *Harvard Human Rights Journal*, 1993, Vol.6, 195

and after conflicts, and considers each State responsible for providing the victims with protection and for prosecuting crimes. Moreover, any State involved in the conflict must respect the civil character of refugee camps and has to ensure free and safe access to the camps for all humanitarian organizations bringing assistance, especially to women and girls<sup>52</sup>.

The most recent official paper in matter of violence against women is the *UNHCR Position Paper on Violence against Women and Girls in the European Union and Persons of Concern to UNHCR*, published in 2014. This Paper specifically concerns European countries, by relying on a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU), as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy”<sup>53</sup>. The TFEU expressly requires EU secondary legislation on asylum to conform to the 1951 Convention, and the EU Directive on preventing and combating trafficking in human beings and protecting its victims recites that “this directive is without prejudice to the principle of *non-refoulement* in accordance with the 1951 Convention relating to the Status of Refugees”<sup>54</sup>. Besides making manifest its position on the issue of violence, the Paper is used by the Council for the reiteration of its call to EU institutions to extend the system of defense for women and girls and for intensifying its fight against gender-based violence. The Paper opens with the definition of violence in all its forms, domestic violence included. In fact, even though UNHCR recognizes specific risks of violence for refugee women (e.g. genital mutilation, forced marriages...), it highlights the importance of condemning domestic violence as well. This approach reveals the recent development of gender violence legislation, which has extended to cover the private sphere, as many acts against women take place inside the household and cannot remain unpunished. Moreover, the Council of Europe stated its awareness that fear of deportation or loss of residence status is a very powerful tool used by perpetrators to prevent victims of violence against women and domestic violence from seeking help in authorities or from separating from the victim from them. Therefore, the drafters of the Convention regulating European migrants’ conditions considered it necessary to ensure that the risk of losing their residence status should not constitute an impediment to victims leaving an abusive and violent marriage or relationship (Art.59, CoE Convention). Besides these provisions adopted inside the EU, the European Commission encourages the use of existing practices and norms proposed by UNHCR, affirming the adherence of the EU to international law conventions related to refugees’ treatment<sup>55</sup>.

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<sup>52</sup> Security Council, *Resolution 1889*, (5 October 2009)

<sup>53</sup> UN High Commissioner for Refugees, *Position Paper on Violence against Women and Girls in the European Union And Persons of Concern to UNHCR*, (March 2014), available at: <http://www.refworld.org/docid/5326ab594.html> [accessed 3 September 2017]

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

## The application of Refugee law

### 2.1 Initial difficulties in the application of 1951 Convention:

#### a. Does Violence against women qualify as persecution?

Although the main problem of 1951 Convention may be seen in the ambiguity of the concept “lack of protection”, there are also other aspects on which some commentators have focused their attention. For instance, Professor Anker<sup>1</sup> detected a big hole in the Convention, being the absence of specific provisions for women protection. The Convention was framed in general terms, with the consequence of a low level of female defense. This appears as a paradox, especially after having considered the data presented by Anker. She reports an increase in the number of refugees after the Cold War: from 2.7 million in 1970s to 8.2 million, to 15.3 million in 1996 - plus 20 million displaced internally within the borders of their countries. At the end of the 1990s the number of refugees was decreasing but the internally displaced were rising due to the restrictive measures in receiving countries<sup>2</sup>. These numbers are impressive, considering that 40 million of refugees added to internally displaced was equal to the entire population of France. But even more interesting for the topic of this thesis is the composition of the group, constituted for 80% by women and their children<sup>3</sup>. This is what led another commentator, Camus-Jaques, to describe refugee women as the “Forgotten Majority”. She highlights that the great majority of them comes from regions facing a conflict, and more in general from Third World countries<sup>4</sup>. This is what allows her to recognize conflict, global injustice, and inequality as the major causes for refugees’ movements.

What Anker denounces, is a lack of legislative instruments protecting women only, which are otherwise left behind by males, who often take advantage of their privileged position<sup>5</sup>. For supporting her request for gender-specific legislation, the author presents some cases where 1951 Refugee Convention had not been sufficient in the protection of female individuals and she points out issues affecting women refugees only. The first factor that needs to be considered in the study of the refugee flux consists in the increase in low intensity warfare after the Cold War and Human Rights violations that have affected mostly women, often in gender-specific ways<sup>6</sup>. On this topic Sima Wali, an Afghan human rights advocate, held a speech in 1995 to explain the condition of adult women after a war or civil conflict, such as the one occurred in Cambodia. She writes that most women are left widowed and handicapped, facing a significant mutation in their role as caretakers. Suffering of physical vulnerability, they become victims of human rights violations, such as mass rapes,

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<sup>1</sup>Deborah E. Anker, *Women Refugees: Forgotten No Longer?* In: Carlier, J. & Vanheule, D. *Europe and Refugees: A challenge?/ Europe et les Réfugiés: Un Défi?* (Martinus Nijhoff Publishers, 1995): 131

<sup>2</sup> *Id.* at 125,126

<sup>3</sup> *Id.* at 126,127

<sup>4</sup> G. Camus-Jaques, *Refugee women: the Forgotten Majority*, in G. Loescher & L. Monahan, (eds.) *Refugees and International Relations* (Oxford University Press, 1989): 141

<sup>5</sup> Anker *supra* note 1, at 129

<sup>6</sup> *Id.*

abduction, torture, forced pregnancy, forced prostitution, women trafficking, and granting of sexual favors in exchange for food<sup>7</sup>. These gender-based violations are not limited to physical damage, but they have life-long effects on the dignity and energy of female victims trying to remake their lives. Furthermore, it is important to highlight that violence against women is no longer a by-product of war, rather it has become a precise objective, like other forms of abuse, including public violence against women who do not conform to cultural practices. Wali sees this trend as an added obstacle in the protection of refugee and displaced female individuals when helping them rebuild their lives<sup>8</sup>. Despite of the situation described, international human rights doctrines and discourse have ignored any specific discussion on the rights of women, and acts such as rape and sexual violence were not condemned outside conflict until the 1998 Rome Statute.

It is clear that Anker takes a gender-focused approach, with the intention of making manifest the critical conditions of women refugees, left unprotected by the Convention. In her article “*Women Refugees: Forgotten No Longer*” (1995), Anker gives voice to a category of refugees that had been ignored until the 1990s, even though it represented one of the refugees’ group that suffered the most, as explained by Sima Wali. The reason why persecution of women struggled to be recognized as such in numerous situations lies in dispositions of national law<sup>9</sup>. For instance, the example about Cambodia displays clear initial difficulties in the application of 1951 Convention, which resulted in contrast with traditional social practices and mores of certain populations, especially in what concerns women. Another significant example related to this topic can be traced in the repressive population policy in China, which promoted coercive sterilization or abortion. In this case, the US held that these policies could not amount to persecution because they were non-political, non-discriminatory, and generally applicable<sup>10</sup>. On the other side, Canada found that such policies were disproportional, targeting specifically women, and they were discriminatory on the basis of political opinion and gender-specific social group, thus providing sufficient ground for asylum eligibility.<sup>11</sup> Finally, the third and most significant case reported here about the issue of violation of social more is the Constitution of Iran, which restricts women to their role of mother and child-bearer. Indeed, marriage is a social obligation, which is reinforced by significant restrictions on employment and access to education. Moreover, women face limitations even in the dress code and in the way they may communicate with men. These provisions are sufficient to state that the Iranian prescribes violent penalties for those who do not conform to such norms<sup>12</sup>.

There is a third violent act that struggled to be recognized as persecution: rape. As a matter of fact, women’s asylum claims were often denied because the harm caused by rape and other sexual violence was not considered serious enough to classify as a ground of “persecution”. Even though there never has been any question about the classification of serious physical assaults as acts of persecution, in some cases the fact that

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<sup>7</sup>Sima Wali, *Refugee Women in Development, Towards Beijing: Priorities for '95*, paper and speech presented at New England regional conference (Harvard University, March 1995)

<sup>8</sup> *Id.* at 7

<sup>9</sup> Anker *supra* note 1 at 130

<sup>10</sup> R. Boland, *Population Policies, Human Rights and Legal Change*, American University Law Review (1995), 1257-1258

<sup>11</sup> Anker *supra* note 1, at 138 [On the Canadian jurisprudence see *Cheung v. Canada*, 1993, 2 F.C. 314, 102 D.L.R. (4th) 214]

<sup>12</sup> Anker *supra* note 1 at 140-141

the harm is sexual undermines its otherwise unambiguous character, as it happens in the US<sup>13</sup>. Regarding this issue, Anker cites the case of Haiti, where during the coup of 1991 military men gang-raped a woman for her political ideas, and many cases of sexual violence occurred and rested unpunished. Paradoxically though, rape is even more disruptive than physical violence, because it harms the victim both physically and mentally, therefore it should trigger a heavier punishment compared to general violence<sup>14</sup>. Only in 1996 the Women Refugee Project, representing its refugee clients and other organizations, filed with the Organization of American States a report in which it recognized the severity of sexual violations. This Communication was particularly important because the recognition of rape as torture not only acknowledges the suffering of women, but, as a legal matter, it also provides a clear foundation for universal jurisdiction under customary as well as international treaty law. Practically, it served as an encouragement for women residing in the US, Canada or other States parties to the UN Refugee Convention to be recognized as refugees and to be granted asylum<sup>15</sup>. With this statement, Anker gives a convincing support to why abused women deserve consideration under UN Refugee Convention and other human rights instruments, and why violence against women is worth to be treated as a specific form of persecution.

#### **b. Right to access the courts and other legal difficulties**

The flaws left by 1951 Convention do not exhaust in the absence of specific provisions for women and the lack of protection mechanisms. Rather, even the rights accorded by the Convention result often ambiguous and leave room for non-application. In respect to this point, the American scholar Hathaway, in his masterpiece *“The rights of Refugees under International Law”* (2005), presents the problem concerning the application of the right to access the courts, which would represent an important instrument for refugees to defend themselves and their rights. Specifically, the Convention grants refugees the right to have access to the courts of any state party, even before having accorded their refugee status<sup>16</sup>. Some law experts, such as Grahl-Madsen, defend a restricted interpretation of the article, that in their opinion would be valid only for courts of law, without applying to administrative authorities. However, later even Madsen recognized the presence of examples of articles in which access to administrative authority is guaranteed, as in the case of article 32 (duty of non-expulsion)<sup>17</sup>. This second interpretation was reinforced by UNHCR Executive Committee Conclusion No.22<sup>18</sup>, affirming the right for all asylum seekers to have free access to all courts and tribunals. Despite these two clear provisions, the ambiguity around this right stay unresolved because Art. 14 of the Covenant on Civil and Political Rights assesses the validity of the right to access the courts only for all courts and tribunals which

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<sup>13</sup> *Id.* at 142

<sup>14</sup> *Id.* at 144

<sup>15</sup> *Id.* at 146

<sup>16</sup> James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005: 905

<sup>17</sup> A. Grahl-Madsen, “Political Rights and Freedoms of Refugees”, in G. Melander and P. Nobel eds., *African Refugees and the Law* 47 (1978): 66

<sup>18</sup> UNHCR Executive Committee Conclusion No. 22, *Protection of Asylum Seekers in Situations of Large-Scale Influx* (1981), at para. II(B)(2)(f), available at: [www.unhcr.ch](http://www.unhcr.ch) [accessed 14 September 2017].

determine criminal charges or rights and obligations in a suit at law<sup>19</sup>. The difficulty encountered in the application of the basic right to access courts was partially foreseen by the drafters, as demonstrated by the declarations of the Secretary-General in “Memorandum”. He acknowledges that even though the right of a refugee to sue and be sued is not challenged in principle, some obstacles can make it illusory in practice. The obligation to furnish *caution judicatum solvi*, and the refusal to grant refugees the benefit of legal assistance would impede the application of that right, considering that many countries allow legal assistance only for nationals and strangers who can invoke a treaty of reciprocity<sup>20</sup>. In other words, the Convention of 1951 represented a significant advancement in the formal guarantee of refugees’ rights and protection, but it often failed to provide the necessary instruments for making its application possible in practical terms. Concerning this aspect, the Convention of 1933 and 1938 were more comprehensive, as refugees were exempted from the obligation to furnish *caution judicatum solvi*, and they could enjoy legal assistance on the same conditions as nationals. On the other hand, the strength of the Refugee Convention is that once habitual residence is established, the rights of refugees to access the courts are not in question<sup>21</sup>. So far, the problems mentioned above affect both male and female refugees, with no distinction. Unfortunately, women face additional risks related to the problem of access to justice, which makes the issue even more relevant and urgent to solve. First of all, women are more exposed to become victims of violence, as their biological nature makes them easy prey for men, especially in precarious contexts such as refugee camps, where violence tends to proliferate. However, this statistic would be partially modified if women could enjoy equality in rights compared to refugee men, as formally guaranteed by the principle of non-discrimination stated in Art.26 of the Civil and Political Covenant, in Art. 2 of the Human Rights Covenants, and in Art 3 of the Refugee Convention. In practice though, women find themselves in a disadvantaged position, starting from the reporting stage. They are often discouraged to report the abuse, especially Roma migrant women and women with disabilities, who may face additional barriers, including cultural ones<sup>22</sup>. For this reason, women often refrain from presenting their claim, with the result that many violent acts are not reported. This is one of the major failures in protecting women refugees and in ensuring gender equality in general. Therefore, this issue does not highlight a serious flaw in 1951 Convention only, rather in human rights law in general and in authorities who should protect individual security such as the UN.

Refugee women do not only cope with violence during the experience after their flight, but violence can be the reason why they leave their country and try to save themselves. And in this case again, gender equality has struggled to prevail so far. In a famous landmark British case, *Shah and Islam*, the House of Lords declared that “it was useless for Mrs. Islam to complain to the police or the courts about her husband’s conduct. On the contrary, the police were likely to accept her husband’s allegations of infidelity and arrest her

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<sup>19</sup> Hathaway, *supra* note 16

<sup>20</sup> *Id.* at 906

<sup>21</sup> *Id.* at 912

<sup>22</sup> Nils Muižnieks, *Human Rights of refugee and migrant women and girls need to be better protected*, Council of Europe’s Official website, Strasbourg, 7 March 2013

instead”<sup>23</sup>. Part of the weakness of women’s claims derives from the absence of gender as a specific reason for persecution, but this topic will be addressed deeper in the next section. Here instead, the focus is simply on the difficulties encountered in cases in which the basis for persecution falls in one of the recognized categories. In fact, women may find very hard to speak about their experience, especially when it was extremely painful. Moreover, they are not helped by the frequent presence of male interviewers, particularly when the act to be reported consists in sexual violence<sup>24</sup>. Thus, the attendance of female officials, who are trained and sensitive to the issue would help the victim in reporting her experience in a more precise and detailed manner. Unfortunately, women are often underrepresented in the UN and in other international agencies. An additional issue that affects women is related to the community from which they come: some cultures hold the woman guilty for failing to preserve her virginity when sexually abused<sup>25</sup>. Sometimes when families of refugees arrive in a country, women are not interviewed, even when they are the primary victim of persecution, instead of their husbands. Other times wives are asked questions only to confirm the view presented by the male member of the family. This attitude denotes another disparity in the treatment of individuals belonging to different sexes. Fortunately, at least in the specific case of adjudicating asylum, guidelines exist about the proper modality to adopt during interviews. For instance, female adjudicators and interpreters must run the interviews, and family members may be required to leave the room if the interviewed seems more likely to speak freely on her own. Moreover, adjudicators are to be familiar with the culture and the problems that have characterized the life of the victim. Finally, additional complications for women may arise from the absence of the right of family reunification. In other words, 1951 Convention does not impose on states the obligation to reunite families, meant as children and mothers, even though it strongly recommends it<sup>26</sup>. Therefore, even if a man is given the right of asylum, his wife may see this right denied, so she is left unprotected without a male figure in the family and sometimes with children to take care of. Such a situation weakens down the woman’s position even more.

## 2.2 Refugee law and the ICC

Directly linked to the questions about persecution, there is another interesting aspect worth to be discussed in the study of refugees’ cases, namely the relation about international Refugee law and international Criminal law. In fact, these two areas often intertwine when addressing issues of refugees, and sometimes the results can show the relative strengths and weaknesses of each one of these two branches of law.

In 1998 the Rome Statute introduced the gender-based persecution among the number of crimes against humanity. This has meant a significant step forward in the legislation aimed at gender protection, and it has been applied immediately by the ICC (International Criminal Court), especially when gender-based

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<sup>23</sup> Susan Forbes Martin, *Refugee Women*, (1992, 2nd ed. Lexington Books, USA, 2004): 34 [See UK Case law: *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)*, House of Lords, UK, 1999]

<sup>24</sup> *Id.* at 36

<sup>25</sup> *Id.* at 37

<sup>26</sup> Forbes Martin, *supra* note 23 at 36

persecution is related to other elements such as race, religion, and political orientation. Such application has provided cases and commentary that can be used by the ICC in its judgements; but because of its recent origin, gender-based persecution has not been discussed in the same depth as the other crimes which fall in the same category<sup>27</sup>. However, for filling the gap, the ICC can rely on sources external to international criminal law when analyzing gender-based persecution. The problem was that, besides the significant improvements in the different areas of law by 1950, gender had remained invisible for years before entering areas of international law, Refugee law included. For example, gender was not considered a characteristic for determining a distinguished social group, therefore it would still fall outside the possible grounds for persecution listed in 1951 Convention. Trying to bring a remedy, the European Parliament in 1984 urged that women fearing inhuman treatment were considered a social group and able to gain refugee status because of that. Also, in the *Note on Refugee Women and International Protection*<sup>28</sup> submitted to the Forty-first Session of the Executive Committee in 1990, the High Commissioner encouraged governments to bring gender among the possible reasons for persecution. Finally, in 2002 in the *Guidelines for Gender-related persecution*, the UNHCR restated that even though gender was not mentioned in the refugee definition, its influence in the type of persecution and harm suffered is widely accepted<sup>29</sup>. This is a clear affirmation of the validity of gender as a ground for persecution condemned under 1951 Convention, despite its absence in the formal statement. It is exactly International Refugee Law the main source of help for the ICC in judging gender-related persecution, especially because gender-specific legislation has been present in Refugee law since 1985, and a rich experience in case law involving gender has accumulated until now<sup>30</sup>. Even the drafters of 1998 Rome Statute were largely influenced by Refugee law, that is why Criminal law ended up being strongly linked to it for gender-based crimes against humanity. It means that judges often look at elements and interpretations of refugee law when applying international Criminal law concerning gender-based persecution, given that refugee law experimented elements of gender-related persecution when this dimension was still completely unexplored in Criminal law. However, it would not be correct to transfer directly the principles of refugee law in Criminal law, as specified in *Kupreskic decision* of International Criminal Tribunal for the Former Yugoslavia<sup>31</sup>. The result is the use of Refugee law not as a principle but as a guide in judgements were criminal law lacks specific gender-sensitive guidelines.

The use of refugee law by the ICC can be difficult sometimes, because some misinterpretations by domestic judges and administrators have characterized the application of refugee law for cases of gender-related persecution. For instance, Oosterveld asserts the existence of a rich feminist literature in refugee law that studied the failure of many domestic decision makers in interpreting the meaning of “gender”, and the

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<sup>27</sup> Valerie Oosterveld, “Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime against Humanity of Gender-based Persecution”, *Duke J Comp. & Int’l L.* (2006-2007): 49

<sup>28</sup> UNHCR, *Note on Refugee Women and International Protection*, 1990, available at: <http://www.unhcr.org/excom/scip/3ae68ccd0/note-refugee-women-international-protection.html> [accessed 3 October 2017]

<sup>29</sup> UNHCR, *Guidelines for Gender-Related Persecution*, 2002

<sup>30</sup> UNHCR, Executive Committee’s *Conclusion No.39*, U.N. Doc. A/40/12/Add.1 (Jan 10, 1986)

<sup>31</sup> ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, 589 (Jan. 14, 2000).

link among gender, discrimination and persecution<sup>32</sup>. Furthermore, even though the influence of refugee law in criminal law is out of doubt, the relation among the two is still blurred and debatable. Oosterveld underlines some unanswered questions concerning the difference between persecution based on gender compared to persecution of an individual as woman or man, and she wonders if these questions matter for the ICC, and why criminal law and refugee law speak respectively of *gender-based* and *gender-related* persecution. These problems may put the link between criminal law and refugee law seriously in doubt.

For answering the question just raised, there is the need to present the main traits of Criminal law concerning persecution and gender, in order to be able to analyze then its connection with Refugee law, whose principles about persecution and gender have already been explained. Firstly, it is worth to mention how persecution entered officially among the crimes against humanity: it was for Law N.10 of the International Military Tribunal to prosecute individuals in Germany who had avoided the Military Tribunal. Persecution was here determined in reason of political, racial or religious grounds<sup>33</sup>. This article was copied almost exactly in the Statute of the ICTY and in the Statute of the International Criminal Tribunal for Rwanda (ICTR), which in addition requires the crime be committed as an attack based on national, political, ethnic, racial or religious grounds<sup>34</sup>. Later, the Rome Statute defined persecution adding three more grounds namely *gender*, *cultural* and “*other grounds that are universally recognized as impermissible under international law*”<sup>35</sup>. Analyzing carefully the article of the Rome Statute, some conservative states pointed out that the term “gender” was not defined, as they were eager to know whether the word was meant to give rights based on sexual orientation or to condemn specific practices against women<sup>36</sup>. Negotiations on the definition of “gender” largely dominated the preparatory stage of the Rome Statute, until its final acceptance as one of the grounds for persecution<sup>37</sup>. This step was significant for Criminal law, but statutes are not the only source that the ICC uses in its decisions, whereas case law can be very important for the final judgement. So, when dealing with persecution involving gender as a possible factor, the ICC made frequent use of judgements by the ICTY and the ICTR<sup>38</sup>. Indeed, these tribunals dealt with many cases involving violence against women, and parts of the episodes brought up before them affected the inclusion of gender in the Rome Statute. As a matter of fact, rape was used as mechanism for ethnic cleansing in Bosnia and Rwanda, which convinced the specialized tribunals to include it among war crimes and crimes against humanity. Human Rights Watch reported horrifying episodes that unfortunately were occurring regularly as part of the war against Tutsi population in Rwanda. Tutsi women were raped, gang-raped, raped with sharp objects, and genitally mutilated. This was the final stage of torture for these women, who were forced to assist to the destruction of their houses and the killings of their relatives

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<sup>32</sup> Forbes Martin, *supra* note 27 at 53

<sup>33</sup> Control Council, Law No. 10 “*Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*”(OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, 20 January 1946)

<sup>34</sup> *Statute of the International Criminal Tribunal* art. 5(h), 32 I.L.M. 1192 (25 May, 1993)

<sup>35</sup> Rome Statute of the International Criminal Court art. 7(1)(h), 2187, U.N.T.S. 90, 37 I.L.M. 999, 1004 (17 July 1998)

<sup>36</sup> Oosterveld, *supra* note 27 at 57

<sup>37</sup> *Id.* at 59

<sup>38</sup> *Id.* at 62

before being subjected to sexual violence<sup>39</sup>. When these episodes came up rape and forced pregnancy were listed in the Statute of the Criminal Court as crimes against humanity when they are part of an attack towards a targeted population.

If the privileged case law for the ICC stayed inside the framework of criminal law, a look to refugee law is needed in order to get some clarifications for the meaning of the two elements that may constitute gender-based persecution. The first element, according to the Rome Statute, requires that the perpetrator deprives one or more persons of fundamental rights. But the meaning of “fundamental rights” in the context of gender-based persecution cannot be found through research of case law of the ICTY and ICTR, because their statutes do not list the specific violations. On the contrary, the UNHCR provided a clear explanation of the forms of persecution. In the 2002 *Guidelines on International Protection: Gender-Related persecution*, the UNHCR lists forms of gender-related violence, rape, dowry-related violence, female genital-mutilation, domestic violence, ad trafficking as acts causing suffering both physically and mentally and used as forms of persecution. Additionally, the UNHCR includes in the reason for persecution, the discrimination caused by the refusal of an individual to adhere to cultural norms attributed to her sex<sup>40</sup>. The Canadian Guidelines, *Women Refugee Claimants Fearing Gender-Related Persecution*, help in defining the possible violations and additionally include a list of human rights instruments when distinguishing between admissible and prohibited behavior towards women. This results particularly useful for interpreting the ICC’s grounds of persecution “contrary to international law”. The evidence of the use of these sources by the ICC can be found in the increasing cases of refugee law considering rape, genital mutilation, domestic violence, gender discrimination, as grounds of persecution<sup>41</sup>.

At this point, it is clear that Refugee law’s understanding of gender-related persecution has grown overtime, helping significantly the ICC to follow a similar path. However, the ICC needs a more informed point to start and refugee law cannot provide guidance for the interpretation of “gender” in specific situations. Again, the missing definition of “gender” in the Refugee Convention makes it fall under anyone of the other grounds, namely race, religion, nationality, membership in a particular social group, and political opinion. In other words, gender risks to be considered as a sub-category if the Refugee Convention is taken into account, and that may lead to the failure in the fight against persecution. Instead, having the Rome Statute explicitly included gender-based persecution as a category on its own, the ICC can avoid the ambiguity created in Refugee law on this topic<sup>42</sup>.

After having exhausted the discussion on the “violations of fundamental rights”, the second element to analyze is the “proper delineation of Public Violations”. Again, the ICC has followed here the attitude adopted by the UNHCR in Refugee law. Given that in the refugee context, women may experience violations caused

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<sup>39</sup> Human Rights Watch, *Sexual violence during the Rwandan genocide and its aftermath*, (September 1996), available at: <https://www.hrw.org/reports/1996/Rwanda.htm> [accessed: 15 September 2017]

<sup>40</sup> UNHCR, *supra* note 28

<sup>41</sup> Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, (15 HARV. HUM. RTS. J., 2002): 133, 140-143

<sup>42</sup> Oosterveld, *supra* note 27 at 68

by overlapping identities, refugee status inquiries must contextualize properly each case and the approach must be holistic in considering all the circumstances affecting the claimant. These traits are common to inquiries by the ICC, which need to be contextualized and holistic as well. However, even though domestic refugee decisions have tried to adopt the guidelines of the UNHCR, some academic experts have criticized many decisions, considered as having misunderstood women's relationship with the perpetrator. For example, women's connection with the state was often criticized, because the commentators have equated *political* with *public* in defining the acts of the prosecutor and in clarifying the claimant's identity. For instance, many refugee decision-makers wrongly considered some acts "personal" because of the private context in which occurred, such as a spousal relationship<sup>43</sup>. As a result, those acts escaped from the classification of persecution. Some commentators criticized this approach based on the idea that any act occurring in the private sphere is caused by personal reasons, with the result of missing the gender patterns taking place<sup>44</sup>. Crawley discussed the theme as well, and she noticed how gender-neutrality can exist in international law only in theory, while in practice it clashes with gendered domestic laws and social patterns<sup>45</sup>. Moreover, the problem of gender-sensitive laws extends further than Refugee law. Human rights law is another area in which this problem has frequently risen, with a prevailing masculine world view that has led to the application of international law only in public and state-governed spheres, with the exclusion of harms suffered by women in the domestic context<sup>46</sup>.

Another problem in the consideration of the non- "political" identity of the claimant, consists in a mistaken definition of politics, centered on institutions like political parties, organizations, and movements, that have constantly excluded women. Instead, politics should include, ad hoc politics and protest activities in which women take part. By participating, women gain knowledge, which put them in danger of becoming the target of persecution. Another mistake can be detected in the assumption that women share the same political views of their husbands: their status, beliefs and identities should not be considered as depending on their male partner<sup>47</sup>. The reason why a focus on these mistakes is important, lies in the fact that considering female experience non-political may lead to wrong decisions in refugee determination, failing to protect women who would qualify as refugee if their political status was recognized. Therefore, the analysis of these mistakes is vital for a progress in refugee law, but also in international criminal law. Indeed, a correct understanding of the terms *gender*, *public* and *private* helps the ICC in evaluating what amounts to persecution and what does not, and consequently what can be classified as gender-based persecution, thereby resulting in a fundamental rights violation to be condemned.

Refugee law is used as reference by the ICC not only in determining the existence of discrimination, but in evaluating the degree of the discrimination occurred as well<sup>48</sup>. The UNHCR's *Gender Guidelines* do

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<sup>43</sup> *Id.* at 70

<sup>44</sup> Anker, *supra* note 40 at 141

<sup>45</sup> Heaven Crawley, *Refugees and Gender Law and Process*, (Jordan Publishing Limited, 2001), ch. 2.1

<sup>46</sup> Oosterveld, *supra* note 27 at 71

<sup>47</sup> Crawley, *supra* note 44 at 22-26

<sup>48</sup> Oosterveld, *supra* note 27 at 74

not classify a “mere” violation as persecution, but there is an analysis on gender to be explained in order to understand this differentiation. The first point to clarify is that widespread and ordinary discrimination should not lead to the mistake of being considered as “mere discrimination” in reason of its frequency. Rather, the fact that violent acts such as rape or sexual abuses occur universally, does not make them less serious, so they still amount to persecution. For instance, UNHCR’s Guidelines condemn the discriminatory state policy or practice as persecution, giving an example that what is widespread by definition does qualify as persecution<sup>49</sup>. Once again, Refugee law provides useful guidance for the ICC.

Oosterveld notes another difficulty that may create concerns about the correct consideration of gender by the ICC. This time the problem lies in the words of the Rome Statute itself, inside the definition of gender. Specifically, the words “context of society” used in the definition would heightened the risk of a social construction of gender, which may lead to the justification of discriminatory behaviors. But the ICC performs careful studies to understand the role of discrimination in maintaining each society and how gender is constructed, in order to find the balance between respecting the culture and respecting human rights. It is not to forget that “context of society” refers to the international society as well, therefore the ICC, must take example from Refugee law, which considers the domestic and the international social construction of gender. So far, the term “gender” has been repeated multiple times, however a complete and precise understanding of its meaning should never be taken for granted, as it may reveal different complexities, especially when compared to sex. Still, one of the key elements for identifying a case of gender-based persecution, resides in the understanding of what gender is and how it includes identities based on sexual orientation or sexual outlaw status<sup>50</sup>. So, this is what the ICC’s Prosecutor and Judges must clearly understand, together with the influence that gender had on the act committed, in order to clarify whether the persecution was based on this ground or not. While Refugee law cannot rely on a definition of gender from 1951 Convention, the ICC counts on the Rome Statute, which defined gender as referring “to the two sexes, male and female, within the context of society”<sup>51</sup>. The part “within the context of society” reminds to the social construction of gender, so it is a way to acknowledges the social expectations towards individuals of the male and female biological sex. Consequently, the definition leaves up to the ICC’s judges all the considerations and evaluations to understand the specific society involved and its interpretation of gender. Again, the ICC can count on a significant help coming from refugee law. Even though the Refugee Convention does not provide a definition, the UNHCR has tried to partially fill this gap through a softer means, the Gender Guidelines<sup>52</sup>. The addition brought by the Guidelines is the importance given to the difference among sex and gender: the former depends on “biological determination” and it is static, the latter can change overtime due to its social and cultural construction. Despite this specific definition, Crawley noted that in refugee law and literature the terms sex and gender were often interchanged, with the latter ending up being used as synonymous of “woman”. On the contrary, the use of the

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<sup>49</sup> UNHCR, *supra* note 28

<sup>50</sup> Oosterveld, *supra* note 27 at 73

<sup>51</sup> Rome Statute, *supra* note 34

<sup>52</sup> UNHCR, *supra* note 28

term “gender” in the Rome Statute would have exactly the purpose to avoid the equation between “gender-based persecution” and persecution of women. In other words, the type of persecution in question is not directed to a woman because of her sex, but because of her social identity<sup>53</sup>.

The last point to analyze in the clause of the Rome Statute condemning gender-based persecution resides in the words “based on”. In the language of law, the causal link is very important when the judges are trying to define the main reason triggering the crime. Indeed, the cause of the crime permits, as in this case, to classify the crime under one category or the other. The expression “based on” clearly means that the main reason behind the persecution must be gender. Similarly, Refugee law uses the expression “for reasons of”, in order to point out the difference between persecution that takes gender-specific forms and persecution *because of* gender<sup>54</sup>. For instance, one may be raped (persecution *as* a woman) for reasons unrelated to gender, or flogged because she refuses to wear the veil (not *as* but *because*), or genitally mutilated (both persecution *as* and *because* one is a woman). Some commentators, such as Oosterveld, are not completely convinced by the classification made by Macklin in order to classify an act in its specific category of persecution. For example, rape against a woman can always be seen as gender-based, even if it may overlap with other types of persecution<sup>55</sup>.

In conclusion, in spite of the many flaws present in 1951 Convention and despite the inconsistency characterizing domestic refugee law, Refugee law still plays a key role in guiding the ICC in regard to gender-based persecution. Indeed, international Refugee law remains so far the only area of international law that has accumulated experience in gender-based persecution, thus it would be a mistake if the judges of the ICC did not take into account this resource.

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<sup>53</sup> Crawley, *supra* note 44 at 6,7

<sup>54</sup> Audrey Macklin, “Refugee Women and the Imperative of Categories”, *Human Rights Q.*, (1995) 17, 258,259

<sup>55</sup> Oosterveld, *supra* note 27 at 83

## The authorities involved in women refugees' protection

### 3.1 UNHCR, CEDAW, CAT: their legislation, role, and limits

While in the previous chapter the focus was on the link between Criminal law and Refugee law, now the attention is driven on the influence of Human Rights law on Refugee law. Particularly, the international bodies which monitor human rights' application and human safety are the same involved in the main issues concerning refugees. This is logical, given that the major needs of refugees, especially gender-related issues, mostly revolves around human rights, so the most sensitive international authorities in this matter have a substantive competence in Human Rights law as well. As a matter of fact, the UN – through some of its specialized committees<sup>1</sup> - is the main body involved in refugees' protection as well as the supervisor of world security.

The UN recognized for the first time the problem related to women refugees in 1979, when the General Assembly discussed the issue on occasion of the Conference for the “women's decade” in Nairobi, proclaimed by the UN itself<sup>2</sup>. But the interest of UNHCR for gender issues became significant only in 1985, with *Conclusion No.39 on Refugee Women and International Protection*<sup>3</sup>, which came out thanks to the developments resulting from the conference. The Conclusion acknowledges the particularly disadvantaged situation of women refugees and the necessity to adopt specific strategies to protect them from physical violence, sexual abuses and discrimination.<sup>4</sup> The intent finally concretized in 1991, when the UNHCR adopted the *Guidelines on the Protection of Women Refugees*<sup>5</sup>. In 1995, the Platform for Action in Beijing asked to the States to recognize as refugees all women suffering gender-based persecution and to promote the guidelines of UNHCR<sup>6</sup>. Afterwards, the involvement of UN has increased but it is still mostly unstructured.

In 1997, the UN has issued a report on the violence against women in civil conflicts, its qualification as international crimes, in addition with an analysis on the role of women in family and society<sup>7</sup>. The Report came with a series of guidelines for the system of the UN and for the organs protecting human rights, such as Cedaw. Therefore, in 1992 the Cedaw Committee issued a recommendation on the necessity to create adequate services for victims of SGBV (Sexual and Gender-Based Violence) including refugee women<sup>8</sup>. Recently, the Committee asked to the single states to apply the CEDAW without discrimination against individuals under

<sup>1</sup> Cedaw Committee and Committee Against Torture as the most relevant committees for this thesis.

<sup>2</sup> Marco Balboni, *La protezione internazionale in ragione del genere, dell'orientamento sessuale e dell'identità di genere. Aspetti di diritto internazionale e dell'Unione Europea*, (G. Giappichelli Editore, 2012): 144

<sup>3</sup> Executive Committee *Conclusion N.39: Refugee Women and International Protection*, 1985, available at: <http://www.unhcr.org/excom/exconc/3ae68c43a8/refugee-women-international-protection.html> [accessed 3 October 2017]

<sup>4</sup> *Id.*

<sup>5</sup> Office of the United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, (Geneva, July 1991)

<sup>6</sup> Balboni, *supra* note 2

<sup>7</sup> *Id.*

<sup>8</sup> CEDAW, *General Recommendation No.19: Violence against Women*, 1992, § 24. Cfr. *General Recommendation No.24 on Art. 12: Women and Health*, 1999, § 16

their jurisdiction, and to prohibit any direct and indirect discrimination against all women, included refugee women and asylum seekers<sup>9</sup>. Moreover, in October 2011, the Committee underlined the obligation to ensure equality among refugees and invited the States to recognize “*gender-related forms of persecution and to interpret the membership of a particular social group of the 1950 Convention to apply to women. Gender sensitive registration, reception, interview and adjudication processes also need to be in place to ensure women’s equal access to asylum*”<sup>10</sup>.

Contemporary to Cedaw’s birth, another Committee was created, whose origin is due to General Assembly *Resolution 39/46* of 10 December 1984. The accession to this resolution implied the adoption of the “*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*”, whose implementation by State parties is monitored by the Committee against Torture, CAT<sup>11</sup>. Given the specificity of the problem defended by the CAT, it is inevitable that among its cases there are also many episodes involving refugee women, who often need and demand protection for some form of torture or inhuman treatment they suffer.

In 2000, *the Special Rapporteur* on violence against women asked governments both to adopt guidelines for the recognition of gender-related persecution as base for asylum request, and to make use of all instruments adopted by UNHCR. However, his successor in 2009 admitted that the improvements related to this matter were poor and gender-related persecution was still struggling to become a sufficient ground for granting asylum<sup>12</sup>. At the same time, the UNHCR stressed the importance to detach the protection mechanism from its dependence on the cooperation between the victims and the authorities of the host country. Indeed, even though monitoring mechanisms exist for the purpose of detecting any default in fulfilling the obligations of the Geneva Convention and of other ratified agreements, studies of 2006 have underlined the lack of comprehensive laws on trafficking and specific provisions for a gender-sensitive approach in asylum laws at the national level<sup>13</sup>. Even the Security Council intervened, issuing resolutions about women refugees, with the goal of inviting the states to adopt effective mechanisms for protection against violence, especially sexual violence, occurring in refugee camps and camps of internally displaced people. These resolutions put evidence on the correct consideration on the impact of armed conflict on women and young girls, resulting in an adequate response to their needs and in efficient instruments for guaranteeing their institutional protection, with the goal of promoting peace and security.

- The Committee Against Torture (CAT)

According to the CAT’s procedure, the applicant must present sufficient reasons for considering the existence of a real and personal risk of torture. Therefore, the facts as told by the woman who has fallen victim

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<sup>9</sup>CEDAW, *General Recommendation no. 28: The Core Obligations of States Parties under Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010, § 12

<sup>10</sup> Balboni, *supra* note 2, at 168

<sup>11</sup> OHCHR Official website, available at: <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx> [accessed: 16 September 2017]

<sup>12</sup> Balboni *supra* note 2, at 168

<sup>13</sup> *Id.*

of the mistreatment gain fundamental importance<sup>14</sup>. However, the Committee has shown its tolerance in accepting some contradictions in the story told by the victim, and it has not been too demanding in the demonstration of evidence brought to support allegations. A pertinent example is the case involving an Iranian woman, widowed of a martyr militant of the Iranian Aeronautic Service. She asserted to have been forced by the government to accept against her will a new marriage with no cohabitation, but with the obligation to give sexual services whenever required by the husband; and then to be condemned to death for adultery for a relationship she had with her Christian partner. Despite a few contradictions and the hesitation the woman had during her deposition, the Committee found that the victim had provided sufficient elements and details on dates, addresses and names of police stations, which were to be verified by the local authorities of the host country<sup>15</sup>. Therefore, the Committee usually accepts the claims and leaves to the country of asylum the task of investigating further.

The CAT seems to have adopted a tolerant approach as for the assessment of “personal risk” as well. This is the case especially for situations of diffused violence against women, such as during the recent conflict in the Democratic Republic of Congo<sup>16</sup>. When similar conditions exist, the context is considered a sufficient proof to support the evidence of the claim presented by a woman, who is more likely to see her refugee status accorded. Instead, more controversies characterize other procedural aspects, such as the elements that are attached to the claim as reasons for proof. Specifically, the Committee does not admit any risk of indirect violence a woman may suffer as wife or as member of the family<sup>17</sup>. A relevant example for this topic is the case of a Belorussian woman that supported her request for asylum on the basis of a series of violent acts (sexual violence included). After considering the political orientation of the woman’s husband and the denunciation against the violence occurred, the refugee status was accorded to her only in reason of the second element brought in front of the Committee<sup>18</sup>. Following the same principle, the Committee refused a claim brought by a woman married with an Islamic terrorist, because the family membership is considered as indirect risk, therefore it does not classify as sufficient reason for accepting a refugee request<sup>19</sup>. This is a lower level jurisprudence, compared to the one adopted by the UNHCR, and it is in contrast with the approach of the Committee itself when excluding the relevance of “distant” kinship only. Moreover, the Committee extends the diplomatic guarantees granted to a man also to his wife<sup>20</sup>. At least though, the CAT admits a second hearing for those women who have omitted certain details when they made the request for asylum the first time with other family members.

- The Cedaw Committee

The main purpose of Cedaw has his roots in the Preamble and the first article of the Charter of the

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<sup>14</sup> Balboni, *supra* note 2, at 166

<sup>15</sup> CAT, 15 February 2001, *A.S. v. Sweden*, CAT/C/25/D/149/1999.

<sup>16</sup> CAT, 24 November 2003, *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*, CAT/C/31/D/199/2002.

<sup>17</sup> Balboni, *supra* note 2, at 168

<sup>18</sup> CAT, *V.L. v. Svizzera*, cit.

<sup>19</sup> CAT, November 24th 2003, *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden*, CAT/C/31/D/199/2002.

<sup>20</sup> Balboni, *supra* note 2, at 169,170

United Nations<sup>21</sup>. The two parts proclaim respectively “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women”, and the purpose of the UN to defend fundamental freedoms with no distinction of sex<sup>22</sup>. Similarly, the Universal Declaration of Human Rights affirms the importance of human rights for women<sup>23</sup>. Despite these formal instruments, it became clear soon that women’s rights were not properly defended, thus the creation of the Commission on the Status of Women became necessary. Since the beginning, the Commission worked specifically on non-discrimination through the elaboration of declaration to protect women’s human rights<sup>24</sup>. Originally founded in 1946 as a simple subcommission of the Commission for Human Rights, the CSW quickly expanded under the pressure of women activists, and it started developing recommendations and proposals to give effects to the recommendations themselves<sup>25</sup>. The CSW also issued Conventions such as the *Convention on Political Rights for women*, and others protecting women and girls from unjust marriage conditions, but the general conventions on Human Rights kept their dominant position in this area. Even though the birth and the work of the CSW meant a deeper engagement in protecting women’s rights, the UN itself realized its failure in the attempt to defeat discrimination against women<sup>26</sup>. For this reason, the UN ordered to work for preparing the Convention on the Elimination of All forms of Discrimination Against Women, which was finally adopted by the General Assembly in 1981.

Cedaw’s jurisprudence had been very poor until the end of the 1990s<sup>27</sup>. The main reason can be found in the difficulty for many appeals in passing the admissibility step, usually because of the failure in adopting internal appeals first<sup>28</sup>. However, it is possible to assess the approach adopted by the Cedaw Committee by looking at the few cases brought to an end. Particularly, the claim of a Chinese woman (underage at the time when the violence occurred), who complained a violation of art. 6 of Cedaw, according to which the member states parties to the Convention are obliged to fight against the exploitation of prostitution. The woman said that the authority concerned with migration had not informed her of the right accorded to the victims of prostitution and because they did not take into account her rights as underage. However, the Committee refused her claim for many reasons: firstly, it was presented too late, secondly, there was lack of evidence because the woman had not provided the extremes of her trip toward the country of asylum, she was travelling without documents, and there was no risk in case of return to her country of origin<sup>29</sup>.

Nevertheless, the approach of the Cedaw Committee remains sufficiently generous, according to Balboni. In fact, even in the case presented above, the Cedaw based its judgement on the admission of proofs whose

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<sup>21</sup>OHCHR Official Website, *Short History of Cedaw Convention* available at: <http://www.un.org/womenwatch/daw/cedaw/history.htm>

<sup>22</sup> *Charter of the United Nations*, San Francisco 1945, Preamble and art.1, available at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> [accessed: 17 September 2017]

<sup>23</sup> *Universal Declaration of Human Rights* (General Assembly *Resolution 217A*), Paris 1948, art.2

<sup>24</sup> *Id.*

<sup>25</sup> OHCHR, *supra* note 3

<sup>26</sup> *Id.*

<sup>27</sup> D. Anker

<sup>28</sup> Balboni, *supra* note 2, 171

<sup>29</sup> CEDAW, February 17th 2009, *Zhen Zhen Zheng v. Netherlands*, CEDAW/C/42/D/15/2007.

credibility is extremely difficult to assess, as the travelling documents. For example, even the UNHCR adopts more restrictive standards, discouraging the use of travelling papers in evaluating refugees' cases, and it requires stronger elements to present in order to consider a claim admissible<sup>30</sup>.

Except for the CAT, the role of the UN's various committees is still very limited. The reason of this deficiency can be easily traced in the difficulty of the claimant to support his/her request with valid and credible elements. As a consequence, the majority of the cases stop to the "reception stage", with the impossibility to go further due to the lack of relevant material for the acceptance of the claim<sup>31</sup>. This problem is often caused by the restrictive approach adopted by the Committee in question: this is the case of the Committee for Civil and Political Rights, which is usually too respectful of national jurisprudence and national authorities, and intervenes only when there is the suspect of a significantly serious violation of rights. The standard adopted by Cedaw is similarly restrictive, while the CAT seems more prone to intervene and admit claims. Additionally, the procedural stage presents some difficulties and contradictions among the committees. On the one hand, the Committee for Civil and Political Rights denies the possibility for women's requests to be evaluated autonomously, while the CAT accords this special right to women, but it still excludes the relevance of the "indirect risk" for women as family members. Finally, given this analysis, the situation today certainly provides refugees with various instruments and authorities protecting their rights, but the difficulty in the application of the Conventions and in the manifestation of the power of these committees persists.

### **3.2 The State: application of international law and interactions among international and national systems**

As already anticipated in chapter 1, the States parties to 1951 Convention and to the 1967 Protocol must respect the principle of non-refoulement, so they cannot return refugees in a country where their life or freedom would be threatened<sup>32</sup>. More generally, the States are expected to defend people from violence and human rights violations. Put in these terms, the States can be reasonably considered a key player in the protection of refugees and in the promotion of human rights. This is partially true, in the sense that national power is still the main entity, while international authorities, including the UN and its Conventions, can gain as much power as States allow them to have<sup>33</sup>. In practice, international agreements leave large room to States, which can decide according to their national laws and their individual interests. Consequently, any State can become either the most important refugee protector or the worst obstacle to the respect of refugees' rights.

In order to understand the basic importance of States in refugees' protection compared to the role of aid agencies, it may be useful to present an example, as the case of the Great Lake Region, in the former Zaire.

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<sup>30</sup> Balboni, *supra* note 2, at 170

<sup>31</sup> *Id.*

<sup>32</sup> UN Convention Relating to the Status of Refugees, July 28th 1951, art.33 para. 1.

<sup>33</sup> Dennis McNamara, "The Protection of Refugees and The Responsibility of States: Engagement or Abdication?", 11, *Harv. Hum.Rts. J.*, (1998): 356

Since 1994, the region was hosting a Rwandan refugee camp, in which fighters and perpetrators of genocide had mixed with the rest of the civilian innocents. Given that the situation was putting at risk the life of all the civilian population in the camp, the UNHCR asked for the separation among them and the fighters. Unfortunately, Zaire did not give its consent to this procedure, condemning implicitly an entire civilian population to death<sup>34</sup>. This example shows how states are free, at least in practice, to decide to ignore the Convention and to act according to their own interests. Indeed, clear guidelines were provided by 1951 Convention and by the UNHCR Statute for the separation in question, but their application depended upon the state concerned, and in this case Zaire autonomously decided to ignore them. In the same context, the State of Zaire even denied atrocities, violence and rights violations that repeatedly occurred in the region. On the contrary, the hostility towards refugee protection was kept alive and humanitarian agencies' staff often fell victim of attacks.<sup>35</sup> Despite both the UN Security Council and the UNHCR condemned these violent acts and violations, little of concrete was done to improve the situation in a future perspective and to guarantee a better respect of the international guidelines. Again, the reason of inaction resides in the importance of States as main actors, compared to international authorities. Indeed, it is still in the interest of States - and not only the developing ones - to retain a consistent autonomous decisional power. For example, even in European States, who are formally members of the main human rights agreements and conventions, the issue of illegal immigrants and criminal aliens is used as powerful argument in election campaigns<sup>36</sup>, with the result of the rise to power of governments issuing provisions designed to prevent admission of uninvited aliens.

Similar problematics are found in other recent episodes of intense refugee flux, such as the Syrian refugee crisis, the largest forced migration since WWII, caused by the Syrian Civil War, that pushed 2.7 million people to leave the country only in the period 2011-2016<sup>37</sup>. The most surprising data are not those related to the number of refugees, rather the ones concerning the host countries. Among the main host states there are developing countries such as Jordan, Lebanon, Egypt, and Turkey, which alone spent more money on assisting Syrian refugees than the whole EU<sup>38</sup>. These numbers clearly reveal the creation of a distorted image often presented by the media. In fact, those Western countries usually depicted as democratic and respectful of Human Rights law, are the main evaders of investment in refugee assistance and in human rights' defense. Obviously, this approach would end up with the failure of investment and assistance implemented by those countries hosting Syrian refugees so far, unless the burdens of the mission are divided among different countries. The problem is the absence of a binding order to turn this strategy into action and to involve EU countries and American countries in the process. Once more, the UNHCR acted in the only way possible, meaning that it called for a global Comprehensive Plan of Action (CPA) and it issued a recommendation to exhort international solidarity towards countries hosting Syrian refugees, by offering forms of admission for

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<sup>34</sup> *Id.* at 357

<sup>35</sup> *Id.* at 358

<sup>36</sup> *Id.*

<sup>37</sup> UNHCR, *2014 Syria Regional Response Plan*, 3, (13 December 2013)

<sup>38</sup> Susan M. Akram, "Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing", *Boston University Law*, (2014): 1

them as well<sup>39</sup>. If the flux of refugees was split among many different countries it would be easier to provide everyone with assistance, and to avoid overburdening the host countries<sup>40</sup> – considering that in this case the host countries in question are not among the most stable and richest in resources. However, this Plan is only a theoretical supposition, which cannot go further than becoming an encouragement, because of its lack of any binding character on a legal level. EU member states, as parties to the CSR51 ((Note of the General Assembly) share international responsibility for the protection of Syrian Refugees, because their governments are not able to protect their fundamental rights, therefore the international community must guarantee them protection.<sup>41</sup> Exactly the non-binding character of documents such as the Note of the GA, is the weakness that has allowed Western countries to return refugees without applying all the necessary procedures: as reported by UNHCR, only 20% of people seeking asylum were accorded the refugee status under 1951 Convention.<sup>42</sup> Certainly, this approach undermines refugees’ protection and makes vane any progress obtained through the conventions and agreements of these last 50 years. In other words, the application of refugee norms by the national states is rarely transparent and it tends to deviate from the official guidelines previously agreed, opting instead for indiscriminate blanket rejection and interdiction of asylum-seekers. Not surprisingly, the results reveal a failure in the defense of refugees’ rights, with Western countries being the first jeopardizing the system agreed in 1951 Convention. Indeed, when refusing to help Syrian people, any state is causing a double damage: firstly, the refugee risks not to be helped or to receive less benefits that what he/she deserves, as the totality of resources are divided among many people; secondly, an indirect suffering is caused to refugees, because if the international community does not retain its rights as protector, then a single state, such as Turkey, can undertake the responsibility of the refugees in question, gaining total control on their treatment. This is exactly what happened in the case of Syrian refugees host in Turkey, where Syrian women were mistreated and victimized with violence.

Some conditions favored the rise of the problem linked to female violence, such as for example the fact that only 271,000 of those 2.7 million people lived in refugee camps, while the others finished to form an unregistered urban population, of which 77% is represented by women and children. Then, the decisive path in the condemnation of Syrian refugees was the agreement signed between EU and Turkey (the EU-Turkey Statement of 2016), deciding that all new illegal migrants arriving in Greek islands would be returned to Turkey<sup>43</sup>. This agreement was possible thanks to the EU Asylum Procedures Directive, which allows for a safe third country and a first country of asylum as places where the asylum seekers can be sent without the need of a complete examination of their asylum claims<sup>44</sup>. Basically, Turkey has acquired legally the position

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<sup>39</sup> UNHCR, *Finding Solutions for Syrian Refugees, Resettlement, Humanitarian or Admission and Family Reunification*, 1, (October 18th 2013) available at <http://www.unhcr.org/5249282c6> (Antonio Guterres’, UNHCR, Address at the 64th Session of Executive Committee of UNHCR’s Programme) (30 September, 2013)

<sup>40</sup> Akram, *supra* note 38, at 10

<sup>41</sup> UN General Assembly, *Note on International Protection*, A/AC, 96/830, 19-20 (September 7th 1994).

<sup>42</sup> UNHCR, *The State of World’s Refugees*, 1997-1998, 2, 290-293

<sup>43</sup> Kivilcim Zeynep, “Legal Violence Against Syrian Female Refugees in Turkey”, *Springer Science+Business Media* (Dordrecht 2016), 194

<sup>44</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common

of gatekeeper, thanks to an international agreement signed among a state and a confederation of states. In this agreement UNHCR and any other UN body was not consulted neither it could intervene in case it wanted: this is another limit of international law, as countries or group of countries can make valid agreements without the need of an impartial and superior consent. The result of the agreement Turkey-EU was the creation of a system opposite to what suggested above with the CPA: the identification of a gate keeper is the means to avoid any share of burdens and any cooperation in the assistance of refugees, who are all reunited under the supervision and control of a single State. Implicitly, this agreement allows the state to treat refugees according to its national law, therefore it legitimizes the application of any norms decided by that country. In the case of female Syrian refugees, the agreement marked their condemnation to live in a system of legal violence. This term refers at the same time to the structural violence exerted without identifiable perpetrator, and to the symbolic violence, imposed by the social order and progressively normalized.<sup>45</sup> In other words, the social asymmetries created with racism, sexism and discrimination in all its forms, are legitimized by law and legal practices. Nonetheless, it is worth to dig deeper and see the dynamics that made possible the perpetration of violence against Syrian female refugees, without exit the international law regime. First of all, the assistance gave to Syrian refugees by Turkey was recognized and accepted under the UNHCR, after an intergovernmental event in Geneva in October 2011, when the Migration and Asylum Bureau under the Ministry of the Interior declared the policy applied in Turkey as “temporary protection”<sup>46</sup>. Then, 7 months after the declaration, the Turkish Ministry of the Interior issued “*Circular No. 62 on the Reception and Accommodation of Syrian Arab Republic Nationals and Stateless Persons Resident in the Syrian Arab Republic, Who Arrive at Turkish Borders in Mass Influx to Seek Asylum*”<sup>47</sup>. This circular basically became the document on which the Temporary Protection was based, given that it includes all the procedures to be applied by the police according to the different categories of refugees. Besides the fact that the document lists some criteria on human treatment established by a state entity regardless international Human Rights law, the most dangerous aspect of the circular is given by its secrecy, because still today it is strictly confidential and not accessible to the public, to NGO’s and to MP’s. The circular is the clear sign of the independency that characterizes Turkey’s management of Syrian refugees, with the result of a consistent detachment from the rules set by the UNHCR. For example, the regime of Temporary Protection is meant to be exceptional in character, thus the duration of the protection offered should be limited. The UNHCR Guidelines on Temporary Protection or Stay Arrangements do not determine an exact duration, but specify that it is not suitable if the stay becomes prolonged.<sup>48</sup> Therefore, as Turkey is party to 1951 Convention, its approach is in clear contrast with this international law instrument. Actually, the

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procedures for granting and withdrawing international protection (Articles 35 and 38).

<sup>45</sup> Cecilia Menjivar and Leisy J. Abrego. “Legal violence: Immigration law and the lives of central american immigrants”, *American Journal of Sociology*, (2012), 117: 1413.

<sup>46</sup> UNHCR, Submission by the United Nations high commissioner for refugees for the office of the high commissioner for human rights’ compilation report 2014—Universal periodic review—The Republic of Turkey. Available at: <http://www.refworld.org/pdfid/5541e6694.pdf>. [Accessed 23 September 2017]

<sup>47</sup> Kivilcim *supra* note 43, at 196

<sup>48</sup> UNHCR, *Guidelines on temporary protection or Stay arrangements*, (2014), available at: <http://www.unhcr.org/5304b71c9.html>. [Accessed 24 September 2017]

measures applied with Syrian refugees are difficult to explain also in the framework of the Turkish legal system, unless the admission of Syrian refugees is considered a political decision, which means a decision made on political considerations. This is the possible explanation given by Kivilcim, who is able to support this view with Turkey's 1994 Asylum Regulation, which orders to stop refugees and asylum seekers at the border, unless no political decisions are taken to the contrary.<sup>49</sup> Then, in 2014, the acceptance of Syrian Refugees was fully legalized through the new Turkish Law on Foreigners and International Protection,<sup>50</sup> in line with Turkey's declaration to the UN Convention. The new law consents refugees to reside temporarily in Turkey until their resettlement to a third country. The problem is that this new law prohibits for Syrian refugees to apply for international protection, thereby imprisoning them in an exceptional legal regime that from temporary is deemed to turn into permanent. Therefore, while at first glance the acceptance of Syrian people in Turkey can seem in line with humanitarian goals, it ends up revealing its real nature of legal violence. The abuse became even heavier for female Syrian refugees, who are left unprotected by the Turkey's Constitution, whose validity is suspended for them. Moreover, given that they cannot obtain international protection, these women are closed into their vulnerability, which is only partially recognized by their categorization as "persons with special needs", but it is insufficient to save them from torture and sexual abuses. Furthermore, the uncertain legal status in which they live, combined with their condition of absolute poverty, force Syrian women and girls to get married with Turkish men as strategy for survival.<sup>51</sup> While legal measures exist against early, forced, and polygamous marriages within the immigration legislation to manage this practices among migrants and refugees, the approach is sometimes criticized. It is often adopted the view of a "clash" of culture, namely Western and non-Western, that would see Muslim women as victims of their own backward culture. Conversely, a different scholarship sees the imbalances concerning gender and sexuality as the primary cause for the problem of marriages<sup>52</sup>. The Turkey's Civil Code condemns polygamy and sets the minimum age for marriage at 17. However, polygamy, early and forced marriage are accepted practices in both the Turkish and Syrian societies, and polygamy is even legal under Syrian law. In Syria, judges can prohibit the second marriage if the man is incapable of providing financial support to his wives, but they can also allow marriages for girls under 17 years old and males under 18 years old.<sup>53</sup> Even though in Turkey law is formally more protective towards women and youth in general, the official statistics do not depict a different situation compared to Syria: in Turkey, polygamy rate is 3.5%, and 23% of women marry before 18 years old.<sup>54</sup> These data reveal the real situation of Turkey, which significantly detaches from what the legislative system

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<sup>49</sup> Kivilcim, *supra* note 43 at 197

<sup>50</sup> *Law on Foreigners and International Protection*, (Turkey, 14 April 2014), art.61.

<sup>51</sup> UNHCR, *Syria regional response plan Turkey*, (2014), available at: <http://www.unhcr.org/syriarrp6/docs/syria-rrp6-turkey-response-plan.pdf> [Accessed 18 June 2016]

<sup>52</sup> Sherene Razack, "Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans Legal and social responses to forced marriages", *Feminist Legal Studies*, (2004) 12: 135-150

<sup>53</sup> Freedom House, *Women's rights in the Middle East and North Africa—Syria*, 2010, available at: <http://www.refworld.org/docid/4b99011dc.html> [accessed 25 September 2017]

<sup>54</sup> United Nations Development Fund for Women, *Violence against women study Syria*, 2005, available at: <http://www.evaw-global-database.unwomen.org/en/countries/asia/syrian-arab-republic/2005/violence-againstwomen-in-syria-study-2005> [Accessed 25 September 2017]

describes. Basically, polygamous and child marriages are legally prohibited but systematically practiced, because of their social acceptance; while laws are ineffective or sometimes not even implemented. In such unstable legal conditions, the arrival of a mass of refugees, whose 80% is constituted by children and women, has encouraged and spread this phenomenon to a worrying level.<sup>55</sup> When trying to exit this vicious circle, the main difficulty for Syrian refugees lies in the opportunity offered by child and polygamous marriages. In other words, this is often a way to guarantee the economic safety of entire families, given that the consent for this practice is exchanged with money to provide for the survival of the other family members and/or for their room. Obviously, as these marriages are prohibited by law, their validity is only religious, and the ceremony is officiated by an imam.<sup>56</sup> Considering Turkey's ratification of 1951 Convention, it would be reasonable to expect provisions and measures implemented by the state to fight this form of violence against children's and women's rights. Unfortunately, the expectation is not respected, given to the role and involvement of Turkey's main exponents in this phenomenon. Indeed, a sort of "trading network" has risen around illegal marriages, which are often favored by public officials, while the imams involved in celebrations are often state employees<sup>57</sup>. Furthermore, the issue concerning sexual abuses of Syrian refugees has been often raised in Turkey's National Assembly, and propositions for inquiry as well as parliamentary questions have been made for preventing the abuse and for punishing the perpetrators. All these attempts to protect human rights and Turkey's international law's respect have failed, and the only answer to a parliamentary question showed that the responsible ministries are totally unconcerned about the problem. This inaction from the government has worsened female refugees' conditions, making the issue expanding and giving the possibility to exploit women with forced sex and housework without any denounce. Living as unpaid house and sex workers, Syrian women refugees are more exposed to any kind of domestic violence, without a system protecting them<sup>58</sup>.

The situation is not better for women and children who escape marriage. They usually end up begging on the streets, which is not considered a crime under Turkish legislation. The worst aspect of this condition is not the excessive hours of work, nor the low wages compared to their Turkish counterparts, rather the main problem is represented by the exposition of female refugees to direct physical violence from security forces. In spite of the shame around this phenomenon, Turkish authorities have not issued directives to face the problem, except for sanctions directed to Syrian refugees only, considered as a "disturbance to public order"<sup>59</sup>. Usually the countermeasure consists in forcibly returning refugees to camps, a method often applauded by media and academics for its "evident results".<sup>60</sup> Therefore, the refugee camps often become a prison for

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<sup>55</sup> Kivilcim *supra* note 43, at 202

<sup>56</sup> Center for Middle Eastern Strategic Studies Effects of the Syrian refugees on Turkey. —ORSAM Report No: 195. (January 2015), available at: [http://www.orsam.org.tr/en/enUploads/Article/Files/201518\\_rapor195ing.pdf](http://www.orsam.org.tr/en/enUploads/Article/Files/201518_rapor195ing.pdf). [ Accessed 25 September 2017]

<sup>57</sup> Association for Human Rights and Solidarity with the Oppressed, *Report on Syrian women refugees living out of the camps*, Mazlum-Der Women Studies Group., 2014, available at: <http://istanbul.mazlumder.org/webimage/report-of-syrian-women-refugees-living-out-of-the-camps.pdf> [Accessed 25 September 2017]: 33-36

<sup>58</sup> Kivilcim, *supra* note 43, at 205

<sup>59</sup> The Ministry Directive No: 30 issued on 2 April 2013 is one of the first directives on that issue.

<sup>60</sup> Kivilcim, *supra* note 43, at 207

refugee women, and the powerful proof supporting this statement is their preference for any form of exploitation in the labor market rather than choosing the risk of becoming prey of the camp. Before the Law on Foreigners and International Protection, the detention of refugees in “foreigners’ guesthouses” was very common, and UNHCR’s access to detained individuals was allowed only on rare occasions<sup>61</sup>. In other terms, this form of detention was used as an obstacle to access asylum procedures, as well as lawyers. This constitute a clear breach of the right of fair trial, and in the case of children’s detention with their mothers, it qualifies as violation of the UN Convention of the Rights of the Child<sup>62</sup>.

In conclusion, the living conditions and the legal environment characterizing Syrian female refugees in Turkey, serves as reinforcing example to the point raised above, after the description of events lived in Zaire. In practice, while international authorities such as UNHCR constantly try to provide guidelines to help States in dealing with refugee movements, and despite the adherence of most countries to agreements promoting human rights - such as 1951 Convention - the main obstacle to a real improvement in the protection of women refugees resides in the immortal prevalence of national power. Indeed, as in all other fields of international law, the state’s authority still prevails on any international regulation, and the reason behind the success/failure of refugee protection depends upon the State’s adherence or not to international provisions supporting human rights. In the case raised above, the exposition of Syrian women to violence and abuses, was determined primarily by the suspension of the validity of Turkey’s Constitution, together with the refusal to investigate and the inaction of the government. Basically, despite the improvements that can be made at an international level, the main problem resides in the governments’ choice to apply them or not.

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<sup>61</sup> *Id.*

<sup>62</sup> “Every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so” (Article 37c of the UN Convention of the Rights of the Child).

## Conclusions

After the analysis operated so far on the international legislative system concerning refugee law and on the main problematics that female refugees have faced during the long history of this phenomenon, it results impossible to hide the significant deficiencies tackling this field of international law. Rape, human trafficking, and female genital mutilation are only some of the physical risks that women and girls face at any stage of the displacement. The instruments offered by international law often are not sufficient to protect women from these threats, nor to favor their access to new countries, as their claims for asylum and refugee status are still too often dependent on their male partners. In spite of the efforts of UN agencies and the improvements achieved through conferences, conventions, and publication of guidelines, the push has not been strong enough to encourage the world community and the national governments to take seriously this issue, as proved by the state of emergency in which refugees still live today, and described throughout this dissertation. Therefore, the issue of refugees' protection should be included among the main international priorities, together with other challenges, such as poverty, hunger, and gender equality, to which it is strongly related. For instance, I find particularly acute Akram's suggestion of adding states' responsibility towards refugees and displaced persons in their territories among the UN's Millennium Development Goals, which could be translated today to their inclusion in post-2015 Development Goals. The MDGs were established by the UN for the international community in 2000, but the goals imply states' responsibility only towards its citizens or residents in their territories, leaving outside millions of people who do not qualify for none of these categories.<sup>1</sup> Actually the goals number 1,3, 8, of the MDGs concern refugees more than other categories, thus their achievements would guarantee a significant improvement for female refugees' condition, without the need of inserting a specific additional goal. Indeed, these points refer respectively to eradication of poverty and hunger, promotion of gender equality and women empowerment, and initiation of a global partnership for development<sup>2</sup>. As the research reported throughout this paper has shown, a significant gap still exists between the aspirations of these goals and the reality of female refugees' life. One of the possible reasons for this failure could be found in the connection among the problems themselves: the difficulty in having a recognized legal status affects the possibility of finding an employment through which reaching equality, empowerment, and consequently the money needed against poverty and hunger. But the concession of legal status depends on state's legal system, thus the main problem ends up being the one discussed in the last chapter of this dissertation: namely, states' responsibility towards refugees and their acceptance. Indeed, in these last few years refugees have been encountering more and more difficulties in their transition from their country to the host State. According to OIM and UNHCR, 4733 refugees drowned or went missing while crossing the

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<sup>1</sup> Susan M. Akram, "Millennium Development Goals and the Protection of Displaced and Refugee Women and Girls" – *Laws 2013* (Boston University, 4 September 2013): 1,2

<sup>2</sup> UN The United Nations Millennium Campaign, and Office of the UN High Commissioner for Human Rights. *The Millennium Development Goals and Human Rights*, Geneva: Office of the UN High Commissioner for Human Rights, n.d., 16. Available at: [http://www.unkampagne.de/fileadmin/downloads/news3/final\\_human\\_rights\\_and\\_mdgs\\_brochure.pdf](http://www.unkampagne.de/fileadmin/downloads/news3/final_human_rights_and_mdgs_brochure.pdf) [accessed on 26 September 2017].

Mediterranean Sea in 2016, meaning 2.40% of those who tried to cross the sea. Since 2008, when UNHCR started estimating the victims, these are the highest numbers ever reached<sup>3</sup>. The reason behind the increase in refugees' death at sea count interdictions in territorial waters or States determination to prevent refugees' landing, but also high barriers to asylum in both Europe and US, where return-back policies, detention practices and third country provisions are largely applied to create an obstacle for new asylum seekers.<sup>4</sup> Another factor that discourages women to proceed with their asylum claims, is given by the difficult process for filing the request, in which women are often left alone without an adequate assistance to help them dealing with the bureaucracy of the host state, as described in chapter 2. All these elements reveal the disinterest of states to work for the improvement of refugees' conditions, which is made even more manifest in the low funds received by UNHCR for investing in the cause. Clearly, low funding means low interest, which suggests that refugees are not a priority of donor states, whose self-interest drives them away from cooperating for the achievement of MDGs and refugees' assistance<sup>5</sup>. In the end, instead of addressing the refugees' challenge through burden-sharing, as meant by the Refugee Convention, all the costs and efforts to host refugee flows have been taken by developing countries, which are also the least able to satisfy women needs, given to their poor areas, and the precarity of legal systems which cannot guarantee rights and safety. Sometimes these countries do not even recognize gender persecution, and/or they do not consider gender as a particular social group. Even worse, discrimination is prohibited when its bases are race, color, sex, political opinion, and national or social origin, but other forms of discrimination are accepted because of the high value placed on state sovereignty. Among these discriminatory basis is included citizenship – and lawful residence - as well.<sup>6</sup>

In the end, as pointed out by many among the most competent professors and writers on the topic, such as Goodwin-Gill and Anker, a significant improvement for the problem of women refugees will not occur, if these operational apathy keeps dominating the behavior of the majority of countries, especially the most developed ones, which could bring a consistent support if they inserted the issue among their priorities. Unfortunately, the current political discussions do not seem to suggest a movement in this direction, given that a conservative reaction has been characterizing 2016 and 2017, especially in the most powerful countries in the world. The US, France, and other European and international powers have been theatre of discussions for shifts towards nationalistic policies and many movements advocating conservative measures against immigrants are becoming consistently widespread, given to their appeal for most citizens. An example is the construction of the wall proposed by US President Donald Trump, as well as the return-back policies insistently demanded by European citizens to block new mass flows of immigrants. On the other hand, some positive signals on the international scenario leave the door open for hoping in higher involvements and

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<sup>3</sup> Lorenzo Bagnoli, *Morti in mare nel Mediterraneo: Perché così tanti nel 2016?*, 12 December 2016. Available at: <http://openmigration.org/analisi/i-morti-in-mare-nel-2016-mai-così-tanti-nel-mediterraneo/> [accessed: 27/09/2017]

<sup>4</sup> Akram, *supra* note 1

<sup>5</sup> *Id.* at 290

<sup>6</sup> *Id.* at 296

cooperation by national governments in supporting international initiatives and financing UNHCR operations. Regarding this possibility, the Leaders' Summit on Refugees, which took place on 20 September 2016 at the White House, brought as result a Joint Statement by the governments of Canada, Ethiopia, Germany, Jordan, Mexico, Sweden, and the United States. After acknowledging the gravity of the challenges that children and women refugees still face – including violence, exploitation, and abuse - the Leaders parties to this Statement declare their commitment in increasing investment for UN humanitarian initiatives.<sup>7</sup> Specifically, they affirm to have sought \$3 billion increase in global humanitarian financing and the commitment to keep the same standards. Furthermore, through the Statement, the leaders demand to the International Organization for Migration and UNHCR the creation of the Emerging Resettlement Countries Joint Support Mechanism, with the goal of helping new resettlement countries select, prepare, and support the movement of refugees, and develop systems to welcome and support refugees upon arrival. Other commitments are related to new policies for facilitating refugees' access to school and legal work, with the support by UNICEF establishing the Education Cannot Wait, the world's first fund for education in emergency situations and in crises.

Even if operational improvements occur- which is still to see – there are also legal challenges to face, as presented in chapter 2. Given the absence of an International Refugee Court, the international protection of refugees relies upon domestic courts applying the Refugee Convention, and before international and regional human rights treaty bodies<sup>8</sup>. In this case, the UNHCR is authorized under art. 35 of the Refugee Convention to act as *amicus curiae* and give its advisory opinion.<sup>9</sup> In these circumstances, the UNHCR does not interact directly with the individual refugee, but with the court in its deliberative response, considering the interpretation of 1951 Convention. However, in cases managed by the ICJ, the UNHCR can intervene only if one of the parties requests so, or in response to the ICJ. The only exception is given by the case in which a State goes before the ICJ on the ground that its sovereignty has or will be violated by a mass cross-border flux of refugees. UNHCR can express his opinion in this case without being called by the ICJ. At the same time, the UNHCR can use the ICJ, because, even though it cannot ask for an Advisory Opinion of the ICJ directly, the General Assembly can do it on his behalf. Therefore, despite the limits of intervention posed by the Convention to the two international bodies, there is still large room for UNHCR and ICJ to cooperate in order to provide refugees, especially women refugees, with an effective legal protection, which on the long run could help in reducing violence and crimes operated against women refugees and too often left unpunished.

Finally, no shortcuts exist for achieving the goal of providing protection to women refugees and giving them the possibility to live safely and with dignity, enjoying freedom and full respect of their fundamental, political, and social rights. Only an efficient application of the international legal system by the UNHCR together with the ICJ and other international bodies involved in international law and security, combined with

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<sup>7</sup> *Joint Statement on Leaders' Summit on Refugees* (The White House, Office of the Press Secretary, September 20, 2016), *International Journal of Refugee Law*, 2016, Vol. 28, No. 4, 733–735, doi:10.1093/ijrl/eew055

<sup>8</sup> Geoff Gilbert, *UNHCR and Courts: Amicus curiae...sed curia amica est?*, *International Journal of Refugee Law*, 2016, Vol. 28, No. 4, 623–636, doi:10.1093/ijrl/eew039

<sup>9</sup> *The 1951 Convention Relating to the Status of Refugees*, Geneva, 1951, art. 35, available at: <http://www.unhcr.org/3b66c2aa10> [accessed: 27 September 2017]

a consistent investment and commitment by the national governments – especially those of the developed countries - can give a possibility to thousands of women refugees to hope for a better life.

# Riassunto in Italiano

## Introduzione

La *Convenzione Relativa allo Statuto dei Rifugiati* (Ginevra, 1951), la cui applicazione fu posta sotto la supervisione dell'UNHCR, fu un documento fondamentale per dare inizio allo sviluppo del diritto internazionale nell'ambito della tutela dei rifugiati. Tuttavia, ancora oggi molte problematiche relative a questa categoria animano lo scenario politico internazionale, dimostrando che, nonostante i progressi ottenuti dagli anni '50 fino ad oggi, non si è ancora raggiunta la padronanza di tale fenomeno. Soprattutto, sono ancora moltissimi coloro che non vedono rispettati i diritti formalmente garantiti dallo status di rifugiato. Proprio le frequenti tragedie che affliggono costantemente i flussi di rifugiati, insieme con l'apatia da parte della comunità internazionale nei confronti di tali eventi, hanno spinto il mio interesse verso un'indagine approfondita sull'argomento. In particolare, oggetto di questa tesi sarà il diritto internazionale relativo alla protezione di una particolare categoria di rifugiati, ancora più vulnerabile delle altre e spesso vittima di violenze e soprusi: la categoria delle donne. Si inizierà introducendo i punti fondamentali della Convenzione di Ginevra del 1951, per poi menzionare la Convenzione sull'Eliminazione di ogni Forma di Discriminazione Contro le Donne (1979), supervisionata dal Comitato Cedaw. Così nel secondo capitolo, si analizzerà più da vicino la scarsa protezione offerta dalla Convenzione del '51 alle donne e l'esclusione del genere dalle possibili basi scatenanti la persecuzione. A questo punto si collegherà la necessità delle donne rifugiate di ricorrere alla giustizia per riuscire ad ottenere lo status di rifugiato in relazione alla violenza subita. È qui che il Diritto Internazionale dei Rifugiati si intreccia con il Diritto Penale Internazionale, e quindi con l'attività della Corte Penale Internazionale. Nel terzo e ultimo capitolo vengono descritte le principali autorità coinvolte nella protezione delle donne rifugiate, ovvero UNHCR, Cedaw, e CAT. L'ultimo ente descritto nel capitolo è anche quello dal ruolo più interessante e controverso, ovvero lo Stato, responsabile di garantire il rispetto dei diritti delle donne rifugiate, e più in generale di applicare le norme imposte dal diritto internazionale. Si avrà allora l'opportunità di sottolineare l'apatia che ha sovente caratterizzato i vari Paesi, dai più instabili ai più sviluppati, portando esempi delle stragi sofferte dai rifugiati del Rwanda o dai rifugiati siriani. Infine elaborerò le mie conclusioni sulla base dei risultati ottenuti dalla ricerca e fornirò un'interpretazione della condizione presente come punto di partenza per il rafforzamento del sistema internazionale in supporto delle problematiche delle donne rifugiate.

## Capitolo 1: La Convenzione del 1951 e il problema della violenza sulle donne

La definizione di rifugiato nel diritto internazionale risale alla Convenzione di Ginevra del 1951 e al Protocollo del 1967, secondo cui per rifugiato si intende “chiunque nel giustificato timore d'essere perseguitato per ragioni di razza, religione, cittadinanza, appartenenza a un determinato gruppo sociale o per opinioni politiche, si trova fuori dello Stato di cui possiede la cittadinanza e non può o, per tale timore, non vuole domandare la protezione di detto Stato; oppure chiunque, essendo apolide e trovandosi fuori del suo Stato di domicilio in seguito a tali avvenimenti, non può o, per il timore sopra indicato, non vuole ritornarvi”. Allo

stesso tempo la Convenzione e il Protocollo determinano i requisiti da soddisfare per ottenere lo status di rifugiato, così come i diritti e gli obblighi che ne conseguono. Innanzitutto, l'individuo deve fornire prova del "timore giustificato" di persecuzione, mentre la necessità di dimostrare "l'assenza di protezione" rimane dibattuta. Il riconoscimento della qualifica di rifugiato infatti sembra ancora largamente basato su una valutazione "caso per caso", elemento che ha portato all'allargamento e alla flessibilità del mandato dell'UNHCR fino al 1977, quando l'Assemblea Generale ha definito le responsabilità dell'UNHCR nei confronti dei rifugiati, con l'aggiunta dell'assistenza di rimpatriati, richiedenti asilo, bambini e donne. Inoltre, significativi progressi nel campo dei diritti dei rifugiati si sono registrati grazie allo sviluppo dei Diritti Umani dopo il 1966, che ha portato all'interpretazione del moderno "obbligo di protezione" come un principio che va al di là del semplice rispetto dei diritti umani ed include il dovere di adottare ogni misura necessaria per una protezione efficace dei rifugiati.

Tuttavia, non bisogna dimenticare che il diritto internazionale offre solo una delle possibili definizioni di "rifugiato", la quale non sempre coincide con quella attribuitagli dalle varie legislazioni nazionali. Per questa ragione, si distingue colui che è rifugiato secondo lo Statuto dell'UNHCR e/o dell'Assemblea Generale, rispetto al rifugiato considerato tale in ragione della ratificazione della Convenzione del 1951 da parte dello Stato. Pertanto risulta evidente l'importanza che lo Stato riveste nel determinare i diritti e doveri del rifugiato. L'esempio più lampante del diretto coinvolgimento dello Stato nella protezione dei rifugiati risiede nel principio di "non refoulement", che si traduce nell'obbligo di non reindirizzare il rifugiato in nessuno stato nel quale lui/lei è a rischio di persecuzione, maltrattamenti, o tortura. La diretta conseguenza di tale principio è il diritto di asilo, incluso nella Dichiarazione dei Diritti Umani (art.14) e avente duplice funzione: la prima riguarda la possibilità di protezione dai pericoli che il rifugiato potrebbe incontrare, la seconda si spinge oltre la sicurezza fisica, e garantisce all'individuo gli stessi diritti dei cittadini legalmente residenti. Il diritto di asilo raggiunge il suo maggior potenziale quando viene utilizzato per garantire non solo i diritti civili, ma anche quelli economici e sociali, come il diritto all'educazione o al lavoro. Essi assumono particolare significato, specialmente se riferiti alla donna, la quale spesso proviene da Paesi nei quali ragazze e mogli vivono in condizioni subordinate, che stanno spesso alla base del motivo stesso della fuga. Purtroppo però, spesso il processo si arresta ancor prima della possibilità di concessione di diritti economici e sociali. Infatti le donne sovente faticano anche solo a vedersi riconosciuto lo status di rifugiate. La base del problema va ritrovata nella Convenzione del 1951, in particolare nell'art. 33, il quale elenca 5 ragioni di persecuzione, rispettivamente razza, religione, nazionalità, appartenenza ad un particolare gruppo sociale, opinione politica. Particolare attenzione va posta sul quarto elemento citato, in quanto risulta lecito chiedersi quali siano i gruppi sociali ai quali l'articolo si riferisce. L'interpretazione più ragionevole sarebbe quella di considerare i gruppi citati nella Dichiarazione Universale dei Diritti Umani del 1948, tra i quali si trovano origine nazionale o sociale, proprietà, nascita o altro stato come proibiti motivi di distinzione. La possibile ragione per cui il *genere* non è stato invece inserito nella lista, va ricercato nella dimensione "privata" nella quale è stata inquadrata la violenza femminile, in contrapposizione a quella "pubblica", che prevedrebbe invece un coinvolgimento dello

Stato. In altre parole, la violenza sulla donna, di solito la moglie, era vista inizialmente come un fatto interno al matrimonio ed escludeva erroneamente la possibile responsabilità dello Stato, anche nel caso in cui il colpevole fosse un soldato, un agente di polizia o di qualsiasi altro corpo civile. Oggi invece essere una donna è considerato un motivo politico sufficiente, se la violenza contro la donna è parte dell'oppressione. Quindi, la Convenzione di Ginevra non è stata modificata, ma le donne possono comunque richiedere lo status di rifugiate sotto altre ragioni. Allo stesso tempo, altre aree del diritto internazionale hanno fornito alle donne strumenti di autodifesa, come la Conclusione N.39 del 1985, ma soprattutto la Convenzione sull'Eliminazione di ogni Forma di Discriminazione contro le Donne del 1993. Così la violenza sulla donna è entrata anche nell'ambito del diritto internazionale dei rifugiati, ogni qualvolta si tratti di violenza tollerata dallo Stato. Non è ancora chiaro però se il fatto che una donna sia vittima di violenza pubblica o privata sia sufficiente a mostrare che è perseguitata perché appartenente a quel gruppo sociale. Goodwin-Gill cita in proposito un caso che possa aiutare ad orientarsi in tale problematica. Si tratta del caso di alcune donne Pakistane richiedenti asilo nel Regno Unito, sulla base dell'insostenibile situazione sofferta nel proprio Paese, a seguito degli abusi subiti dal marito, che le aveva poi accusate di adulterio. In considerazione delle violenze fisiche ed emotive che le donne avrebbero subito in Pakistan, la loro richiesta di asilo fu accettata sulla base dell'assenza di protezione da parte del proprio Stato, che non protegge la donna in simili situazioni esattamente perché donna.

Proprio per stimolare la protezione delle donne in situazioni simili, che ancora si verificano regolarmente in molte parti del pianeta, l'Assemblea Generale dell'ONU pubblicò la Dichiarazione Sulla Violenza Contro le Donne nel 1993. La dichiarazione si apre affermando l'urgenza di garantire alla donna i diritti fondamentali, ovvero uguaglianza, dignità, sicurezza, libertà, integrità. La violenza viene considerata come la manifestazione di una disuguaglianza di potere tra uomo e donna e quindi come una forma di discriminazione. Inoltre viene definita la violenza in tutti e tre i suoi aspetti, cioè fisico, sessuale e psicologico, sia nella sfera pubblica sia privata. Viene poi sottolineata l'importanza della partecipazione di ogni Stato nella lotta contro questo tipo di violenza. Partecipazione che deve avvenire sotto forma di protezione e di assistenza e che viene verificata tramite documentazioni compilate dagli stati e inviate alle Nazioni Unite per il monitoraggio e la verifica. Il principale compito della Dichiarazione del 1993, rimane comunque legato al sollecito di attenzione e di consapevolezza verso la violenza subita dalle donne, specialmente dopo anni di violenti episodi non denunciati, verificatisi in Bosnia, Rwanda, Somalia e Vietnam. Spesso infatti bisogna fare i conti anche con la riluttanza della vittima nel riportare certe violenze, a causa della vergogna provata. Proprio per istruire gli Stati a portare assistenza alle vittime che incontrano tali difficoltà, l'UNHCR ha pubblicato nel 1995 delle Linee Guida, che si concentrano soprattutto sulla violenza sessuale, spiegandone le caratteristiche e i tempi e modi in cui può verificarsi: prima, durante o dopo la fuga, da parte di altri profughi o di agenti di polizia locali.

Al di là delle autorità nazionali, è importante anche il coinvolgimento di organizzazioni internazionali, le quali, oltre a fornire documentazione più dettagliata, possono partecipare a forum e Conferenze per elaborare nuove strategie e programmare operazioni più efficienti. Purtroppo, nonostante tutti gli sforzi degli enti

internazionali, spesso i casi di violenza sulle donne vengono amministrati secondo le leggi nazionali e regionali, che non sempre sono conformi ai principi elencati fino ad ora. A questo proposito, l'ultima dichiarazione dell'UNHCR riguardo la violenza sulle donne è il *Promemoria sulla violenza contro le donne e le ragazze nell'Unione Europea e le persone di interesse per l'UNHCR*. Questo Documento rappresenta un invito all'Unione Europea a conformarsi alla Convenzione del 1951, per lottare contro il traffico di esseri umani e per estendere il sistema di difesa delle donne, rafforzando così la lotta contro la violenza di genere.

## **Capitolo 2: L'applicazione del Diritto Internazionale relativo ai Rifugiati**

Se si analizza la Convenzione di Ginevra da un'ottica incentrata sulla categoria delle donne, vi si identifica un punto debole che risalta più di ogni altro. Si tratta della mancanza di una specifica disposizione relativa alla protezione della donna, nonostante ella costituisca la netta maggioranza dei rifugiati. Questo aspetto è stato analizzato da vari esperti di diritto internazionale e di questioni relative al femminismo, specialmente Deborah Anker, le cui riflessioni su questo tema risultano particolarmente dettagliate e ricche di spunti. Utilizzando anche i dati forniti da questa autrice è possibile arrivare ad attestare la necessità di strumenti legislativi specificatamente rivolti alla protezione della donna. Infatti questa categoria soffre maggiormente di violazioni dei diritti umani e violenza di genere a causa di vari fattori, tra cui l'incremento di conflitti armati a bassa intensità. A questo proposito è utile analizzare anche il discorso tenuto nel 1995 dall'ambasciatrice per i diritti umani Sima Wali, la quale ha sottolineato la pratica della violenza contro le donne non solo come effetto collaterale della guerra, ma come obiettivo specifico. In questo contesto risulta chiara l'insufficienza degli strumenti forniti dalla Convenzione del '51 in difesa delle donne. Ad aggravare la situazione ha contribuito inoltre la frequente resistenza di alcuni Stati a riconoscere la persecuzione delle donne nel sistema legislativo nazionale a causa di fattori culturali e sociali, come accaduto in Iran per il velo o in Cina per il caso della sterilizzazione forzata. In certi Paesi persino lo stupro ed altre forme di violenza sessuale faticano ad essere riconosciute come persecuzione. Questo problema ha toccato non solo Paesi in via di sviluppo come Haiti, ma anche Stati sviluppati come gli Stati Uniti. Solo nel 1996 il Progetto per le Donne Rifugiate ha pubblicato una comunicazione con la quale invitava gli USA, il Canada e altri Stati membri delle Nazioni Unite a riconoscere lo stupro come forma di tortura. Questa Comunicazione è stata importante anche dal punto di vista legislativo, in quanto ha costruito le basi per l'accettazione di questa classificazione anche nella giurisdizione internazionale sotto forma di diritto consuetudinario o trattato internazionale.

Collegandosi al discorso precedente, è possibile rilevare un altro punto debole della Convenzione di Ginevra, ovvero il largo spazio lasciato agli Stati riguardo a inadempienze rispetto alla Convenzione. A questo proposito, diventa importante il diritto di appello alle corti, che diventa l'ultimo strumento utilizzabile dai rifugiati per difendere se stessi e i propri diritti nel caso in cui lo Stato non provveda a ciò. Il diritto di appello è garantito dalla Convenzione del 1951 e successivamente riaffermato dalla Conclusione N.22 dell'UNHCR, che conferma l'accesso dei richiedenti asilo a tutte le corti e tribunali, scansando equivoci riguardo la validità di tale diritto solo per le corti legislative o anche per le autorità amministrative. Tuttavia l'ambiguità attorno al quesito permane a causa del Patto sui diritti Civili e Politici, che limita l'accesso a corti e tribunali che

determinano oneri penali o diritti e obblighi in un processo giudiziario. Mentre queste difficoltà riguardano i rifugiati in generale, ve ne sono poi alcune aggiuntive che interessano solo le donne. Già dal momento in cui devono riportare la violenza subita, le donne vanno spesso a scontarsi con pregiudizi culturali e con il disagio e la vergogna per la violenza subita, amplificati dalla frequente presenza di personale maschile durante le interviste. Per fortuna, almeno nel caso di interrogatori per la concessione del diritto di asilo, esistono specifiche Linee Guida da seguire durante le interviste, in modo da facilitare la vittima nell'esposizione dei fatti.

A questo punto è evidente lo stretto rapporto creatosi tra Diritto Internazionale in materia di Rifugiati e Diritto Penale Internazionale. Queste due aree inevitabilmente si intrecciano, spesso influenzandosi l'una con l'altra e a volte facilitando l'evoluzione di entrambe, nonostante alcune differenze sostanziali permangano nel tempo. Importante per il tema affrontato in questa tesi, risulta sicuramente l'introduzione della *persecuzione* sulla base del *genere* tra i "Crimini contro l'Umanità" attraverso lo Statuto di Roma del 1998. Tuttavia, l'assenza di una discussione approfondita su questo tipo di crimine rispetto agli altri, ha portato la Corte Penale Internazionale a ricorrere all'aiuto del diritto internazionale in materia di rifugiati, un'area nella quale sono presenti specifiche norme di genere dal 1985 e che offre una ricca giurisprudenza. Tuttavia, proprio alcune interpretazioni di corti nazionali e amministrative sono state caratterizzate da interpretazioni errate della persecuzione relativa al genere, rendendo l'utilizzo di questi esempi più difficile per la CPI. È così possibile identificare sostanziali differenze tra diritto penale e diritto dei rifugiati, a cominciare dal concetto di persecuzione *basata sul genere e relativa al genere*. La prima espressione è propria della Corte Penale ed evidenzia la necessità di identificare il genere come motivo principale della persecuzione, escludendo i casi in cui è solo una delle ragioni oppure è semplicemente una caratteristica della vittima ma non il fattore determinante della violenza. Questo tipo di persecuzione è entrato nel Diritto Penale con la giurisprudenza del Tribunale Penale per il Rwanda e del Tribunale Penale per la ex- Jugoslvia, entrambi coinvolti in casi di persecuzione contro le donne. Tuttavia, per quanto riguarda i diritti fondamentali violati nel caso di tale crimine e necessari per dichiarare la qualificazione di essa come persecuzione basata sul genere, la Corte Penale ricorre oggi alle *Linee Guida sulla Protezione Internazionale: persecuzione Relativa al Genere*, pubblicate dall'UNHCR nel 2002, nel quale sono elencate le varie forme di persecuzione. Inoltre, per dichiarare l'avvenuta persecuzione sulla base del genere, la CPI deve analizzare un ulteriore elemento: l'appropriata delineazione di Pubblica Violazione. Infatti spesso non è stato riconosciuto alle donne uno status politico, il che ha portato al mancato riconoscimento di esse come rifugiate. Anche in questo caso un'analisi complementare dei concetti di *genere, pubblico e privato* da parte del diritto in materia di rifugiati e di quello penale ha portato a progressi nella valutazione dei casi di persecuzione. Specialmente nella definizione di *genere*, la Corte Penale ha potuto ricorrere alle *Linee Guida sul Genere* dell'UNHCR. Infine quindi, è possibile affermare che il diritto in materia di rifugiati ha accumulato la maggiore esperienza nella persecuzione legata al genere, pertanto il suo utilizzo risulta fondamentale per i giudici della CPI.

### Capitolo 3: Le Autorità coinvolte nella Protezione delle Donne Rifugiate

Mentre nel capitolo precedente si è analizzato il rapporto tra Diritto Penale e Diritto Internazionale a tutela dei Rifugiati, l'attenzione viene ora rivolta all'importanza dei Diritti Umani per la protezione dei rifugiati. In particolare, i due campi si intrecciano poiché le autorità garanti dei diritti umani sono le stesse poste a tutela dei rifugiati, tra cui il principale risulta essere l'UNHCR. Le Nazioni Unite riconobbero per la prima volta il problema relativo alle donne rifugiate nel 1979, alla Conferenza di Nairobi, ma tale interesse si concretizzò nel 1985 con la *Conclusion N. 39 sulle Donne Rifugiate e la Protezione Internazionale* da parte dell'UNHCR. Successivamente, nel 1991, l'UNHCR adottò le *Linee Guida sulla Protezione delle Donne Rifugiate*, ed infine, nel 1997, l'ONU pubblicò un rapporto sulla violenza delle donne nei conflitti civili, la sua qualifica come crimine internazionale, e un'analisi sul ruolo della donna nella famiglia e nella società. Questo documento è risultato particolarmente utile come riferimento per le autorità in difesa dei diritti umani, non ultimo il Comitato Cedaw. Esso costituisce il principale organo per la lotta contro la discriminazione della donna, a partire dalla sua nascita nel 1981. La giurisprudenza del Cedaw è stata abbastanza scarsa fino al 1990, ma è comunque possibile individuarne i principali criteri adottati attraverso l'analisi di alcuni casi esemplari. In particolare, si riconosce una certa generosità nell'approccio adottato dal Comitato, in quanto vengono ammesse come valide anche prove facilmente opinabili, e gli standard adottati risultano meno restrittivi rispetto a quelli dell'UNHCR.

L'altro comitato particolarmente rilevante in materia è il Comitato Contro la Tortura. Il nucleo del giudizio di tale comitato risiede nel verificare l'esistenza di un rischio di tortura reale e personale, quindi i fatti raccontati dalla vittima, in questo caso la donna, assumono fondamentale importanza. In base agli esiti dei casi sottoposti al CCT, si nota una generale accettazione delle richieste di asilo, mentre il Comitato preferisce lasciare allo Stato di asilo la possibilità di ulteriori investigazioni. Tuttavia, altri aspetti procedurali risultano più controversi, come per esempio gli elementi annessi come ragioni a supporto della richiesta. Nello specifico, il CCT non ammette nessun rischio di violenza indiretto, di cui una donna può essere vittima come moglie o membro della famiglia. Però è ammessa una seconda udienza per le donne che hanno omissi certi particolari quando interrogate nel corso di una prima richiesta di asilo effettuata con un altro membro della famiglia. È bene ricordare che il ruolo dei vari comitati dell'ONU, ad eccezione del CCT, è molto limitato, poiché la maggior parte dei casi si ferma al primo stadio, quello di ricezione, a causa della mancanza di materiale per inoltrare la richiesta. La ragione di tale difficoltà va attribuita agli standard eccessivamente restrittivi applicati dai vari comitati. Perciò, seppur questi organi rappresentino un importante strumento a disposizione dei rifugiati, la loro difficoltà nel manifestare un potere effettivo continua a caratterizzarli e a limitare le possibilità di questi nella tutela dei rifugiati.

L'altra autorità fondamentale nella protezione dei rifugiati è rappresentata da ogni singolo Stato aderente alla Convenzione del 1951 e/o al Protocollo del 1967. La principale responsabilità che ne deriva è quella stabilita dal principio di "non-refoulement", ma più in generale ad ogni Stato è attribuito il dovere di difendere gli individui dalla violenza e dalla violazione dei diritti umani. Più che altro però, il ruolo

fondamentale rivestito dai Governi deriva dall'ancora forte prevalenza del potere nazionale su quello internazionale, in quanto ogni autorità internazionale, ONU incluso, può acquisire tanto potere quanto lo Stato intende attribuirgli e non oltre. Ciò significa che ogni Paese ha il potere di diventare il principale difensore dei diritti dei rifugiati, così come il principale ostacolo alla loro affermazione. Ciò è dimostrabile, ad esempio, attraverso il comportamento tenuto dallo Stato dello Zaire, che durante la guerra civile rifiutò di seguire la proposta dell'UNHCR di spostare un campo profughi, lasciando che migliaia di civili cadessero vittima delle violenze dei soldati. Tuttavia occorre citare anche episodi in cui i principali responsabili del fallimento dell'aiuto ai rifugiati sono Paesi sviluppati, e non poveri come lo Zaire. Per esempio, il flusso migratorio proveniente dalla Siria negli anni 2011-16 si è riversato prevalentemente in Libano, Egitto, Turchia, e Giordania, mentre gli stati europei si sono rifiutati di contribuire nell'assistenza dei rifugiati siriani. Ovviamente un comportamento simile da parte degli Stati più ricchi mina l'efficacia di qualsiasi piano destinata all'aiuto dei rifugiati, poiché ogni operazione ha comunque bisogno di ingenti finanziamenti, quindi di somme e di personale messi a disposizione dai Paesi con maggiori risorse. Inoltre, a seguito dei solleciti dell'UNHCR all'Unione Europea e agli stati americani per partecipare alla gestione dei rifugiati Siriani, l'UE ha reagito firmando un accordo con la Turchia, che risulta completamente contrario al piano di cooperazione internazionale proposto dall'ONU, in quanto stabilisce per la Turchia il ruolo di guardiano verso cui indirizzare tutti i nuovi migranti sbarcati sulle isole greche. In questo modo i siriani vengono condannati a vivere in un sistema di "violenza legale", imprigionati in un Paese dal quale è difficile uscire e nel quale i diritti umani sono formalmente garantiti ma sistematicamente violati.

Gli esempi relativi ai rifugiati in Zaire e in Turchia costituiscono un esempio emblematico del comportamento adottato dai vari Stati della comunità internazionale, i quali troppo spesso sottoscrivono formalmente i diritti umani e li violano sistematicamente, oppure si chiudono nel rifiuto a collaborare alle missioni di assistenza, che equivale alla condanna a morte di milioni di profughi.

## **Conclusioni**

A seguito dell'analisi effettuata nei capitoli precedenti, risulta evidente l'insufficienza degli strumenti offerti dal diritto internazionale per la tutela delle donne rifugiate, nonostante i passi avanti compiuti dal 1950 fino ad oggi, specialmente grazie agli sforzi degli organi delle Nazioni Unite. Occorre soprattutto un maggior coinvolgimento della comunità internazionale, in modo da favorire l'inclusione della questione relativa ai rifugiati tra le priorità della politica internazionale, al pari di problemi già presenti negli Obiettivi del Millennio stilati dall'ONU, come la fame, la povertà e l'uguaglianza di genere.

Purtroppo però qualsiasi azione effettuata a livello delle autorità internazionali, perfino dell'ONU, risulta inutile senza una più attiva collaborazione dei singoli Paesi, specialmente quelli Europei e dell'America del Nord, dai quali dipende maggiormente la disponibilità finanziaria dei piani di assistenza attuati. Invece sono proprio i membri dell'UE a manifestare una clamorosa apatia nei confronti delle difficoltà affrontate da milioni di rifugiati, rendendosi così responsabili dell'incremento del numero di vittime nel Mediterraneo. Addirittura, in certi casi le barriere di accesso vengono ulteriormente elevate, come nel caso degli USA,

incitando una xenofobia e un sentimento nazionalistico sempre più potenti. In sostanza, considerato il limitato potere effettivo di cui godono l'ONU e gli organi internazionali in genere, non si verificheranno miglioramenti soddisfacenti nella difesa dei diritti delle donne rifugiate, a meno che non si registri contemporaneamente un maggior impegno da parte dei Governi nazionali.

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