

# THE LEGAL PROTECTION OF REFUGEE: WESTERN BALKANAS

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## Abstract

*States have been granting protection to individuals and groups fleeing persecution for centuries; however, the modern refugee regime is largely the product of the second half of the twentieth century. Like international human rights law, modern refugee law has its origins in the aftermath of World War II as well as the refugee crises of the interwar years that preceded it.*

*The refugee in international law occupies a large space characterized, on the one hand, by the principle of State sovereignty and, on the other hand, by competing humanitarian principles deriving from general international law and from treaty. The study of refugee protections invites a look not only at States' obligations with regard to admission and treatment after entry, but also at the potential responsibility in international law of the State whose conduct or omissions cause an outflow. The community of nations is responsible in a general sense for finding solutions and in providing international protection to refugee. This special mandate was entrusted to UNHCR.*

*At the start of the 21st century, protecting refugees means maintaining solidarity with the world's most threatened, while finding answers to the challenges confronting the international system that was created to do just that.*

*The aim of this article is to describe the foundations and the framework of international refugee law, to define refugees and protection of refugees; as well as to provides a brief analysis of the changing migration and asylum dynamics in the region and outlines some of the main challenges arising in this context..*

**Keywords:** *Legal Protections; Refugee; Freedom of Movement; Western Balkan; Managing Borders.*

## Introduction

The term “refugee” is a term of art, that is, a term with a content verifiable according to principle of general international law. In ordinary usage, it has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination is not relevant; the flight is to freedom, to safety.<sup>1</sup> Implicit in the ordinary

meaning of the word “refugee” lies an assumption that the person concerned is worthy of being, and ought to be, assisted , and, if necessary, protected from the causes and consequences of flight.

Refugees have existed as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for refugees dates only from the time of the League of Nations and the election of Fridtjof Nansen as the first High

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<sup>1</sup> The reasons for flight may be many; flight from oppression, from a threat to life or liberty, from prosecution, from deprivation, flight from war or civil conflict, from natural disasters, flood, food crisis.

Commissioner for Russian refugees in 1921.<sup>2</sup> The League of Nations defined refugees by categories, specifically in relation to their country of origin.<sup>3</sup>

A further international legal instrument of that period is the resolution which the Intergovernmental Committee on Refugees (IGCR) adopted in Evian on 14 July 1938 to define its functions.<sup>4</sup> Its primary objective, “facilitating involuntary emigration from Germany (including Austria)”.<sup>5</sup> A major review at the Bermuda Conference in April 1943 expanded the mandate to include “all persons, wherever they may be, who, as a resultant of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on

account of their race, religion or political beliefs”.<sup>6</sup>

Up until 1950 the League of Nations, and thereafter the UN, established and dismantled several international institutions devoted to refugees in Europe. The International Refugee Organization (IRO) was the last to precede the United Nations High Commissioner for Refugees (UNHCR). The IRO was created in 1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was to be terminated by June 30, 1950.<sup>7</sup>

The Office of the UNHCR succeeded the IRO as the principal UN agency concerned with refugees, taking account of the impact of developments within the UN, such as article 14(1) of the Universal Declaration of Human Rights,<sup>8</sup> and the 1967

<sup>2</sup> The International Nansen Office for Refugees was created by the League of Nations Resolution of 30 September 1930 began active operations on April 1931. See League of Nations, *Treaty Series*, Vol. LXXXIX, No. 2005.

<sup>3</sup> Nansen’s mandate was subsequently extended to other groups of refugees, including Armenians in 1924, as well as Assyrian, Assyro-Chaldean, and Turkish Refugees in 1928. During the League of Nations period (1921-1946) several institutions were created to perform some or all of the tasks of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946) and the Intergovernmental Committee on Refugees (1938-1947). By adhering to the Convention relating to the International Status of Refugees, of 28 October 1933, States Parties for the first time undertook real obligations on behalf of Russian, Armenian and assimilated refugees. See League of Nations, *Treaty Series*, Vol. CLIX, No. 3663. Assimilated refugees were Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks.

<sup>4</sup> League of Nations, *Official Journal*, XIXth Year, Nos 8-9, August-September 1938, pp. 676 and 677; C. 244 M. 143.1938 XII, annex. In February 1939 the Member States of the IGCR appointed as Director the newly appointed High Commissioner for Refugees, whose headquarters were likewise in London. The IGCR ended its activities on 30 June 1947, six months after the Office of the High Commissioner closed. During that time the IGCR also protected the “Nansen refugees”.

<sup>5</sup> 1938 19 (8-9) LNOJ 676-7. Also see UN Press Release SG/REF/3, 23 Jul. 1979.

<sup>6</sup> See UN doc. A/C.3/5, annexed to GAOR, Third Committee, 1 st. Sess., 1 st Part, 1946, Summary Records: UN doc. A/C.3/SR.1-11. UNRRA.

<sup>7</sup> The Constitution of the IRO continued to practice of earlier instruments, and specified certain categories to be assisted. The IRO was also competent to assist ‘displaced persons’, including those deported or expelled from their own countries, some of whom had been sent to undertake forced labor. See *Journal of Law & Policy* [Vol. 5:129], *The Evolution of the International Refugee Protection, Regime* Erika Feller, pp. 129-30, available at: [http://law.wustl.edu/harris/documents/p129\\_Feller.pdf](http://law.wustl.edu/harris/documents/p129_Feller.pdf).

<sup>8</sup> “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 [General Assembly resolution 217 A](#). Subsequent regional human rights instruments have elaborated on this right, guaranteeing the “right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.” American Convention on Human Rights, art. 22(7); African [Banjul] Charter on Human and Peoples’ Rights, art. 12(3), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Declaration on Territorial Asylum.<sup>9</sup> The bases for an international legal concept of the refugee are thus to be found in treaties, State and United Nation practice, and in the Statute of the UNHCR.<sup>10</sup>

In the 1980s and '90s, substantial changes came about in the environment in which international refugee protection was to be realized. The number of refugees grew exponentially— no longer as a product of colonialism but due to the steep rise in internal interethnic conflicts in the newly independent states.<sup>11</sup> And the refugee population steadily increased from a few million in the mid-1970s to some ten million by the late 1980s. In 1995 the number of persons needing assistance rocketed to around twenty-five million.

The field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established. Briefly, the movement has been from the Statute through good offices and assistance, to protection and solutions. The class of beneficiaries has moved from those defined in the Statute, through those outside competence assisted on good offices basis, those defined in relevant resolutions of the General Assembly and directives of the Executive Committee, arriving finally at the generic class of refugees, displaced and other persons of concern to UNHCR.<sup>12</sup>

Finally, Migration dynamics in the Western Balkans<sup>13</sup> have undergone fundamental changes during the past years. Countries in the region still have to cope with the consequences of large-scale displacement of the 1991-95 conflicts. Social and economic challenges continue to trigger the movement of nationals from the Western Balkan countries within and from the region. However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk.<sup>14</sup>

### **The Legal Framework of the International Refugee Protection System**

The refugee in international law occupies a large space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing

<sup>9</sup> Adopted at the 1631st plenary meeting, 14 Dec. 1967; In: Resolutions adopted by the General Assembly during its 22nd session. Volume I, 19 September-19 December 1967. - A/6716. - p. 81. - (GAOR, 22nd sess., Suppl. no. 16)

<sup>10</sup> UNGA res.(V), annexed, paras. 1,2.

<sup>11</sup> The conflicts were fuelled by superpower rivalry and aggravated by socioeconomic problems in developing countries. Solutions to refugee problems became even more elusive— whether in Afghanistan, in the Horn of Africa, or in Southern Africa. To give some examples, 2.5 million people were displaced or fled to Iran from Northern Iraq in 1991; in former Yugoslavia the number of refugees, displaced and others assisted by UNHCR, exceeded four million; and the Great Lakes crisis of 1994 forced three million people to flee their countries.

<sup>12</sup> See Guy S. Goodwin – Gill, *The Refugee in International Law* (Clarendon Press, 1996),15; UNGA res. 36/148, 16 Dec. 1981; UN doc. A/41/324 (May 1986). Despite the protest of individual governments, the international community at larger has not hitherto demurred when UNHCR has exercised its protection and assistance functions in cases of large-scale movements of asylum seekers.

<sup>13</sup> For the purpose of this paper, the Western Balkans includes Albania, Bosnia and Herzegovina, Croatia, Kosovo (UNSCR Resolution 1244/99), Montenegro, Serbia and the Republic of Macedonia.

<sup>14</sup> See the concept note on Refugee Protection and International Migration in the Western Balkans: Suggestions for a Comprehensive Regional Approach, September 2013, available at: <http://www.unhcr.org/531d88ee9.html>.

humanitarian principles deriving from general international law and from treaty.<sup>15</sup>

The controlling international convention on refugee law is the 1951 Convention relating to the Status of Refugees (1951 Convention)<sup>16</sup> and its 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol).<sup>17</sup> The 1951 Convention establishes the definition of a refugee as well as the principle of non-refugent<sup>18</sup> and the rights afforded to those granted refugee status.<sup>19</sup>

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. Together, the Refugee Convention and Protocol cover three main subjects:

- The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status;
- The legal status of refugees in their country of asylum, their rights and

obligations, including the right to be protected against forcible return, or refugent, to a territory where their lives or freedom would be threatened; and

- States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention.<sup>20</sup>

Convention refugees are thus identifiable by their possession of for elemental characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>21</sup>

The States which acceded to or ratified the 1951 Convention agreed that the term

<sup>15</sup>Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception. It is incomplete so far as refugees and asylum seekers may still be denied even temporary refuge or temporary protection, safe return to their homes, or compensation. See UN doc. E/CN.4/1503, para. 9.

<sup>16</sup> United Nations General Assembly resolution 429(V) of 14 December 1950, available at <http://www.unhcr.org/refworld/docid/3b00f08a27.html>, has lost much of its significance.

<sup>17</sup> The Convention enabled States to make a declaration when becoming party, according to which the words "events occurring before 1 January 1951" are understood to mean "events occurring in Europe" prior to that date. This geographical limitation has been maintained by a very limited number of States, and with the adoption of the 1967 Protocol, has lost much of its significance. The Protocol of 1967 is attached to United Nations General Assembly resolution 2198 (XXI) of 16 December 1967, available at <http://www.unhcr.org/refworld/docid/3b00f1cc50.html>.

<sup>18</sup> The principle of non-refoulement prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture. The possible application of non-refugent or an analogous principle of refuge to those outside the 1951 Convention/1967 Protocol is also considered, as is the relationship between non-refugent and asylum.

<sup>19</sup> Although the 1951 Convention definition remains the dominant definition. The regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

<sup>20</sup> By acceding to the Protocol, States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

<sup>21</sup> "The Executive Committee reaffirms that the 1951 Convention relating to the Status of Refugees and the 1967 Protocol remain the foundation of the international refugee regime." See UNHCR Executive Committee Conclusion N° 87(f), 1999.

‘refugee’ should apply, first to any person considered a refugee under earlier international agreements; and, secondly, to any person who, broadly speaking, qualifies as a refugee under UNHCR Statute.<sup>22</sup> Despite differences at the national and regional levels, the overarching goal of the modern refugee regime is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.<sup>23</sup>

The 1951 Convention and the 1967 Protocol remain the principal international instruments benefiting refugees, and their definition has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognized refugees. It forms the basis for

article I of the 1969 OAU Convention on Refugee Problems in Africa.<sup>24</sup>

Moreover, the refugee crisis in Central America during the 1980s led in due course to one of the most encompassing approaches to the refugee question. The 1984 Cartagena Declaration<sup>25</sup> proposed a significant broadening, analogous to that of the OAU Convention.<sup>26</sup>

A key step in establishing the governance – and governability – of refugee is the establishment of national law based on and in compliance with international law. This is usually accomplished through ratification by states of relevant international human rights instruments and international labor standards, followed by their effective implementation.

<sup>22</sup> Art. 1A(2) of the Convention. The 1951 Convention does not define how States Parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State Party to develop. This has resulted in disparities among different States as governments craft asylum laws based on their different resources, national security concerns, and histories with forced migration movements.

<sup>23</sup> Governments normally guarantee the basic human rights and physical security of their citizens. But when people become refugees this safety net disappears. Refugees fleeing war or persecution are often in a very vulnerable situation. They have no protection from their own state - indeed it is often their own government that is threatening to persecute them. If other countries do not let them in, and do not protect and help them once they are in, then they may be condemning them to an intolerable situation where their basic rights, security and, in some cases their lives, are in danger.

<sup>24</sup> Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session. See Text United Nations, Treaty Series, No. 14691, entry into force 20 June 1974 in accordance with Article XI, Addis-Ababa, 10 September 1969. While incorporating the existing 1951 Convention refugee definition, the OAU Convention added a paragraph specifying that the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. In other words, the notion of “refugee” was broadened beyond victims of generalized conflict and violence. The OAU Convention was also a significant advance from the 1951 Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions— particularly on voluntary repatriation, in contrast to the integration bias of the 1951 Convention— and through its promotion of a burden-sharing approach to refugee assistance and protection.

<sup>25</sup> See Regional Refugee Instruments & Related, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html>.

<sup>26</sup> The Cartagena Declaration on Refugees bases its principles on the “commitments with regards to refugees” defined in the Contadora Act on Peace and Cooperation (which are based on the 1951 UN Refugee Convention and the 1967 Protocol). It was formulated in September 1984 and includes a range of detailed commitments to peace, democratization, regional security and economic co-operation. It also provided for regional committees to evaluate and verify compliance with these commitments. See more at: <http://www.refugeelaidinformation.org/cartagena-declaration-refugees#sthash.eIjR0C9.dpuf>. See also Executive Committee Conclusion No. 22 (1981) on the protection of asylum seekers in situations of large-scale influx.

The 1951 Convention also protects other rights of refugees, such as the rights to education, access to justice, employment and other fundamental freedoms and privileges similarly enshrined in international and regional human rights treaties. In their enjoyment of some rights, such as access to the courts, refugees are to be afforded the same treatment as nationals while with others, such as wage-earning employment and property rights, refugees are to be afforded the same treatment as foreign nationals.<sup>27</sup>

Despite these rights being protected in the 1951 Convention and under human rights treaties, refugees in various countries do not enjoy full or equal legal protection of fundamental privileges. Ethiopia, for example, made reservations to Articles 22 (public education) and Article 17, treating these articles as recommendations rather than obligations.<sup>28</sup> Although not a party to the 1951 Convention, Lebanon is host to a large population of refugees, predominately Palestinians. Restrictive labor and property laws in Lebanon prevent Palestinians from practicing professions requiring syndicate membership, such as law, medicine, and

engineering, and from registering property.<sup>29</sup>

The adjudication of asylum claims is reserved to individual States. Although some States, namely those that comprise the Council of Europe, have made an effort to adopt a uniform asylum system, international and regional bodies lack the jurisdiction to adjudicate individual asylum claims.<sup>30</sup> International and regional bodies do, however, adjudicate claims asserting violations of the human rights of refugees and asylum seekers.

Furthermore, the municipal law practice of non-extradition of political offenders is one antecedent to current principles protecting refugees from return to a State in which they may face persecution. In some countries, the principle of asylum for refugees is expressly acknowledged in the constitution.<sup>31</sup> In others, ratification of the 1951 Convention and the 1967 Protocol has direct effect in local law, while in still other cases, ratifying States may follow up their acceptance of international obligations with the enactment of specific refugee legislation or the adoption of appropriate administrative procedure.<sup>32</sup>

<sup>27</sup> 1951 Convention, art. 16 (refugees are to be granted equal access to the courts), art. 17 (refugees are to be afforded the same access to wage-earning employment as foreign nationals), art. 13 (refugees are to be afforded the same rights to moveable and immovable property as foreign nationals).

<sup>28</sup> See United States Committee for Refugees and Immigrations, *World Refugee Survey 2009 – Ethiopia*, 17 June 2009, available at: <http://www.refworld.org/docid/4a40d2a594.html>.

<sup>29</sup> See Human Rights Watch, *World Report 2011: Lebanon* (2011).

<sup>30</sup> See Dublin Regulation (REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013, Official Journal of the European Union, L 180/31. Together with the recast Dublin Regulation, three other legal instruments constitute the “Dublin System”. Regulation (EU) No. 603/2013 concerning the establishment of “Euro act”. for the comparison of fingerprints for the effective application of the recast Dublin Regulation and Regulation (EU) No. 118/2014 which amends (EC) No. 1560/2003 laying down detailed rules for the application of the recast Dublin Regulation. Also see Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (commonly known as the Qualification Directive).

<sup>31</sup> See UN doc. ST/GENEVA/LIB/SER.B/Ref.9, 68-74.

<sup>32</sup> The Preamble to the Constitution of France acknowledges the principle of asylum, while a 1952 law declares that refugees within the competence of the Office shall include those within the mandate of UNHCR, as well as those within article 1 of the 1951 Convention. Canada also adopted the Convention definition in the 1976 Immigration Act (*Canada: Immigration Act, 1976-77, c. 52, s. 1, 1976*, available at: <http://www.refworld.org/docid/3ae6b5c60.html>). The Federal Republic of Germany has both constitutional and

Finally, refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called ‘statutory refugees’), but also other large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin.<sup>33</sup> The agency does this in several ways: it ensures the basic human rights of uprooted or stateless people in their countries of asylum or habitual residence and that refugees will not be returned involuntarily to a country where they could face persecution. Longer term, the organization helps refugees find appropriate durable solutions to their plight, by repatriating voluntarily to their homeland, integrating in countries of asylum or resettling in third countries.<sup>34</sup>

### International Migration: The Western Balkans

International migration is the movement of people across borders to reside permanently or temporarily in a country other than their country of birth or citizenship.<sup>35</sup> The United Nations (UN) estimates that in 2013 some 232 million people were living outside their country of birth or citizenship for more than one year. This represents just over three per cent of the world’s population and would rank such migrants, if living within the same territory, as the world’s fifth largest country. While the number of international migrants has grown steadily, that three per cent proportion of world population has remained stable over the past 40 years.<sup>36</sup>

In current rates of international migration continue, the number of international migrations worldwide could

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enacted law provisions benefiting refugees, both of which were amended in 1992/93. In other countries, the admission of refugees and special groups is often decided by the government in the exercise of broad discretionary powers. There are a number of States who host large refugee populations but who are either not a party to the 1951 Convention and 1967 Optional Protocol or who do not have laws or policies in place to address asylum claims. These States include a large number of countries in the Middle East and Asia with significant refugee populations, including Egypt, Jordan, Syria, India, Malaysia, Lebanon, and Pakistan. *See* U.N. Treaty Collection, Ch. V Refugees & Stateless Persons (listing countries that are party to the 1951 Convention); *see also*, UNHCR, Country Operations Plans (explaining the legal framework of countries where UNHCR operates), available at: <http://www.unhcr.org/pages/49e456f96.html>. In such cases, refugee status determinations are carried out by field offices of the UNHCR.

<sup>33</sup> Now often referred to as ‘displaced persons’ or ‘persons of concern.’

<sup>34</sup> In many countries, UNHCR staff work alongside other partners in a variety of locations ranging from capital cities to remote camps and border areas. They attempt to promote or provide legal and physical protection, and minimize the threat of violence - including sexual assault - which many refugees are subject to, even in countries of asylum. They also seek to provide at least a minimum of shelter, food, water and medical care in the immediate aftermath of any refugee exodus, while taking into account the specific needs of women, children, the elderly and the disabled.

<sup>35</sup> Migration - The movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.

<sup>36</sup> *See* <http://esa.un.org/migration/index.asp?panel=1>; A World Bank Fact Sheet 2010: <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/World.pdf>; United Nations Development Program (UNDP). 2009. Human Development Report 2009: Overcoming barriers: Human mobility and development. [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf); Conference on Migration and Development, 2006. Background information, <http://www.belgium.iom.int/internationalconference/becgroundinfo.htm>.

reach 405 million by 2050.<sup>37</sup> While South-North movement patterns previously dominated the migration landscape, today international migrants move in equal share from developing to developed countries and between developing countries.<sup>38</sup> Migration is also no longer only unidirectional and permanent; it is increasingly multiphase and multidirectional, often occurring on temporary or circular basis.<sup>39</sup>

Migration today is motivated by a range of economic, political and social factors. Migrants may leave their country of origin because of conflict, widespread violations of human rights or other reasons threatening life or safety. The UN global estimates of international migrants count those living outside their country of birth or citizenship for more than one year. While this estimate includes migrant workers, migrants in an irregular situation and refugees, it does not account for the millions of persons worldwide who migrate on a short-term temporary or seasonal basis to and from another, usually neighboring country for a few weeks or months each year. However, many of these persons are included in legal definitions of “migrant workers”.<sup>40</sup> ICRMW is very clear that states

have the right to control their borders, including the establishment of criteria governing admission of migrant workers and members of their families.<sup>41</sup>

With international migration increasing in scope, scale and complexity, more countries are now simultaneously countries of origin, transit, and destination for migration. New forms of partnership and cooperation have emerged to govern migration, including in the context of South-South cooperation<sup>42</sup> and engaging private as well as non-governmental actors.

In the context of globalization, migration brings both development opportunities and challenges. While many migrants are able to move, live and work in safety and dignity, others are compelled to move as a result of poverty, lack of decent work, and environmental degradation. Human rights violations, including generalized violence, armed conflict, and persecution too often result in forced migration. Closing the gap between humanitarian and development aid by ensuring a more effective transition in the context of the return of refugees and Internally Displaced Persons and their reintegration in places of origin could help

<sup>37</sup> See IOM, (2010), *The World Migration Report 2010: The Future of Migration: Building capacities for change*, Geneva, available at: [http://publications.iom.int/bookstore/free/WMR\\_2010\\_ENGLISH.pdf](http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf).

<sup>38</sup> United Nations Population Division/DESA, *Presentation at the Tenth Coordination Meeting on International Migration*, New York, 9-10 February 2012, available at: <http://www.un.org/esa/population/meetings/tenthcoord2012/V.%20Sabine%20Henning%20-%20Migration%20trends.pdf>.

<sup>39</sup> *Ibid*, *Supra* 36.

<sup>40</sup> See Article 2(1) and 5 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), United Nations, *Treaty Series*, vol. 2220, p. 3; Doc. A/RES/45/158, entry into force on 1 July 2003.

<sup>41</sup> This balance is reflected in Article 79 of ICRMW: “*Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention*”. Under Article 34 of ICRMW, migrants also have a duty to comply with the laws and regulations of the states of transit and destination as well as respect the cultural identity of the inhabitants of the states of transit and destination.

<sup>42</sup> South-South cooperation is a broad framework for collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains. Involving two or more developing countries, it can take place on a bilateral, regional, sub regional or interregional basis. See UN Office for South-South Cooperation: <http://ssc.undp.org/content/ssc.html>.



reduce the incidence of forced or involuntary migration.

In the absence of sufficient regular migration opportunities, migrants resort to irregular migration channels which place them at risk during transit and upon arrival in countries of destination. Many migrants, particularly those who are in an irregular situation and those working in precarious sectors, encounter human rights violations, labor exploitation including poor working conditions and low wages, trafficking and sexual abuse, violence, lack of social protection, discrimination and xenophobia. Thus, for too many migrants, their human development aspirations and potential remain unfulfilled, and their important contributions to the host society go unrecognized. Regardless of status, migrants, and in particular those who are most vulnerable, therefore require equal and specific inclusion in the development agenda at global, regional and national levels.<sup>43</sup>

Migration dynamics in the Western Balkans<sup>44</sup> have undergone fundamental changes during the past years.<sup>45</sup> However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also

destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk.<sup>46</sup> In 2012 the asylum applications from the Western Balkan region in the EU27+ (including Switzerland and Norway) amounted to more than 30,000 which constituted almost 9% of all asylum applications.<sup>47</sup> The recognition rates are low<sup>48</sup> and rejected asylum-seekers are returned to their countries of origin under readmission agreements the EU and its Member States concluded with the countries in the Western Balkans.

Largely owing to its strategic geopolitical location, the Western Balkans has become an important hotspot on one of the main migration routes to the EU. An increasing number of refugees and migrants from outside the region, in particular Afghanistan, Pakistan, Palestine, Syria, Somalia and North Africa, are arriving from Turkey and/or Greece and transiting the region using what is known as “the Western Balkan route.” Many lodge asylum claims in one or more of the Western Balkans countries, but often depart before having

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<sup>43</sup> See *A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the United Nations development agenda beyond 2015*, Report of the Secretary General, UN doc. A/68/202 (26 July 2013), e.g. para. 93 and 111.

<sup>44</sup> The Western Balkans includes Albania, Bosnia and Herzegovina, Croatia, (UNSCR Resolution 1244/99), Montenegro, Serbia and Republic of Macedonia.

<sup>45</sup> Countries in the region still have to cope with the consequences of large-scale displacement of the 1991-95 conflicts. Social and economic challenges continue to trigger the movement of nationals from the Western Balkan countries within and from the region.

<sup>46</sup> Predominant drivers of migration from the region are poverty, low living standards, unemployment and social exclusion. The liberalization of visa policies in the context of the EU accession process has reportedly been an important contributing factor facilitating legal movements.

<sup>47</sup> The former Yugoslav Republic of Macedonia and Serbia continue to be the main countries of origin. In October 2012 the number of Serbian and Macedonian citizens submitting asylum claims reached almost 6,000 in one month. With almost 15,000 asylum applications lodged in 2012 Serbian nationals remain one of the highest ranked nationalities of asylum applicants in the EU. Source: Euro stat, Asylum Applications in EU27+ from Southeast Europe, 2008-12. 7 February 2013.

<sup>48</sup> See Western Balkans Annual Risk Analysis 2013, Front ex. Available at [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/WB\\_ARA\\_2013.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2013.pdf).

their asylum claims processed and their protection needs determined.<sup>49</sup>

All countries in the region have adopted relevant legislation for regulating entry and stay of aliens<sup>50</sup>, as well as are parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol<sup>51</sup>. Also, they have established national migration management system and national asylum systems. However, shortcomings in the implementation of the legislation and gaps in institutional capacity do not always guarantee that asylum-seekers can access fair and efficient asylum procedures and enjoy the basic standards of treatment.<sup>52</sup> Moreover, Readmission agreements concluded between the EU and Western Balkans countries do not cover only nationals, but also allow for the return of third country nationals who had transited through the Western Balkans to an EU Member State. With regard to the latter, there is no system in place to ensure that returned asylum-seekers whose claims have not been examined on substance in the returning country are protected against refulgent and can access the asylum procedures in the country of return.

It should be noted that Countries of the region have developed a number of good practices at national and regional level which can serve as a basis for further

initiatives. These include for instance the creation of the Balkans Asylum Network (BAN) to facilitate regional cooperation and build the capacity of non-governmental organizations active in the field of asylum and migration, the implementation of the border monitoring project in Croatia (2008-present), the establishment of migrant service centers in the Western Balkan countries (62 are currently operational in the region), the elaboration of standard operating procedures for identification and referral of victims of trafficking in Albania, or the monitoring of arrivals of returned migrants at the Pristina airport in Kosovo. Initiatives aimed at regional cooperation and exchange of information on migration issues among law enforcement actors are also undertaken by the Southeast European Law Enforcement Centre (SELEC), the International Law Enforcement Cooperation Unit (ILECU) or under the framework of Police Cooperation Convention for Southeast Europe (PCC). Of particular note is the Migration, Asylum, Refugees Regional Initiative (MARRI) which was created under the former Stability Pact for South Eastern Europe to promote dialogue and closer regional cooperation on migration and asylum related issues among the Western Balkan countries.<sup>53</sup>

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<sup>49</sup> See UNHCR, *Asylum Levels and Trends in Industrialized Countries*, 2011, available at <http://www.unhcr.org/4e9beaa19.html>. The recent accession of Croatia to the EU has made it an EU Member State with the longest external land border. This may impact the nature and scale of the migration flows passing through the region, including by leading to an increase in the number of irregular migrants trying to enter the EU through Croatia and of those readmitted from Croatia under the existing readmission agreements. The future accession of Romania and Bulgaria to the Schengen zone as well as changes in the socio-political development in Northern Africa, Central Asia and the Middle East are likely to also affect migratory flows in the region.

<sup>50</sup> Laws on foreigners, legislation on border control etc.

<sup>51</sup> Except for Kosovo. See UNSCR 1244/99

<sup>52</sup> For example, recognition rates are extremely low despite the fact that many extra-regional asylum-seekers come from refugee-producing countries. In 2012 the recognition rate; in Montenegro 0.12%; in Serbia less than 1% and 0% in the Macedonia. In Croatia the total refugee recognition rate was 16.75%. See UNHCR data, available at: <http://www.unhcr.org/pages/4a013eb06.html>.

<sup>53</sup> See *Refugee protection and International Migration in the Western Balkans, Suggestions for a Comprehensive Regional Approach*, UNHCR and International Organization for Migration (IOM), available at: <http://www.unhcr.org/531d88ee9.pdf>.

The challenges described above will require new and cooperative approaches building on the region's humanitarian tradition and existing good practices. Against this background, this UNHCR/IOM initiative will assist States in the Western Balkans in establishing and operationalizing a protection-sensitive migration and asylum management system that meets the legitimate concerns of States to protect their borders and territories, reach their migration management objectives and fulfil their obligations under international human rights and refugee law.<sup>54</sup> The initiative will focus on those areas where more coordinated and joint action at both national and regional levels can contribute to resolving the region's particular challenges. These areas include: Protection-sensitive entry systems; Enhancing mechanisms for information sharing; Improvement of reception arrangements; Recognizing refugees; Solutions for refugees; Identifying and providing assistance to persons with specific needs and vulnerable migrants; and Providing assisted voluntary return and reintegration.<sup>55</sup>

### Conclusion

Taking stock of where we came from, UNHCR's perception is that refugee protection stands at a crossroads. Its most important tool—the 1951 Convention—sets out a basic framework that remains directly relevant to many, but not to all,

displacement situations.<sup>56</sup> Furthermore, alliances on protection are shifting.

The Convention has a legal, political and ethical significance that goes well beyond its specific terms: legal in that it provides the basic standards on which principled action can be founded; political in that it provides a truly universal framework within which states can cooperate and share the burden resulting from forced displacement; and ethical in that it is a unique declaration by the 140 States Parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged.

Assertions that the Convention is no longer relevant are belied by encouraging recent developments. At the Inter-Parliamentary Union meeting in Amman in May 2000,<sup>57</sup> 648 parliamentarians from 124 countries around the world reaffirmed the centrality of the Convention to asylum systems today; EU leaders meeting in Tampere, Finland,<sup>58</sup> followed suit as have the 56 government members of the UNHCR's Executive Committee. States continue to accede to the Convention and State Parties continue to promote accession.

There is no doubt that the Convention regime has gaps. We have to be able to admit this without blaming the Convention for problems to which it was never designed to respond. Recently critics have alleged that the Convention is outdated, unworkable, irrelevant and inflexible, a complicating factor in today's migration environment.

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid. See also Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action, European Commission – Press release, Brussels, 25 October 2015.

<sup>56</sup> Concerns about the 1951 Convention, specifically for what it does not address, have led some states to go so far as to question its continuing value. A great many more states increasingly disregard it or find ways around it, even in situations it directly addresses.

<sup>57</sup> See Press release of the Inter-Parliamentary Union\_Geneva, 12 April 2000\_N° 1, available at: <http://www.ipu.org/press-e/amman1.htm>.

<sup>58</sup> See Tampere Kick-start to the EU's policy for justice and home affairs, European Commission, available at: [http://ec.europa.eu/councils/bx20040617/tampere\\_09\\_2002\\_en.pdf](http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf).

Several states have deemed it an instrument unresponsive both to the interests of states and to the real needs on the ground. The Convention was never conceived only as an instrument for permanent settlement, much less for migration control. The Convention, together with its 1967 Protocol, was drafted to become the global, multilateral, standard-setting agreement on how to protect individuals in need of protection.<sup>59</sup>

Primary responsibility for protecting refugees and all persons within their own country rests with the national authorities of the country. National responsibility is a core concept of any response to refugees. It is a fundamental operating principle of the international community and is routinely emphasized by governments themselves, as a function of their sovereignty.<sup>60</sup>

The international obligation not to return refugees to danger is absolute, and applies to all countries regardless of their level of economic development. Meeting the life-saving needs of refugees, setting up fair and efficient asylum procedures, helping refugees return home or integrate in host communities all have a financial cost, met by receiving States, as well as by the international community in a spirit of international solidarity.

The right to seek and enjoy asylum enshrined in the Universal Declaration of Human Rights, and reflected in the 1951

Refugee Convention provides the legal basis for protecting people fleeing persecution, conflict and violence related to their race, religion, nationality, social group or political opinion.

In UNHCR's view, constructive and visionary immigration policies could result in an easing, or at least a balancing, of the pressure on asylum systems. There would be a positive switch in approach to managing migration through migration tools and managing the asylum system through asylum tools. Where there are linkages, and trafficking and human smuggling is a case in point, special additional approaches are called for.

In 2015, UNHCR issued Guidelines on International Protection<sup>61</sup>, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol, to help clarify why the Convention applies to people fleeing conflict and violence in such situations. These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979, reissued, Geneva, 2011) and the other Guidelines on International Protection.<sup>62</sup>

In UNHCR's view, constructive and visionary immigration policies could result in an easing, or at least a balancing, of the

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<sup>59</sup> The Convention at 50: the way ahead for refugee protection by Erika Feller, available at: [file:///C:/Users/Dell-PA-D/Downloads/02%20\(1\).pdf](file:///C:/Users/Dell-PA-D/Downloads/02%20(1).pdf).

<sup>60</sup> Yet, it is sometimes the very governments responsible for protecting and assisting their internally displaced populations that are unable or even unwilling to do so and, in some cases, they may even be directly involved in forcibly uprooting civilians. Even then, however, the role of international actors is to reinforce, not replace, national responsibility. This requires a two-pronged approach to encourage States and other authorities to meet their protection obligations under international law while also supporting the development of national and local capacities to fulfill these protection responsibilities.

<sup>61</sup> See UNHCR, Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, HCR/GIP/15/11, 24 June 2015.

<sup>62</sup> These Guidelines, having benefited from broad consultation, are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers, as well as UNHCR staff carrying out refugee status determination under its mandate and/or advising governments on the application of a prima facie approach. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

pressure on asylum systems. There would be a positive switch in approach to managing migration through migration tools and managing the asylum system through asylum tools. Where there are linkages, and trafficking and human smuggling is a case in point, special additional approaches are called for.

Today's conflicts are often driven by racial, ethnic, religious and/or political divisions. In the Central African Republic, South Sudan and the Syrian Arab Republic (Syria), and more recently in Iraq, what may appear at first glance to be indiscriminate violence often targets particular populations on the basis of their perceived support for one of the parties to the conflict.

Therefore, the UNHCR initiative will focus predominantly on the common needs and challenges of the countries in the Western Balkans including Croatia which became the first country in the region to join the EU. Practical cooperation with other countries along the migratory route (such as Austria, Italy, Slovenia, Hungary, Romania, Greece and Turkey, etc.) will be sought as well.

In order to assist States in the region in achieving the objectives outlined above, the

joint initiative will seek to develop a sustainable, comprehensive and cooperative framework for concrete action in the area of refugee protection and migration management, at national and regional levels.

On the basis of priority areas identified above, UNHCR, with input from other relevant stakeholders, will work with the Governments in the region towards development of a comprehensive roadmap/framework for action, outlining short and long-term objectives for the region, including concrete proposals for activities at both national and regional levels.

As a final point, the humanitarian situation of migrants along Western Balkans route calls for urgent action using all available EU and national means to alleviate it. To this end, the European Council considers it necessary to now put in place the capacity for the EU to provide humanitarian assistance internally, in cooperation with organizations such as the UNHCR, to support countries facing large number of refugees and migrant, building on the experience of the EU Humanitarian Aid and Civil Protection Department<sup>63</sup>.

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