II
ПРАВНИ ОКВИРИ ЗА РЕШЕЊЕ КРИЗЕ

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MIGRANT CRISIS – SAFETY CHALLENGE FOR THE REPUBLIC OF SERBIA

Апстракт: Мигрантска криза једна је од приоритетних тема у савременим међународним односима. То потврђују и бројне расправе и активности које се у последње време воде на глобалном и регионалном нивоу (на пример, у Економском и социјалном савету Уједињених нација – ECOSOC, у Високом комесаријату за избеглице Уједињених нација – UNHCR, у Међународној организацији за миграције – IOM, у Глобалном форуму за миграције и развој – GFMD, у форуму Г20 најразвијенијих земаља света, као и у Европској унији која прати и надзире актуелне миграцијске токове са Блиског истока, Азије, Северне и подсахарске Африке). Конкретни резултати ових активности очитовани су у правним актима и политичким агендама у којима је међународна заједница одредила начине и правце деловања за превазилажење негативних ефеката мигрантске кризе на социјалном, економском и правном плану. С обзиром да је мигрантска криза произвела и одређене ризике по националну безбедност а да ефективна заштита од тих ризика претпоставља доследну примену међународног права (нарочито у сфери избегличког права, права о људским правима и хуманитарног права), у студији која следи биће анализирана правна позиција различитих категорија миграната (емиграната и имиграната, избеглица, тражилаца азила, илегалних миграната, и др.), у циљу превазилажења могућих безбедносних изазова за Републику Србију.

Кључне речи: миграције, избеглице, азиланти, Међународно право, безбедносни изазови, Република Србија.

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This paper was created within the project "Serbia in contemporary international relations: Strategic directions of development and firming the position of Serbia in international integrative processes – foreign affairs, international economic, legal and security aspects", Ministry of Education and Science of the Republic of Serbia, number 179029, for the period 2011–2017.

1. General overview of the problem of migration

Migration as a social phenomenon is the subject of many studies in the social sciences especially in the sociology, demography, economy, history, political geography, international law and international relations.[2] The reasons that lead to migrant movements in human history were different. Thus, in previous historical epochs there have been migrant movements due to economic reasons (for example, nomadic migration, migration caused by the slave trade, migration caused by the colonisations after the great world discoveries and conquest, etc.), then for political reasons (for example, mass expulsions of the population during the war, forced exile, deportations, migration caused by the exchange of the population in parts of the ceded territory after the war, etc.), and finally, from cultural and religious reasons (for example, migration caused by cultural mission of civilized nations in less civilized countries, migration caused by religious expansion in underdeveloped and religious not homogeneous areas, etc.). In recent history, there are also numerous migrations and spatial movement of population that were triggered in most cases economic and political reasons. Thus, it is not unknown that industrial revolution and the rapid development of the capitalist system led to significant population movements from Europe to the United States, Canada and Australia, as well as in certain colonized areas of Africa, Latin America and Asia. Due to the global economic crisis and the depression that followed the outbreak of the First World War, massive migrant flows have temporarily waned. During World War II, tens of millions of people forcefully migrated from the political, economic and ideological reasons. In the period after the end of World War II, there has been significant inter-continental migration (for example, from Europe to North and South America, Oceania and Israel). Also, during the same period there were significant and inter-continental movements of population from underdeveloped to developed areas of the same country, or from less developed countries to the developed countries (for example, from

[2] R.K. Jenny, "*Current Trends and Developments:* The Changing Character of Contemporary Migration", *International Migration,* 1984, vol. 22, no. 4, pp. 388-398; Jahn Eberhard, "Migration Movments", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law,* 1997, vol. III, pp. 369-371; Patrick Manning, *Migration in World History*, New York and London, Routledge, 2005, pp. 1–193.

the South East European countries to the countries of Northern and Western Europe). This process was caused by the reconstruction of the war-torn economy, then by the internal and international mobilization of the working population in order to accelerate the industrialization of the underdeveloped areas and regions (so called "labour migrations"), and with the process of decolonization that took place within the United Nations together with the establishment of a New World Economic Order that is supposed to eliminate the vast differences existed between the underdeveloped countries of the South and developed countries of the North. After the end of the Cold War and the process of disintegration of the former Eastern Bloc, there has been a transformation of the World Order that has resulted in the great movement of population. This process has not stopped yet. On the contrary, the process is accelerated and today, according to internationally recognized statistical analysis, the number of migrants in the world has risen to 244 million which represents the largest number since the World War II.[3]

From the above description it is clear that migration can be caused by political, economic, social, cultural, religious and other reasons. Depending on the social circumstances migrations occur on a voluntary or forced basis. According to their character, migration can be internal and international, planned and haphazard, organized or unorganized. The key factor to distinguish migration from other similar phenomena is the "intention of migration" that is the intention of leaving the country of origin or the area in which exists the habitual residence. The intention of migration is caused by a variety of motives that are the subject matter of social sciences (especially demographics). The seriousness of intentions of migration thereof is measured

[3] According to official data of the United Nations in 2015, in the world has been an increase in the migrant population by 41 percent compared to the actual strength that existed in 2000. One-third of the total number of migrants is now deployed in about twenty countries. The largest number of international migrants lives in the United States, with 19% of the world's total. Germany and Russia host 12 million migrants each, taking the second and third place in States with the most migrants worldwide. Saudi Arabia hosts 10 million migrants, followed by the United Kingdom with 9 million and the United Arab Emirates with 8 million. See: United Nations, Department of Economic and Social Affairs, Population Division, Internet: http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates15.shtml

through the influence of motivational factors, called "push" and "pull" factors.[4] Push factors encourage emigrant processes (for example, the lack of political, civil, social, religious and cultural rights in the country of origin, oppressive political regime, war events, poverty, persecutions, etc.), While pull factors influencing the increased immigration flows (for example, a better economic, social and cultural conditions of life in the receiving country, existing the more democratic system and the greater political and civil liberties, peace and stability, better climatic conditions, etc.). In the international community there is a distinction between persons who leave their own home country, and persons who voluntarily enter into the receiving country. Persons who migrate to their home country are emigrants, while for the receiving country these persons are immigrants. In further studies the author will provide a more detailed explanation of these terms and their meaning in the international legal theory and practice.

Emigration

As mentioned above, the term "emigration" is covered by the broader concept of "migration". From the aspects of international law, emigration is relevant only in the case of leaving the home country with the aim of settling abroad. Persons who leave their country, for this country represent emigrants. Emigration may arise in the event of a voluntary abandonment of the territory of the home country, as well as in the case of forced abandonment when it comes with transfer and expulsion of inhabitants. While the first mentioned case largely motivated by personal and economic reasons, the second case is caused by the internal and international conflicts that invariably lead to the emergence of refugees. In traditional international law, emigration represented a natural right of man whose boundaries determined by the States. The discretion of the States to regulate emigration internally mostly remained limited with constitutional norms. At the international level, however, the States took over the corresponding obligations contained in international legal instruments, mostly in international treaties and conventions.

[4] Everett S. Lee, "A Theory of Migration", *Demography*, 1966, vol. 3, no. 1, pp. 47, etc.

Thus, for example, in the Universal Declaration of Human Rights of 1948, the provision of Article 13, paragraph 2, guarantees that: "Everyone has the right to leave any country, including his own, and to return to his country".[5] The provision of Article 12, paragraph 2 of the International Covenant on Civil and Political Rights of 1966 guarantees the similar right along with certain clarification contained in paragraph 3 of the same Article where it states that: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".[6] The Convention on the Elimination of all forms of Racial Discrimination of 1965 confirms in Article 5, the prohibition and elimination of racial discrimination in all its forms and guarantees equality before the law for everyone without distinction of race, national or ethnic origin. Special emphasis in the Convention in this regard places in the provision of point d) ii) where equality includes "the right to leave any country, including one's own, and to return to one's own country".[7]

At the regional level there are several international legal instruments governing the subject matter. Thus, at the European level, on 16 September 1963 the Council of Europe adopted the Protocol 4 to the European Convention on Human Rights of 1950, which like the previous international legal instruments of universal character provides that:

1. "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.

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[5] The Universal Declaration of Human Rights was proclaimed by the UN General Assembly in Paris on 10 December 1948. See: "International Bill of Human Rights", A/RES/217(III) A-E

[6] The International Covenant on Civil and Political Rights was adopted by the UN General Assembly on 19 December 1966. See: "International Covenant on Civil and Political Rights", *UN Treaty Series,* no 14668, 1976, vol. 999, pp. 171-346.

[7] The Convention on the Elimination of all forms of Racial Discrimination was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. See: "Convention on the Elimination of all forms of Racial Discrimination", A/RES/2106(XX) A

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposes in accordance with law and justified by the public interest in a democratic society".[8]

Under the auspices of the Organization of American States, in 1969 the member States adopted the American Convention on Human Rights (known as the Pact of San José). The Convention, as well as the previously mentioned international legal instruments guarantees freedom of movements and right to emigration (provision of Article 2, paragraph 2).[9]

In Africa, the Organization of African Unity adopted in 1981 the African Charter on Human and Peoples' Rights (known as the Banjul Charter). In Article 12, paragraph 2 of the Charter stipulates that: "Every individual shall have the right to leave a country including his own, and to return to his country. This right may be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".[10]

In view of the above-mentioned examples of legal regulation of issues of emigration, it is clear that the international community has established certain standards and rules that apply *erga omnes*. This right is guaranteed by numerous international legal instruments that constitute part of general international law.[11] The right of emigration may be limited only in exceptional cases. In principle, exceptions must be narrowly interpreted in practice, while States have an obligation in this respect to align their legislation with international legal standards.

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[8] Ibid.

[9] "American Convention on Human Rights", OAS, Treaty Series, 1969, no. 36

[10] "African Charter on Human and Peoples' Rights", OAU Doc. CAB/LEG/67/3 rev. 5.

[11] Rosalyn Higgins, "The Right in International Law of an Individual to Enter, Stay and Leave a Country", *International Affairs,* 1973, vol. 49, pp. 341-357; Paul Weis, Andreas Zimmermann, "Emigration", in. R. Bernhardt (ed.), *Encyclopedia of Public International Law,* 1995, vol. II, pp. 74-78.

Immigration

Immigration represents another aspect of the concept of "migration". In international legal theory, the term "immigration" represents a process of voluntary entry into the country other than country of origin for the purpose of permanent settlement. Persons who leave their own country for permanent settlement in another country, for that other country are immigrants. Determination of "voluntary entry" and "permanent settlement" in the international legal practice is not fully developed. Thus, it is considered that the immigration is "voluntary" when migrants enter in another country regardless of the specific reason (for example, to improve their economic and social status, because of political or religious oppression, legal prosecution, because of family integration, etc.). In relation to the second determinant – "permanent settlement", in the international legal practice exist different solutions. Thus, countries practicing different requirements and deadlines for obtaining the status of an immigrant, although in real, immigrants include different categories of persons who immediately upon entering at the territory of receiving country acquire that status. Since there are no universal rules for determining the status of immigrants, States are free to define certain restrictive criteria. This discretion stems from the concept of territorial sovereignty by which States have the right to "exclude aliens from the whole or part of its territory".[12] In relation to State, aliens are any persons who are not one of its nationals and in respect of which, territorial jurisdiction exists only as long as they residing in the State territory *(subditi temporarii).* Hence, within the categories of immigrants can not be qualified persons who fall into the category of aliens under domestic law, such as for example, diplomatic and consular representatives in foreign countries, their families, foreign students, merchants and tourists. Since the States do not have the same internal regulations which regulate the status of aliens, hence there is no unity in regard to immigration status. Nevertheless, at the international level, there are general principles and rules incorporated into conventions and bilateral and multilateral international treaties which are the relevant legal basis for the behaviour of States in relation to immigrants. The universal organization of the United Nations through its specialized organizations and bodies (UNHCR, IMO, and ILO etc.), regulates the issue of

[12] Lassa Oppenheim, *International Law,* London, Longmans, 1967, vol. I, pp. 675, etc.

protection of immigrants, and by their control mechanisms performs supervision over implementation of common standards.

In relation to the content of the common standards on immigration status, the existing international legal instruments mainly guarantee the right of movement or leaving one's own country, but there is no corresponding duty which establishes a clear obligation of the receiving States to permit entry into the country for immigrants. Protection of immigrants however, stems from the international protection of human rights. Thus, immigrants have, *inter alia*, the rights deriving from the right to life such as the right to work and the right to citizenship, etc.

In terms of protecting the life of immigrants and their families, as well as their right to work and other human rights and freedoms, the United Nations adopted in 1990 the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families.[13] This Convention is the only international legal instruments that deal solely with migrant's problems. The Convention applies to all migrant workers and members of their families regardless of their legal status. It requires from States parties to respect their fundamental human rights during the entire migratory process, including preparation, departure, transit, and the eventual stay, residency, and employment in another country. It provides for their right to leave and enter the State of origin and the right to move and reside freely in the territory of the receiving State. The inhumane living and working conditions and physical and sexual abuse that many migrant workers must endure in the Convention are covered by the reaffirmation of their "right to life" and prohibition against cruel, inhuman or degrading treatment of punishment as well as slavery or servitude and forced or compulsory labour. According the Convention provisions, migrant workers are entitled to the freedom of thought, conscience and religion. They also have the right to hold and express opinions and the right to be informed about their rights of admission and their rights and obligations in receiving States. States parties of the Convention have an obligation to treat migrants as well as with its own nationals in respect of remuneration, work conditions social security and emergency medical care. The Convention also provides that migrant workers have the right to transfer their earnings and

[13] "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families", A/RES/45/158, 18 December 1990.

savings as well as their personal effects and belongings. It also accepts the principle that migrant's property should be protected and should not be confiscated arbitrarily.[14]

In terms of protection of the right to citizenship of immigrants, in the international community there is a general rule incorporated in the Universal Declaration of Human Rights of 1948. In the provision of Article 15, Universal Declaration guarantees that: "Everyone has the right to a nationality", and "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".[15] The impact of the Universal Declaration of Human Rights is durable, and on its grounds has continuously upgraded the overall development of the rights of citizenship in the international and domestic legal plan. In this respect, it seems interesting at this point to mention how and in what manner is governed the right to citizenship in the EU countries. The Treaty on European Union, signed in Maastricht on 7 February 1992, established EU citizenship.[16] This citizenship is not excluded the possibility of holding national citizenship of member States. EU citizenship offers certain advantages such as freedom of movement and residence throughout the EU, active and passive voting rights, diplomatic protection in third countries, the right to petition the European Parliament, the right to appeal to the Ombudsman, etc. The Council of Europe in 1997 adopted the European Convention on Nationality.[17] This Convention represents a modern instrument of the right to citizenship and the type of synthesis of previous nationality rules that apply in to the EU member States. The adoption of the European Convention on Nationality constituted two parallel legal systems on the national and international level. On this way, the

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[14] Some major States in the regions of Western Europe, North America, Pacific Asia, Australia, and the Gulf have not ratified the Convention, even though they are host to the majority of international migrant workers. See: Thanh-Dam Truong, Des Gasper (Eds), *Transnational Migration and Human Security: The Migration-Development-Security Nexus*, Springer, Berlin, 2011, pp. 1-370; S. Hune, J. Niessen, "The First UN Convention on Migrant Workers", *Netherlands Quarterly of Human Rights,* 1991, vol. 9, p. 133.

[15] Supra 5.

[16] "Treaty on European Union", Office for Official Publications of the European Communities, Luxembourg, 1992.

[17] "European Convention on Nationality", Strasbourg, 6 November 1997, *European Treaty Series* No. 166.

legal regulations on nationality of the Council of Europe and of the EU through the mechanism of legal incorporation become part of internal legal order of their member States. Given this regulation of the right to citizenship, there are certain specifics regarding the status of immigrants. Specifically, the EU member States guarantee the right of movement of their nationals within the Union. Generally, they recognize the right to immigration for their nationals. The nationals of the EU member States enjoy almost unrestricted freedom to entry into the other EU States although permanent residence can be subject to certain restriction.[18] That freedom, however, does not apply to nationals of third countries with which the EU member States have not regulated bilateral relations. Freedom of movement in this regard is limited to the legislation of the Member State concerned, which is free to regulate the possibility of entry and residence, as well as the acquisition of citizenship by immigrants.

Taking into account the present solutions in international legal practice, it is clear that States are not entirely free to ignore the freedoms and rights of immigrants, which are guaranteed by international law. In this regard, the States are trying to incorporate in its internal legislation provisions on respect of the rights of immigrants also predicting the special procedural rules on crossing State borders, entering the national territory and the acquisition of their nationality.

In international practice, there are some cases that can not be subsumed under the term "immigrants". These cases, although reminiscent of immigration, does not take place within the framework of international legal standards. On the contrary, these cases are examples of violations of international law. In the next part of the study the author will try to give an explanation on the so-called "illegal immigration".

Illegal immigration

In international community, the term "illegal immigration" mostly means all types of immigration which are illegal from the point of international law.

[18] The Schengen Agreement of 1990 has abolished most internal immigration control for EU State nationals and nationals of some third countries. See:"The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders", *Official Journal* L, pp. 13-18, 22 September 2000.

In international legal practice, illegal migrations occur as a result of illegal entry to another country in relation to the country of origin and that, for example crossing the State border without valid identity and travel documents, and then crossing the State border with forged travel and identity documents and in other cases that are in conflict with the law of transit States and State of final destination.[19] This immigration is contrary to the will and authorization of these countries and often represents a violation of fundamental human rights and freedoms. Also, illegal immigration is often linked with the commission of offenses, such as enforcement coercion and torture, human trafficking and the creation of the illegal labour market. Therefore, the legislation of many countries prescribes restrictive measures with regard to illegal immigration, including detention and deportation.[20] The causes of illegal immigration may be different, as are the causes that lead to legal immigration (political, economic, social, cultural, legal, religious, etc.). Unlike legal immigration where it requires that immigrants "voluntarily enter" in the receiving State with the intention of "permanent settlement", for illegal immigrants "voluntary entry" (which in some cases mean only volunteer passage through transit State), not so much an essential condition how important is their intention to permanent residue in the State of final destination. In cases where illegal immigrants entering irregularly in another country different in relation to their own State, as a rule, they do not enjoy legal protection except protection that is provided through international legal instruments on human rights which the State concerned is incorporated in its own internal legal order.[21] In this regard, on illegal

[19] Illegal entry into the country means in most cases, unauthorized entry that is contrary to the immigration law of the State another in relation to the State of origin. In international practice is not unknown to the largest number of illegal entries takes place on the border between the US and Mexico, and then through the Mona Channel between the Dominican Republic and Puerto Rico, through the Strait of Gibraltar, Fuerteventura, and through the Strait of Otranto.

[20] V. M. Briggs, "The State of U.S. Immigration Policy: The Quandary of Economic Methodology and the Relevance of Economic Research to Know", *Journal of Law, Economics and Policy,* 2009, vol. 5, no.1, pp. 177-193.

[21] These illegal migrants are often referred to as the migrant *sans-papier* or *clandestines.* These are persons who have left their home State and live in another State without possessing a formal legal admission of the authorities.

immigrants apply the basic rules and principles on the protection of fundamental human rights deriving from the Universal Declaration of Human Rights of 1948,[22] the International Covenant on Civil and Political Rights of 1966,[23] the International Covenant on Economic, Social and Cultural Rights of 1966,[24] the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956,[25] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,[26] the United Nations Convention against Transnational Organized Crime of 2000 (so called *Palermo Convention*), and its Protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air,[27] etc. These rules and principles

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[22] Supra 5.

[23] Supra 6.

[24] The International Covenant on Economic, Social and Cultural Rights was adopted by General Assembly resolution 2200 (XXI) of 16 December 1966. See: "International Covenant on Economic, Social and Cultural Rights", *United Nations, Treaty Series*, vol. 993, pp. 3, etc.

[25] *The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was* adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956. See: "*Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery", United Nations, Treaty Series*, vol. 226, pp. 3, etc. This Convention complements the Slavery Convention of 1926, which is still operative and which proposed to secure the abolition of slavery and of the slave trade, and the Forced Labour Convention of 1930, which banned the any form of forced or compulsory labour, by banning debt bondage, serfdom, servile marriage, and child servitude.

[26] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly on 10 December 1984. See: "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *United Nations, Treaty Series,* vol. 1465, pp. 85, etc.

[27] The United Nations Convention against Transnational Organized Crime was adopted by a resolution 55/25 of the United Nations General Assembly on 15 November 2000. See: "United Nations Convention against Transnational Organized Crime" *United Nations, Treaty Series*, vol. 2225, pp. 209, etc. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime was adopted by

can help first, to ensure the fundamental rights of illegal immigrants in the process of implementation of restrictive measures by the receiving State, and second, in the process of legalizing their status if they meet the all necessary conditions. Of course, in the first case, the application of legal standards on the protection comes as a result of the abuse of rights by immigrants (for example, in the case of false asylum seekers), while in the second case, the final outcome will depend solely on the assessment of the State on whose territory illegal immigrant found, which in turn depends on domestic law, and then the application of the rules and principles of international law (in particular in the field of refugee law, human rights law and humanitarian law).

In connection with the above-mentioned analysis of the general categorization of migrants (emigrants-immigrants, illegal immigrants), in the next part of the study the author will be paid more attention to vulnerable categories of migrant populations.

2. Vulnerable categories of migrants

The international community, some categories of persons are in such a legal or factual position that there is a good chance that their rights be denied or violated. Among them are refugees, then the people who look like refugees but did not enjoy their status (i.e., *de facto* refugees), asylum seekers and internally displaced persons.

2.1. Refugees

In international legal practice there is no single definition of the term "refugee". The reason for this is different ideological concepts which underpin

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resolution A/RES/55/25 of 15 November 2000. See: "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime", United Nations, *Treaty Series*, vol. 2237, pp. 319, etc. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime was adopted by resolutionA/RES/55/25 of 15 November 2000. See: *United Nations, Treaty Series*, vol. 2241, pp. 507, etc.

[28] Guy Goodwin Gill, *The Refugee in International Law*, Oxford, 1996, pp. 4, etc.

the internal legal systems of the countries, followed by the lack of a universal concept to cover all cases of this phenomenon in practice.[28] The development of international relations after World War II, however, has led to a certain unity so that in the international legal practice crystallized more precise criteria for the identification of persons who may fall under the category of refugees. This is manifested in the international legal instruments adopted in the post-war practice, which relate to the Constitution of the International Refugee Organization (IRO), then in the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), and finally in the provisions of the Convention relating to the Status of Refugees of 1951 as amended with the Protocol to the Convention Relating to the Status of Refugees of 1967.[29]

The Constitution of the International Refugee Organization draws on an earlier legal practice. Consequently, the definition of "refugees" in the Constitution implied specific groups of pre-war and war-time refugees (for example, persons considered as refugees before the outbreak of the World War II for reasons of race, religion, nationality, or political opinion, and then the victims of the Nazi, Fascist, or Quisling regimes which had opposed the United Nations, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of Nazi persecution, etc.).[30] The Constitution included a general clause according to which the category of refugees be classified persons who was outside their home country, which could not or which for valid reasons (including persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions), did not want to put themselves under the protection of their country of origin. This later clause indicated the basic elements of the term "refugee" included in the Statute of the Office of the United Nations High Commissioner for Refugees who was succeeded the International Refugee Organization.[31]

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[29] J. Hathaway, "The Evolution of Refugee Status in International Law", *ICLQ,* 1984, vol. 33, pp. 348, etc.

[30] The Constitution of the International Refugee Organization was adopted by the United Nations General Assembly on 15 December 1946. See: "Constitution of the International Refugee Organization", *United Nations, Treaty Series,* vol. 18, pp. 18, etc.

[31] The International Refugee Organization assumed most of the functions of the earlier United Nations Relief and Rehabilitation Administration. In 1952, the International

Starting from the previous solutions contained in international treaties and other international legal instruments, UNHCR Statute covers cases of refugees that occurred prior to 1 January 1951, who are outside their country of origin, then who are unable or unwilling to avail themselves of its protection "owing to a well-founded fear of being persecuted "or "for reasons other than personal convenience".[32] Then UNHCR Statute includes general solution that is not limited by time and space, including in the term "refugee also "any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence".[33] Given the number of refugees increased after the Second World War, as well as the number of people whose status was legally undefined, mandate of the United Nations High Commissioner for Refugees was interpreted flexibly in accordance with humanitarian needs and political guidelines of the UN General Assembly and the Economic and Social Council of the UN (ECOSOC).[34]

Under the auspices of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951, was adopted the Convention Relating to the Status of Refugees.[35] The purpose of this Convention was to revise and consolidate all previous international legal instruments relating to the status of refugees and to regulate that status in a more comprehensive manner than had previously been done.[36]

Refugee Organization ceased to exist, and it was replaced by the Office of the United Nations High Commissioner for Refugees.

[32] The Statute of the Office of the United Nations High Commissioner for Refugees was adopted by the United Nations General Assembly Resolution 428(V) of 14 December 1950. See: A/RES/428(V).

[33] Ibid.

[34] Ibid, para. 3.

[35] "Convention Relating to the Status of Refugees", *United Nations, Treaty Series*, 1951, vol. 189, pp. 137, etc.

[36] Thus, Article 1A, paragraph 1 of the Convention deals with the so-called: *Statutory refugees*. This provision stipulates that the term "refugee"shall apply to any person who

This instrument is grounded in Article 14 of the Universal Declaration of human rights 1948, which recognized the right of persons to seek asylum from persecution in other countries. The Convention defined the minimum standard of treatment of refugees by setting out the basic right to be granted to them in the country of refuge and also laid down the duties of refugee's *vis-à-vis* that country. The main disadvantage of this Convention was the fact that it applied only on refugees who were to become due to events that occurred prior to 1 January 1951. This time limitation of the Convention was the result of the efforts of the State, at the time of the adoption of the Convention to limit their obligations to refugee situations that existed at the time, or to situations that could subsequently occur as a result of already existing. In addition to restriction *ratione temporis*, the Convention stipulated possibility of introducing *ratione loci* restriction (application of the Convention only to events occurred only in Europe or in Europe or elsewhere). Relatively few States appear to have availed themselves of this option. The passage of time and the emergence of new refugees from other geographical areas, led to the amendment of the provisions of the Convention, and the adoption of the Protocol Relating to the Status of Refugees in 1967. The Protocol made no changes to the substance of the Convention. It did remove the time limitation to events occurring before 1 January 1951 and any *ratione loci* limitation, except for those States that had opted for a restriction to events occurred only in Europe. Since parties to the Protocol have agree to be bound by the substantive provision of the Convention and the definition of refugee in that Convention as amended by the Protocol, it is possible for a State to accept obligations of the Convention by only ratifying the Protocol.[37] Given the importance of the changed definition of refugees, at this point we shall quote Article 1 of the Convention as amended by the 1967 Protocol. The provision defines the term of "refugee" as:

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has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and to February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization. The meaning of this provision is to ensure links with the past and continuity of international protection of refugees.

[37] Peter Nygh, Sam Blay, "Refugees", in: Sam Blay, Ryszard Piotrowicz, Martin Tsamenyi (eds.), *Public Internationa Law, An Australian Perspective,* Oxford, 2005, p. 287.

"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."[38]

From the above definition, it can be seen that the Protocol profiled the following elements to determine who can be subsumed under the category of refugees: a) persons who are outside their country of origin or habitual residence; b) persons who are owing to well-founded fear of being persecuted for reasons of race, religion, nationality of political opinion; c) persons who are unable or unwilling to avail themselves of the protection of that country, or to return there. The Convention excludes certain categories of persons from the term of "refugee" even though they qualify under the above quoted definition. They include categories of persons who have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, then the persons who have committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee, and finally, the persons who have been guilty of acts contrary to the purposes and principles of the UN. In addition to these categories of persons which are excluded from the categories of "refugees", the Convention stipulates even the exclusion of the categories who are already receiving protection or assistance from an agencies or bodies of the United Nations (for example, from the United Nations Relief and Works Agency for Palestinian Refugees in the Near East – UNRWA, or the United Nations Office for the Coordination of Humanitarian Affairs – OCHA which is different in comparison with protection and assistance of the Office of the United Nations High Commissioner for Refugees - UNHCR), as well as the categories who do not need international protection but there may be need international assistance (for example, so-called "national refugees" in the host country that have equal status as its nationals).

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[38] "Protocol Relating to the Status of Refugees", *United Nations, Treaty Series,* 1967, vol. 606, pp. 267, etc.

In addition to this international legal determination, in the Convention are included the provisions that define the legal status of refugees and their rights and obligations in the receiving State (where they have simple or lawful presence, lawful or habitual residence). Thus, in setting out the fundamental rights of refugees, the amended Convention stipulates a variety of treatments ranging from a "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally", self-employment and the practice of liberal professions, housing and public education, to "the most favourable treatment stipulates to nationals of a foreign country" and to "the same treatment as is accorded to nationals" (for example, in the matter of elementary education, public relief, employment, labour and social security). The Convention confirms in favour of refugees the principles of non-discrimination and of freedom of religion. It exempts refugees from the requirement of reciprocity and from exceptional measures taken against nationals of the State of origin in time of war or other exceptional circumstances and from *cautio judicatum solvi*. It provides that the personal status of the refugee shall in principle be governed by the law of the State of his domicile or residence.[39] Also, it sets rules in respect of administrative assistance, identity paper and travel documents.[40] Certainly, one of the most important provisions in the Convention is the provision that provides protection against expulsion or forcible return of refugees to the States where they have reason to fear persecution (principle of *non-refoulment*), which in a meantime become a general principle of international law.[41]

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[39] Eberhard Jahn, "Refugees", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law,* 1997, vol. IV, pp. 72-76.

[40] A Schedule to the Convention prescribes the form of the travel document and makes provision, among other matters, for renewal, recognition, and return to the State of issue. Article 28 paragraph 1, also empowers States, in their discretion, to issue travel documents to refugees not linked to them by the nexus of lawful stay, who may be present temporarily or even illegally.

[41] The principle of non-refoulement embodied in Article 33 of the Convention is stipulating that: "No Contracting State shall expel or return ('refouler') 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". Exceptions to the principle of non-refoulement are laid down in Art.

Taking into account all mentioned characteristics of the terms of "refugees", it is clear that the amended Convention represents the main international legal instrument when considering standards of treatment of these categories of migrant peoples. The Convention imposes on States an duty to cooperate with the United Nations High Commissioner for Refugees – UNHCR, in the exercise of its competences and, in particular, to facilitate its duty of supervising the application of the provisions of the Convention.[42] Essentially, the amended Convention eliminated prior restrictions and that provided universal effect in international refugee law.

Notwithstanding the above mentioned international legal instruments that at the universal level regulates the problem of refugees, there are other relevant international instruments such as the International Covenant on Civil and Political Rights of 1966,[43] the International Covenant on Economic, Social and Cultural Rights of 1966,[44] the International Convention on the Elimination of all Forms of Racial Discrimination of 1966,[45] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,[46] the Convention on the Rights of the Child of 1989,[47] the Geneva Convention

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33 (2) Refugee Convention. If the refugee can be regarded as a danger to the security of the country, they can be expelled or deported. Unlike persons falling under the narrow scope of Art. 1 (F) Refugee Convention and thus being excluded from protection, individuals who are covered by the criminality provision of Art. 33 (2) Refugee Convention fulfil the requirements of the refugee definition. According to Art. 33 (2) Refugee Convention, the danger to national security must lie within the very person of the refugee. Hence, if a refugee arrives as part of a mass influx causing a danger to national security, the application of the principle of non-refoulement cannot be suspended.

[42] As the Convention does not explicitly provide for procedural rules, the content and realm of the procedural rights can not be easily identified and State practice is not coherent. In many countries, the UNHCR participates in the procedures or, at least, tries to influence the procedure of determination of refugee status.

[43] Supra 6.

[44] Supra 23

[45] "International Convention on the Elimination of all Forms of Racial Discrimination", *United Nations, Treaty Series,* 1966, vol. 660, pp.195, etc.

[46] "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *United Nations, Treaty Series,* 1984, vol. 1465, pp. 85, etc.

[47] "Convention on the Rights of the Child", *United Nations, Treaty Series*, 1989, vol. 1577, pp. 3, etc.

relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol I additional to the Geneva Conventions of 1977,[48] the Agreement relating to Refugee Seamen of 1957 and the Protocol thereto of 1973.[49]

At the regional level also there are relevant legal acts which create international obligations to the contracting parties to respect international standards in the area of refugee law. These instruments include *inter alia*, the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, which apart from the principle international legal instruments contains provisions on asylum, prohibition of subversive activities, non-discrimination voluntary repatriation and travel documents.[50] Very interesting is the fact that this Convention is a real reflection of the problems of refugees in Africa and that the existing definition of "refugee" extends to the situation that led to the abandonment of the home country in case of external aggression, occupation, foreign domination or events that are serious about it disturb public order.[51]

In the American continent, under the framework of the Organisation of American States – OAS, two legal instruments was adopted the same day (28 March 1954). First was the Convention on Diplomatic Asylum,[52] and the second

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[48] "Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)", *United Nations, Treaty Series,* 1949, vol. 75, pp. 287; "Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)", *United Nations, Treaty Series,* 1979, vol. 1125, pp. 3, etc. This instruments provide that in the event of international armed conflict provide protection for internationally protected persons including refugees

[49] The Agreement applies to seamen who fear persecution for reasons including nationality. The Convention also calls for the same treatment of all seamen with regard to admissions and sympatric consideration for those seamen who do not qualify as staying lawfully under the Convention. See: "Agreement relating to Refugee Seamen, *United Nations, Treaty Series,* 1957, vol. 506, pp. 125, etc.

[50] "Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)", *United Nations, Treaty Series,* vol. 1001, pp. 45, etc.

[51] M. R. Rwelamira, "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa", *International Refugee Law,* vol. 1, no. 4, pp. 557-561.

[52] "Convention on Diplomatic Asylum", *United Nations, Treaty Series,* 1954, vol. 1438, pp. 104, etc.

was the Convention on Territorial Asylum (so-called *Caracas Convention*).[53] The notion of refugee is very similar to the concept laid down in the Convention Relating to the Status of Refugees. Beginning in the eighties of the 20th century, when there was a mass exodus of people from the countries of Central America, OAS member States have joined efforts to solve the resulting social, economic and political problems. In this regard, the receiving States adopted the Cartagena Declaration on Refugees which laid down the legal foundations for the treatment of Central American refugees, including the principle of *non-refoulement,* the importance of integrating refugees, and undertaking efforts to eradicate the causes of the refugee problem. The definition of the term of "refugee" in the Cartagena Declaration on Refugees is close to that of the OAU Conventions encompassing "persons who have fled their country 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".[54] The Cartagena Declaration on Refugees is applied in State practice and, in some cases, has been incorporated into domestic legislation.

In Europe number of legal instruments adopted within the framework of the Council of Europe. On special importance are the European Convention on Extradition of 1957,[55] the European Agreement on the Abolition of Visas for Refugees of 1959,[56] the European Convention on Social Security of 1972,[57] the European Agreement relating to the Transfer of Responsibility for Refugees of 1980, etc. Also, following the fluctuation of refugees in Europe, the Council of Europe adopted certain acts which are to serve to the member States as guidelines for their activities according to the different categories of migrant population. For example it should be noted the Council of Europe Recommendation 773 on the Situation of *de facto* Refugees of 1976,[58] the Council of Europe Recommendation

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[53] "Convention on Territorial Asylum", *United Nations, Treaty Series,* 1954, vol. 1438, pp. 129, etc.

[54] "Cartagena Declaration on Refugees Refugees", OEA/Ser.L/V/II.66/doc.10, Rev. 1984, p. 190.

[55] "European Convention on Extradition", Paris, 1957, ETS No.024.

[56] "European Agreement on the Abolition of Visas for Refugees", Strasbourg, 1959, ETS No. 31.

[57] "European Convention on Social Security", Paris, 1972, COETS No. 7.

[58] "Recommendation 773 (1976) on the situation of de facto refugees", Council of Europe, Parliamentary Assembly, 26 January 1976, pp. 775, etc.

to Member States on the Harmonisation of National Procedures relating to Asylum,[59] the Council of Europe Recommendation to Member States on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognised as Refugees.[60]

On the other hand, the European Union (formerly the European Communities), adopted legal instruments by which refugee law has become part of EU law. It is known, for example, that in the last decade of the last century, the European Union adopted the Maastricht Treaty who performed the harmonization of rules on asylum and refugees.[61] Then the EU adopted two important documents: The Dublin Convention Determining the State Responsiblity for Examining Applications for Asylum lodged in one of the Member States of the European Communities,[62] and the Convention on the Application of the Schengen Agreement.[63] Perhaps the best examples that the European Union was working on harmonization of rules on refugee represents the provision of Article 18 of the Charter of Fundamental Rights,[64] and the relevant provisions of the Articles 67-79 of the Treaty on the Functioning of the EU.[65] Also, it is important to note that European Union has adopted a series of

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[59] "Recommendation to Member States on the Harmonisation of National Procedures relating to Asylum", COE Committee of Ministres, CM/Rec. 1981, p. 16.

[60] " Recommendation to Member States on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognised as Refugees", COE Committee of Ministres, CM/Rec. 1984, p. 1.

[61] "Treaty on the European Union", Maastricht, OJ C 91, 29 June 1992.

[62] "Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention", 15 June 1990, OJ C 254, 19 August 1997.

[63] Supra 18.

[64] The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter contains rights and freedoms under six titles: *Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice*. Proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. See: "Charter of Fundamental Rights of the EU", OJ C 326/391, 26 October 2012.

[65] "Treaty on the Functioning of the European Union" OJ C 115/47, 13 December 2007; **"**Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union", OJ C 326/01, 26 Octobar 2012.

act of secondary legal nature (Soft law), in order to harmonize domestic law with international legal standards concerning the protection of the rights of refugees. Here are some of them: the Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,[66] the 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,[67] the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status,[68] and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).[69]

In the next part of the analysis, the author will provide explanations regarding legal positions for other categories of migrant populations, such as *de facto* refugees, asylum seekers, internally displaced persons.

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[66] "Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof", OJ L 212/12, 7 August 2002.

[67] "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," OJ L 304/12.

[68] "Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", OJ L 326/13,

[69] "Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)", OJ L 339/9, 20 December 2011.

2.2. De facto refugees

De facto refugees are persons who not recognised as refugees within the meaning of Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 as amended by the Protocol of 31 January 1967 and who are unable or unwilling for political, racial, religious or other valid reasons to return to their countries of origin.[70] In international legal practice, great number of asylum seekers who do not qualify as refugees, fall under this category and become persons eligible for subsidiary or complementary protection.[71] It is often case with asylum seekers, whose applications are pending or were denied and who cannot be removed or expelled from the receiving State due to humanitarian reasons. The basis for such protection may result from the general principles of international law or, from the principle of non-refoulement as humanitarian basis for granting complementary protection to those who can not be returned to their country of origin or former reside. Given that they have neither the formally recognized status of a refugee according to the Convention relating the Status of Refugees nor a status of asylum according to other international legal instruments these categories of persons often known as a "person in need of protection". Even though the notion *de facto* refugee is not mentioned by the Convention, some of its provisions apply to every refugee falling under a State's jurisdiction or having entered its territory. This category of vulnerable persons may still enjoy a specific status if the receiving State gives them possibility to legalize their residence under of certain prescribed conditions. In any case, *de facto* refugees enjoy human rights according the international instruments, but human rights do not necessarily entail the right of residence or the right to work.[72] In any case, the receiving State may decide of the extent of usage of these rights within the limits of their legislation and international obligations accepted by the international legal instruments.

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[70] See for example: "Recommendation 773 (1976) on the situation of de facto refugees", Council of Europe, Parliamentary Assembly, 26 January 1976.

[71] Livia Elena Bacaian, *The Protection of Refugees and their Right to Seek Asylum in the European Union*, Institut Eurpéen de'l Université de Geneve, 2011, p. 18.

[72] The problems of de facto refugees in some cases may fall under the scope of international labour law, especially under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990.

2.3. Asylum seekers

In international law, under the law of asylum implies the right of State that on its territory (including the area that is under its control, such as ships, aircraft, diplomatic missions and others.), provides shelter to a foreigner who is considered at risk of persecution or some serious danger (so called: *territorial* and *extra-territorial* or *diplomatic asylum*). Granting the asylum is a sovereign right of every State and every State determines the conditions under which a foreign national can obtain such protection. Other countries are obliged to comply with it.

The right to asylum is a fundamental human right. This attitude stems from Article 14 of the Universal Declaration of Human Rights, according to which:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.[73]

In the Declaration on Territorial Asylum of 1967, also guarantees the right to seek and enjoy asylum, but does not provide a right to get asylum.[74]

In contrast to these international instruments, the Convention relating the Status of Refugees lists the fundamental basis of persecution and sets forth a complex system on the position of the refugee in the receiving State. Although the Convention deals only with the status of persons who have been admitted to the territory of the Contracting Parties, it establishes a legally binding system which countries actually impose as a criterion for the granting of asylum or of the prohibition of expulsion (principle of *non-refoulement*). In this sense, it is easier to determine the ratio of refugee status under the law of asylum. However, for many States the distinction between refugees and asylum seekers is still ambiguous. This stems from the fact that the said Convention does not specifically regulate the issues of asylum seekers. For that reason, each States still has the discretion to regulate the system of asylum.

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[73] Supra 5.

[74] "Declaration on Territorial Asylum", UN General Assembly, 14 December 1967, A/RES/2312(XXII).

Since asylum includes protection of various types of vulnerable groups, defining the term of "asylum" as especially in international practice requires relatively precise criteria. These criteria established by the United Nations High Commissioner for Refugees and according to them, the "asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined".[75]

In most cases, asylum implies a long-term stay. The admission to residence and asylum guarantees includes a set of rights. In many countries, in situations where individuals are not eligible for refugee status, there is a so-called: *subsidiary* or *complementary protection* that is completely equated with asylum. This status is a sufficient guarantee that an individual will not be deported to another country where his life could be in danger or where he would be exposed to a serious torture.[76]

2.4. Internally displaced persons

In international practice, there is no universal legal definition of internally displaced persons. Also, unlike the case of refugees, there is no international legal instrument which applies specifically to internally displaced persons. Hence there is legal uncertainty, because the absence of a binding international legal regime represents "grave lacuna" in international law.

Thanks to the Guiding Principles on Internal Displacement of the United Nations, which was result of the works of the Commission on Human Rights, the General Assembly and the Representative of the Secretary-General, this legal deficiencies is somewhat filled. Thus, the Guiding Principles on Internal Displacement defines the term of "internally displaced person" as:

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[75] UNHCR, *2009 Global Trends,* p. 23. A similar definition is found in the EU legislation, in the *Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers,* in which the Council has stipulated that that an "applicant" or an "asylum seeker" is "*a* third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken". See: "Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers",OJ L 31, 6 February 2003.

[76] Vojin Dimitrijević, Dragoljub Popović, Tatjana Papić, Vesna Petrović, *Međunarodno pravo ljudskih prava,* Beograd, 2007, str. 181-184.

> "Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border".[77]

The purpose of the Guiding Principles is to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection. The Principles reflect and are consistent with international human rights law and international humanitarian law. They restate the relevant principles applicable to the internally displaced, which are now widely spread out in existing instruments; clarify any grey areas that might exist. They also apply to the different phases of displacement, providing protection against arbitrary displacement, access to protection and assistance during displacement and guarantees during return or alternative settlement and reintegration.

At the regional level, the Organization of African Union recalling on universal and regional international legal instruments, adopted in 2009, the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Recognizing inherent rights of the internally displaced persons as provided for and protected in international human rights and humanitarian law, Article 1(k) of the Kampala Convention defines these vulnerable categories as:

> "Persons or group of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situation of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed one internationally recognized State border".[78]

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[77] "Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum, Guiding Principles on Internal Displacement", Commission on Human Rights, Economic and Social Council, E/CN.4/1998/53/Add.2, 11 February 1998.

[78] "Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)", OAU, 23 October 2009, Internet: https://www.au.int/web/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa

From the above definition, it is clear that the term "internally displaced persons" *lato sensu* means vulnerable group of persons who are living in a refugee-like situation although they have reminded within the internationally recognized borders of their country. These persons flee their home on similar grounds as refugees (for example, because of fear for their lives and personal security in situations of natural disasters, of conflicts, or even civil wars). Internally displaced persons occur as a result of involuntary or forced displacement, evacuation or relocation within the international borders of the home country. The stay in the territory of their home country and do not seek refuge status in another State. In that sense, the internally displaced persons do not meet the requirements of Article 1A, paragraph 2 of the Convention relating the Status of Refugees. As they are not outside the country of their nationality, they have primary care and assistance from their State. This obligation arises from the sovereignty and the principle of non-intervention. The responsibility of the State for its nationals continues to exist, even if State authorities do not want, or are not able, to protect the person.[79] If the State is not able to protect its nationals within its frontiers, they need protection which can only be granted by other States and the international community.

Conclusions

In the history of human civilization, the migrant movements were always present. With the latest migrant crisis, various categories of vulnerable people are trying to settle in Europe and other, mostly developed areas in the world, originating from different subjective and objective reasons. "They look for legal pathways, but they risk also their lives, to escape from political oppression, war and poverty, as well as to find family reunification, entrepreneurship, knowledge and education. Every person's migration tells its own story. Misguided and stereotyped narratives often tend to focus only on certain types of flows, overlooking the inherent complexity of this phenomenon, which impacts society in many different ways and calls for a variety of responses".[80] In this regard, special

[79] Guy Goodwin Gill, op.cit., p. 264.

[80] "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a European Agenda on Migration", COM(2015) 240 final, Brussels, 13.5.2015.

responsibility lies with the States. Especially in the current crisis situation reflected in Europe, where countries are faced with several new and complex security threats and where the need for new synergies and closer cooperation at all levels. Security threats caused by migrant crisis are increasingly diverse and increasingly internationalized. These threats require an effective and coordinated response by both the European and the wider regular international level.[81] Security and respect for fundamental rights of various categories of migrant peoples are not conflicting aims, but consistent and complementary European policy objectives. The task of protecting and assisting all who are "in need" are becoming more complex and burdensome, just as durable solutions are becoming more elusive. The very magnitude of the contemporary problem of refugees, asylum seekers, illegal immigrants, internally displaced persons and other vulnerable persons is indication that universal legal approach to this question is not yet adequate. Therefore, it is necessary to unite efforts in order to prevent a more accidents, and that would not have happened to a regional migrant crisis develops into a global humanitarian disaster due to non-observance of basic human rights and democratic values such as the rule of law in the field of migrants law. The final solution of the problem in this field is certainly to be sought in new and original approaches as well as comprehensive international efforts that would lead to new types of protecting institutions or to the extension of the mandate of existing ones.

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[81] "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a European Agenda on Security", COM(2015) 185 final, Brussels, 28.4.2015.

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Abstract: Migrant crisis is one of the priority themes in contemporary international relations. This is confirmed by numerous discussions and activities lately link to global and regional level (for example, in the Economic and Social Council of the United Nations – ECOSOC, in the Office of the United Nations High Commissioner for Refugees – UNHCR, in the International Organization for Migration – IOM, in the Global forum on migration and development – GFMD, in the G20 forum of the most developed countries of the world, as well as in the European Union, which monitors and controls the current migration flows from the Middle East, Asia, North and sub-Saharan Africa). The concrete results of these activities are manifested in legal acts and political agendas in which the international community has set modes and courses of action to overcome

the negative effects of migrant crisis in social, economic and legal plan. Given that the migrant crisis produced and certain risks to the national security, and that the effective protection of these risks assumes the consistent implementation of International law (in particular in the field of refugee law, human rights law and humanitarian law), in a study that follows will be analyzed legal positions of different categories of migrants (emigrants, immigrants, refugees, asylum seekers, illegal immigrants, etc.), in order to overcome potential security challenges for the Republic of Serbia.

Key words: migration, refugees, asylum seekers, International law, security challenges, the Republic of Serbia.