

# Implications of the Debate on Irregular Migration in the European and Spanish Asylum Regime\*

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## ABSTRACT

Flows of refugees and the reasons why people flee from their countries of origin, seeking protection in third countries, are different from the flows that occurred when the Convention on Refugee Status was approved. However, asylum law has not been changed, at least regarding the internationally legal and conceptual framework established in the 1951 *Convention*. Meanwhile, the current nature of migration has elicited government policies based on the logic of the control of migration flows. The inability to clearly distinguish between forced and voluntary migration, despite the willingness of states to do so, has caused this logic to affect the right of asylum to the detriment of the protection it implies.

*Keywords:* 1. migrations, 2. refugees, 3. irregularity, 4. human rights, 5. mixed flows.

## Implicaciones del debate sobre la migración irregular en el régimen de asilo de Europa y España

## RESUMEN

Las actuales corrientes de refugiados y los motivos de huida buscando protección en terceros Estados son distintos de los que justificaron el surgimiento del régimen jurídico del asilo. Sin embargo, este régimen apenas ha sufrido cambios, al menos en relación con el concepto establecido internacionalmente en la *Convención* de 1951. Por su parte, los caracteres actuales de las migraciones han tenido como respuesta primordial, por parte de los poderes públicos, políticas basadas en la lógica del control de los flujos migratorios. La imposibilidad de distinguir claramente entre migraciones forzadas y voluntarias, a pesar del empeño mostrado por los Estados, ha provocado que esta lógica acabe afectando la normativa de asilo en perjuicio de la protección que significa e implica este derecho.

*Palabras clave:* 1. migraciones, 2. refugiados, 3. irregularidad, 4. derechos humanos, 5. flujos mixtos.

\*Text originally written in Spanish.

## *Introduction<sup>1</sup>*

Human mobility is a complex reality that is impossible to include within a single typology. From the days when protection was sought in sacred sites to the time when people embarked on a project to ensure or improve their living conditions in employment, economic and political terms, these realities have demanded the corresponding evolution of the legal system to match the complexities of the situations and needs of those who move from one place to another. On the basis of these general assumptions, this study aims to assess how current trends in rules governing migration and foreigners have a negative influence on the development of the asylum system, restricting it or even contradicting its protective nature.

The negative influence of the logic of controlling migratory flows in asylum policies has been analyzed by the doctrine in regard to figures or specific aspects, which, according to the official discourse, are justified because they have always sought to ensure the protection of genuine refugees. However, this discourse clashes with the effects that the implementation of such measures has actually produced, such as stiffening border controls, establishing procedural criteria for determining the state responsible for examining an asylum application and so on. Despite the fact, it should be noted, that states insist on conceptual and legally separating asylum and refuge for migrations. Because they understand that the former are forced and the latter voluntary.

All this has led to a confusion of categories, without having determined whether these measures have actually affected the right to asylum and if so, how. And here lies the novelty of this analysis. In the determination and systematic explanation of the way in which measures that were intended to protect genuine asylum seekers actually ended up negatively affecting their experiences. Whether because they are unaware of their situation, or because they force them to use irregular channels to enter the territory,

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causing a shadow of irregularity to fall on anyone who arrives in the territory in situations suspected of involving persecution (which therefore justify asylum).

*Phenomenology of Migrations and National Migration Policies*

Cross-border mobility includes flows of refugees and asylum seekers, a specific expression of forced displacement. These ancient realities, such as the figure of asylum, began to be regulated internationally after World War II, with rules permeated by the socio-historical context in which it emerged. At the time, states decided to guarantee protection (the ultimate purpose of asylum) for those fleeing for political reasons, according to the influence of the world's shared awareness at the time. In this respect, the normative and institutional framework constructed is based on these assumptions and has remained unchanged despite the trends and reasons prompting flight from a person's country of origin or residence today. For the same reason, there has been no adaptation of the regulation of the current complexity of this phenomenon, inferred from the heterogeneity of experiences (De Lucas, 2004:19).

In this context, the main interests of the states regarding the migratory phenomenon translate into the creation and consolidation of different categories according to the experiences involved, in order to broaden the scope of the implementation of immigration rules as opposed to extending the protection of refugee status, thereby limiting its content and restricting the possibilities of filing an application for asylum (Solanes, 2010:118 and following). As a corollary, national policies regulating the migratory phenomenon share this possibility of distinction as an assumption (Castles, 1993a:52),<sup>2</sup> and therefore their natures are conditional

<sup>2</sup> An attempt has been made to establish criteria for distinguishing between "true and false immigration" (De Lucas, 2004:21). Public authorities' use of the aforementioned terms seeks to legitimize policies based largely on the restriction of access to their territories. In keeping, it should be added, with the assumptions underlying migration policies regarding residence in the destination countries. Remember that migration policies arbitrate both assumptions: access to land and the conditions (and rights and duties) of the stay in the territory.

upon reductionist views, not for the benefit of individuals (migrants) but rather to legitimize policies restricting rights. This creates an unstable, fallacious classification of simple categories with weak distinctive boundaries (despite their complexity), including asylum-seekers and refugees (Castles, 1993b:18).

The destabilization of the distinction between the categories created, not just between forced and voluntary migration, affects the asylum or refugee regime. A clear example is the configuration of a specific legal response for the assumptions of applicants who fail to meet the requirements of the *Convention Relating to the Status of Refugees* (known as Geneva *Convention* of 1951), yet who are in a similar situation (United Nations, 1951). As argued below, this dissonance between current policy and circumstances constitutes a wasted opportunity to extend the protection of refugee status and thereby strengthen the meaning of this protection. *A fortiori*, when, contrary to what asylum means, this has led to the intrusion of migration policies into the sphere of asylum/refuge (Castles, 1993b:19).

The greatest impediment to the evolution of the right to asylum oriented towards the inclusion of the assumptions of new grounds or new realities, by dealing with the current conditions in which refugee flows are created (*de facto* assumptions that can be assimilated into the reasons initially included in the text of the *Convention*), has been the vagueness and conceptual rigidity of the framework and the unwillingness of states, which is reflected in the articulation of concepts and categories that inspire current immigration policies (Fitzpatrick, 1996:239, 240). While the rigidity is due to the difficulty of amending the *Convention* and its elements, the vagueness requires an interpretation of them (think of the blurring of conventional reasons or the term “persecution”), which has two meanings. On the one hand, although this has not prevented progress towards interpreting new realities within the protection of the *Convention*, for example in certain aspects of gender-based claims, on the other, the application of asylum law has been restrictively interpreted in relation to other situations, which, strictly speaking, do not fit into the conventional frame-

work. This requires a change in the law in favor of migrants' rights in order to ensure legal certainty, without therefore relying on sensibilities and non-binding interpretations.

### *Mixed Motivations as a Cause of Forced Displacements*

As discussed so far, migratory experiences stem from different reasons and causes. And sometimes in relation to individual experiences, there are various reasons why a person flees from his country of origin, leading to what United Nations High Commissioner for Refugees (UNHCR) (United Nations, 2007:9) has called displacements based on "mixed motives". This assumption may include a combination of reasons that lead to simultaneously forced and voluntary flight, invalidating the possibility of distinction, at least for these cases.

However, before exploring this specific assumption in detail, it is worth determining the type of migration involved. In so-called forced migrations, the decision to undertake a migration project depends on factors outside the subject's will; conversely, voluntary migrations are presumed to be the result of free decisions, without any *prima facie* external constraint, as can be proved. By way of an example, and according to this distinction, the first kind of paradigms involves persecutions in which a person's life or fundamental rights and freedoms are at risk as opposed to those motivated by the decision to achieve a greater degree of satisfaction of non-basic needs. In short, the bases of the recognition of the right of asylum are regarded as not being comparable with migrations based, for example, on economic or employment reasons or the pursuit of improved living conditions.

This distinction, which reveals the conceptual rigidity of the categories listed (especially with regard to the reasons or motives that are clearly capable of being viewed as persecution), is in turn an assumption of asylum and immigration systems (Arendt, 2004; De Lucas, 1995). However, in contradiction with the above, widespread situations of human rights violations, armed conflict and social instability, and restrictions on access to resources have

been interpreted as assumptions that are outside the scope of the protection of the right of asylum, due to the fact that they do not strictly adhere to the framework of the *Convention* (Gunning, 1990:54). And since the *Convention* has not been modified, it must also be understood as an exception, and a consequence of this distinction.

As such, it adds another element to the determination of the framework applicable to human mobility, which is the normative nature of the concept of refugee. In other words, its meaning has been almost exclusively determined by the definition of the Geneva *Convention* and the New York *Protocol* (United Nations, 1967). The point is that the normative character of asylum law prevents other factors from being taken into account, outside asylum legislation itself, which would make it possible to broaden its application and, therefore, understand a broader range of types of fleeing as experiences of asylum. Consider that at the international level, each of the elements in the framework has only been understood as recommendations, guidelines and interpretative guidelines for the content of the *Convention*, without any substantive change, let alone with binding effects.

In this scenario, the insistence on the possibility of distinguishing between situations that warrant international protection and others that do not, has meant that the latter are determined in immigration offices (*sede de extranjería*). And this refocusing hinders any possible extension of asylum, even in the case of “mixed migratory flows” (United Nations, 2007:7), whose components are discernible in people in both situations, as discussed in detail below. In the mid-1990s, there was a change in the regulatory trend that had existed until then (Joly, 1999). Previously, asylum policies had tended to integrate asylum seekers, despite also containing the termination clauses established by the *Convention* of 1951. However, the change focused more on timing and the restriction of the contents of protection, with almost full powers to regulate the means of access and change the legal status of migrants with a political background that was far removed from the rights paradigm (Solanes, 2003a), *a fortiori* because the limits

on state action regarding immigration are lower than they are with asylum.

This is the direction in which changes in most national systems, with the most varied discourses (including those relating to security) and with the aim of controlling migration flows, point. To this end, all possible barriers to prevent access to territories are established (Solanes, 2003b). However, unlike the above, there is another contrary trend that points to the potential for change for the benefit of asylum seekers. This is evidenced by the passage of the *Cartagena Declaration* (United Nations, 1984) in Central America and the Organización de la Unidad Africana (OUA, 1969); supranational texts that provide such recognition to extend the circumstances that justify the determination of refugee status. In the same sense, one can understand the performance of UNHCR, when it decided to extend its protection to situations not strictly covered by the definition of the Geneva *Convention* (Goodwin-Gill, 1989:12), while reaffirming the need to distinguish between migrants and persons seeking international protection. This is an area of special concern for UNHCR since it ultimately affects the right to asylum (United Nations, 2007).

The need to particularize refugee and asylum seekers' situation, especially those that are understood not to be forced, is based on the serious nature of the persecution these individuals face which, according to the conventional text, must be individualized. The focus on the links between migration and asylum has led UNHCR to consider strategies regarding the consequences of the fact that these realities are changing, since migratory movements and refugee flows are too (United Nations, 2007:3; Gortázar, 2006). For his part, Castles identifies and defines the links between asylum and migration (asylum-migration nexus) as the combination of different reasons for mobility, which results in the inability to distinguish, in most cases, economic motivations from others related to human rights. He therefore describes the distinction between the categories as false, as mentioned earlier (Castles, 2003:17).

And, although unlike the latter, UNHCR does not question the distinction between reasons, it is possible to say that there are

different approaches that turn, as Castles suggests, into contributions or powerful arguments that confirm the timeliness and feasibility of generating new international policies. This is particularly so when there is a favorable opinion of UNHCR to protect *de facto* refugees who are therefore genuine, also according to Castles (2003). For this reason, UNHCR's commitment to extending its sphere of protection to those situations in which migrants' rights may be compromised as a result of their situation, constitutes a basis for the expansion of international protection. And if the High Commissioner stresses the need to strengthen mechanisms for the protection of refugees, this is because of the negative consequences of these links in a scenario of the stiffening of policies to enter countries.

The social circumstances in which subjects are located condition the multiple possible peculiarities and dimensions of displacements, which in turn determine the motivations or reasons leading to migration or being forced to leave one's country of residence. Thus, the solutions adopted in the form of reductionisms (of categories) in migration policies have finally affected asylum seekers, who have seen how states have restricted the possibilities of access to their territory, by blocking the procedure for seeking asylum, which constitutes a serious violation of a fundamental right (Dummett, 2001:103 and following). Therefore, De Lucas is correct when he notes the dual effect produced as a result of the asylum system having achieved this logic of control. First, that the risks assumed by equating discrete categories of a complex phenomenon such as migration, have ignored and "deformed" realities. And second, since they are distorted, no appropriate legal responses have been provided even if this means that fundamental rights are being violated (De Lucas, 2006).

Therefore, the origin of the confusion between the categories of forced and voluntary migration, and the subsequent effects on asylum, are mainly due to the vagueness of the first notion and the indeterminacy of the elements of refugee status. This has enabled nation-states to emphasize this distinction in terms of truth/falsehood, consolidating it through various regulations concerning



foreigners, thereby justifying the adoption of restrictive measures and policies through the idea of ensuring the identification of “genuine refugees”, as outlined below.

As discussed earlier, the concept of refugee and the nature of international protection established in the 1951 *Convention* are imbued with the origin, purpose, budgets and political sense prevailing at the time (United Nations, 1951; Ramón, 2004:190). The political division between East and West during the adoption of the *Convention* is currently meaningless, but has shifted to a new, radically different one, the North/South divide.

This new barrier is not geographical but rather social and political, as a result of which it extends into both, resulting in subdivisions ad intra each of them. This transformation affects how mobilities and displacements originate, and determines the solutions provided for their management and/or the protection of the rights of those who move (Castles, 2003:17). Consequently, if it is decided to opt for extending ways of handling migration policies, this will be to the detriment of a possible extension of the protection of asylum. Especially when this means that the former are applied *a priori* to all mobilities, and therefore also to realities that are similar to those that warrant protection, halting the applications of asylum seekers and producing other negative consequences that clash with the assumptions and nature of the right of asylum (Adler, 1997).

Restricting entry to asylum seekers is achieved by establishing certain requirements for standard entry into a country. These include:

1. The notion of safe country. According to this notion, it is assumed that certain countries are safe enough, in that they offer sufficient protection for citizens, which would justify considering any request from its citizens or residents unfounded *a priori*. The collective nature of a particular context is therefore evaluated in order to deny an asylum request, even though this same collective nature is the main reason put forward to exclude the admission of applications alleging an armed conflict or serious human rights violations (Gunning, 1990:54);

2. The notion of “alternative internal flight”. According to this notion, if there is a safe area within the country of origin, *i.e.* one that does not fulfill the conditions that give rise to a well-founded fear of persecution, it is presumed that the applicant could move to it, thereby justifying the rejection of application (Santolaya, 2001:98). This possibility, it should be noted, may cause streams of internally displaced persons (IDPs), although this is not taken into consideration by the receiving countries;
3. One of the most effective means of preventing access to a country is visa requirements (Adelman, 1988:9). This is common practice in most European countries, including Portugal, Belgium, Spain, Germany, France, Sweden, Switzerland and the United Kingdom, and is even required during transit to third countries. This same logic underlies other practices common to the countries mentioned, such as the current restrictive interpretation of the definition of refugee (Boccardi, 2002:198);
4. Establishing procedures and criteria for determining the state responsible for examining an asylum application, although, according to the international legal framework, nothing should prevent the country of destination from being chosen purely on the basis of the applicant’s personal criteria. Consider that the choice of destination may sometimes be due to important (if not essential) aspects for applicants, and also to their protection and/or integration, such as possible social networks, language or other factors (Skran, 1992:23);
5. Sanctions on airline or shipping companies for permitting travel by “undocumented persons”, which shifts the responsibility for controlling administrative status to private agents (Loescher, 1992:3);
6. Reduced access to social resources, because, as noted, the reduction of protection to refocus protection on laws concerning aliens not only affects their timing, but also the content of the rights. These include authorization to work for others or access to policies to promote rights (Skran, 1992:23);
7. Or the creation of centers for immigrants to stay on a temporary basis (De Lucas, 2004:35).

These figures, too often provided for in administrative rules that are difficult to reconcile with rights, tend to deny the capacity for autonomy and/or agency of the applicant, in part, it should be noted, because of the scant progress achieved in the conceptual and legal framework of the *Convention*. If, in turn, it confirms the turnaround in national asylum policies (it should be recalled that they were initially characterized by seeking the integration of refugees). At a second stage, this protection was oriented towards temporality and exceptionality (Joly, 1999). There has been an undeniable retrogression in the scheme in that it dilutes the meaning and avoids the protective purpose for which it was created. Namely, the equality and the protection of rights, a universal platform that is not based on the bond of citizenship (De Lucas, 2009b).

In this respect, this system can be said to have been affected by the stiffening of migration policies. Either because of the (im)mediate restriction of access to territory or through the discourse of security and control of movement of displacements in order to stop the entry of economic migration (Harvey, 2005). As a result of all this, and in order to institutionalize the absolute control of flows, refugees have become a problem for states in Europe (De Lucas, 2003:21 and following; Schuster, 2003:238). Without forgetting that these other barriers tend to be added to those resulting from a situation of persecution in their country of origin or residence, thus reducing the possibilities of fleeing to third countries.

*The “Clandestinization” of Refugees as a Consequence  
of National Migration Policies*

The difficulties encountered by an asylum seeker fleeing his country of origin or residence for fear of being persecuted or when persecution exists is compounded by the obstacles they face to seeking asylum in the country of destination. This is why applicants increasingly resort to irregular forms of entering territory. This effect is known as the “clandestinization” of asylum

seekers and refugees (Rodríguez, 2002). The phenomenon has been explained as the result of economic migrants making “improper” use of asylum, labeled excessive and fraudulent by public institutions, according to which it has justified the stiffening of immigration policies, which ultimately affects the asylum system. And consequently there has been a reduction of the possibilities of strengthening the asylum system (Solanes, 2010).

This argument of “misuse of asylum” modified the orientation and the paradigm of European asylum policies until the mid-1990s. And, in the case of Spain, it caused the first amendment of the 1984 *Asylum Act* (Cortes Generales, 1984), with the approval of the 9/1994 *Law* (Cortes Generales, 1994), which modified the previous one. This change in asylum rules had already been anticipated as a result of the passage of the Non-legislative Proposal (Cortes Generales, 1991) approved by the Congreso de los Diputados on April 9, 1991, which called on the government to take the necessary measures to ensure the celerity of individual examinations of asylum requests, and “prevent the fraudulent use of the system to protect refugees for the purpose of economic immigration”. Indeed, the Explanatory Memorandum of the 9/1994 *Law* (Cortes Generales, 1994) refers to this use as “the main route of illegal immigration into our country”.

In this respect, and in order to address this “fraudulent” use and expedite the procedure for determining asylum status, the 9/1994 *Law* (Cortes Generales, 1994) introduced a dual phase into the process of determining refugee status. It introduced a preliminary examination of asylum applications,<sup>3</sup> which rejects applications shown to be “clearly unfounded”. In other words, the rejection is conditional on the implausibility, falsehood, abuse or lack of validity of the acts giving rise to the application, or when it is

<sup>3</sup> According to the Explanatory Memorandum of *Law 9/1994* (Cortes Generales, 1994), its purpose is to enable “the swift refusal of those requests that are manifestly unfair or unfounded, and others which should not be examined by Spain, or where there is another State able to provide protection”. This preliminary examination, processed by the Asylum and Refugee Office, according to *Royal Decree 203/1995* (Cortes Generales, 1995), was promoted by the aforementioned Non-legislative Proposal on April 9, 1991.

not based on conventional grounds. In other words, none of the grounds explicitly set out in the 1951 *Convention* (United Nations, 1951), or based on facts, data or other claims are alleged or are sufficient to warrant protection.<sup>4</sup>

In principle, the literal wording of the provision indicates that the decision whether or not to admit asylum claims at this initial stage is not based on the underlying nature of the matter. Thus, in order to resolve the issue, the appropriate legal officer must determine whether the elements required in the definition of refugee status are present or, on the contrary, are not present and therefore that this is a manifestly unfounded claim. However, the establishment of this first phase has produced results in the opposite direction to those indicated to justify its establishment. Thus, the well founded fear of persecution, which requires proving a subjective element and an objective component, is based on alleged data and facts that should not be evaluated during this first phase. However, there have been occasions where certain acts have been declared insufficient to give rise to a well-founded fear. This implies, then, that the agent has evaluated the gravity of the acts and even the existence of a link between the act and one of the *Convention* grounds—which are the three elements set out in article 1 (A) 2 of the Geneva *Convention*—,<sup>5</sup> thereby deciding not to admit the claims and making the applicants defenseless. The point is that one must not confuse evaluating acts to discern whether they are “patently false and unfounded”, with their assessment as being serious enough to be considered persecution

<sup>4</sup> The 12/2009 *Law* regulating asylum and subsidiary protection includes another list of reasons for non-admission of applications for asylum in the territory (article twenty) and borders (article twenty-one). The first group is based on the lack of competence to examine applications under *Regulation (EC) 343/2003* (Consejo Europeo, 2003) and international agreements. The second includes the assumptions based on the lack of requirements for the asylum application. Among others, it mentions coming from safe third country or of a member state of the European Union.

<sup>5</sup> The definition of refugee set out in article 1 (A) 2 of the 1951 *Convention*, with the universalization that allowed the entry into force of the 1967 New York *Protocol*, from which it follows that the elements that must be present to determine status are: 1) well-founded fear of persecution, 2) a kinship link, and 3) one of the *Convention* grounds (United Nations, 1951, 1967).

(United Nations, 1951). This is an aspect that can only be settled in the second instance, in which the determination or otherwise of the Statute is decided, which ultimately decides that all the elements are combined in the manner required.

Likewise, at this late stage, it must also be decided whether the demands contain one of the grounds expressly set forth in the *Convention*. Here, the main problem is how to determine the unfounded nature of an application in relation to the grounds, especially when persecution is due to ambiguous motives and the applicant alleges confusing circumstances or ones that would be difficult to link to a cause, or because indeterminate concepts are involved. Which increases the possibilities of refusing to admit claims based on situations that warrant protection. This procedure has therefore become a major obstacle to the examination of applications based on gender or in which the persecutory act of violence is an assumption of violence against women based on gender. In both cases, this is due to the obstacles in determining the links between the act of persecution and the reason (Merino, 2012).

Let us return to the coordination of different categories for *prima facie* different realities, in reference to the distinction between voluntary and forced migration, and how this hinders asylum seekers' access to protection mechanisms. If migration policies are based on this categorization, this in turn legitimizes the adoption of policies and, in turn, promotes the discourse of the necessary distinction between border mobility experiences in terms of truth and falsehood. That is why this discourse has justified the establishment of a dual phase, insofar as it is based on the desirability of streamlining procedures for identifying "genuine" applicants, as opposed to migrants who "fraudulently" use asylum procedures.

Finally, despite this aim, the possibilities of gaining access to territories in third countries have been restricted, affecting asylum seekers. And this has led them to use other non-formal mechanisms—hence the clandestinization—which ensure their entry, given that the requirements for "regular" access are also limited.

Consider a situation in which a virtual asylum seeker may find himself, characterized by the absence of protection of his rights and fear for his physical integrity and other rights and freedoms. It is also common to share a fear of being identified, which, together with the fact of persecution, forces an asylum seeker to use all available resources, even though his immediate objective is not applying for asylum.

Therefore, the appearance of mixed flows, formed by asylum seekers and economic migrants, coupled with tighter access to the national territory of third countries, not only creates pressure to abuse asylum mechanisms, but also drives those seeking protection, even if they are “genuine refugees”, not to use the formal, regular mechanisms of entry into another country (Juss, 2006:239). This leads to the prioritization of immigration rights over asylum, assuming the irregular status of any subject that enters the territory, who is also awarded a lesser legal status, whose holders have been qualified as *infrasubjects* (De Lucas, 2009a).

*“Humanitarian Reasons” and the Regulation of the Assumptions  
of International Protection in Immigration Rules*

Despite setbacks, the constant modification of immigration rules, compared to the low variability of asylum rules, has also led to the emergence of new forms of protection, such as those based on “humanitarian grounds”. This type of protection is created to ensure the rights and safety of so-called *de facto* refugees. This nomenclature refers to asylum seekers whose demands fail to include the necessary elements for the recognition of refugee status, although they are in a similar situation to that justifying asylum, a similarity which warrants their protection. These have been qualified by the doctrine as “atypical or non-right situations” (López, 1991:121), and at the policy level, they have been called subsidiary protection.

Their creation has been common to most European states since the regime change mentioned earlier, and in 2004 they were institutionalized after being included in the legal instrument which

seeks to harmonize national asylum laws among member states. Specifically, *Directive 2004/83/EC* (Consejo Europeo, 2004), of the Council, issued on 29 April 2009, for which minimum standards were established regarding requirements for the recognition and status of third country nationals or stateless persons as refugees or persons needing another type of international protection and the contents of the protection granted. It is regulated as international protection that may be recognized in those situations in which not all the elements defining asylum are present, yet the subjects are equally deserving of protection, as noted earlier. However, it has not always been defined much less regulated in the place where asylum has been sought, as noted above (Consejo Europeo, 2004).

The transformation and dimensions of the flow of refugees arriving in Europe in the 1980s forced states to adopt new mechanisms. In most cases, there is a different one for each legal order, given the scant normative and institutional community development and because assumptions not foreseen in the *Convention* (United Nations, 1951) are involved. As a consequence of the paradigm shift in the management of migration flows, and given the priority of political over legal assumptions, these mechanisms are established in immigration law rather than asylum law, in keeping with the constant attempt to control these flows. For the same reason, they depart from the rights paradigm that governed the previous asylum regime (Van Selm-Thorburn, 1998:37). However, this secondary protection figure reduces its content in relation to its timing and also to the rights of the owners, even though this has involved providing coverage for situations that are not clearly distinguished from conventional ones, yet had been excluded to date. This in turn, it should be noted, has been detrimental to the extensive application of refugee status.

One of the assumptions showing the implications of this change is the answer to claims based on collective situations, understood as the protection claimed for mobility scenarios caused by generalized violence, massive human rights violations or natural disasters. This assumption, for example, includes not only domestic or



international armed conflicts but also so-called “environmental refugees” fleeing their home countries due to natural disasters that cause difficulties in meeting basic needs (Borrás, 2006). In the face of these new realities, the individualized nature of the persecution required by the international framework of asylum is called into question, especially since it follows that these are assumptions that are outside the scope of protection.

These cases may deserve protection on humanitarian grounds, because of the similarity of the reasons that justify the usual determination of status. Yet they question the fragmentation of protection, at least in relation to the conceptual aspects of the framework, because they provide solutions in the immigration regulations that ultimately affect asylum. And this restriction proves that asylum is still a legal model with assumptions (drawn from the socio-historical context in which it is configured) that are not suited to the current situation (Añón, 2010).

Consider that the porous nature of the experiences of border mobility in collective situations is fully proven. For example, insofar as failure to meet basic and/or safety needs constitutes serious damage to and a violation of basic rights. In this case, social rights, sharing *a fortiori* the requirement of absence of protection by the state of which he is a national and from which he is fleeing. Hence it is said that protection has a stronger meaning in these cases, because it involves aspects such as who should guarantee it (think of armed conflicts where there are areas of influence of the conflicting parties), who is not guaranteeing it and the reasons why this is or is not being done (Roberts, 1998:392).

In short, the main problem that arises with the creation of these figures, which paradoxically should be regarded as mechanisms for extending protection, is the restrictive application of refugee status. Especially when these international obligations that have been assumed do not operate as limits to the action of public authorities. Likewise, it is a national policy outside the objective sphere of application of the *Convention* (Hathaway, 1992:78). In any case, the implementation of these new categories of protection, which give rise to so-called “restricted asylum”, can only be understood

as the effect of the fulfillment of the obligations assumed under the non-refoulement principle, laid down in article 33 of the *Convention* (Joly, 2006:124 and following) which strengthens its consideration as *jus cogens*. Meaning that it is binding for states.

If so, the restrictions on the criteria for determining refugee status, or the tightening of access to European states (justified in the discourse on the use of asylum by “bogus asylum-seekers” creating negative assumptions regarding asylum seekers), do not prevent, in the event of a petition for protection, in which case circumstances are adduced to be insufficient for recognition of refugee status (international protection by a state), the assumption of certain obligations motivated by humanitarian grounds (*i.e.*, a person’s physical protection).

Time constraints on protection, correlative to the exceptional, particular circumstances that cause it, as well as the disparity of forms and the diversity of regulations that still exist in this regard, continue to weaken the general system of the right of asylum. The fragmentation of protection into a process of reducing guarantees and criteria for interpreting elements, and the fragility of the new forms of protection, with all the limitations they contain *per se* (regarding the content and timing of the protection, despite the establishment of the causes of cessation in the *Convention*), reflect the negative considerations affecting the figure of asylum seekers and those who have not been granted refugee status due to their failure to meet the criteria once established for this purpose.

### *A Weakened System of Rights Protection*

The so-called “new” asylum system is characterized by the temporary nature of protection, the return of *de facto* refugees to their countries of origin being a key objective. Thus, integration ceases to be a common practice for the benefit of protection standards. Over time, some of the assumptions that must be met, which have become features of existing regulations, have been added, such as the notion of safe country (which has included the determination, no longer on an individual basis, of asylum appli-

cations, insofar as there is a list of countries considered to offer protection to their citizens, which assumes that any application is unfounded), or alternative inner journey (in cases where there is a safe area in the country of origin and it is understood that the applicant could have moved to it, the status will not be recognized), among others.

The current trend in western states to strengthen their borders and prevent access to their territories is based on multiple discourses, due its proximity to migration movements, has not escaped the discourse on the national security of states and the control of migrations (De Lucas, 2009b). It is in this sense that one must understand article 19, paragraph one of the current *12/2009 Law* (Cortes Generales, 2009), dated October 30, regulating the right of asylum and subsidiary protection, according to which the principle of non-refoulement is the main effect after the request for protection, and a fundamental pillar of the institution of asylum, yet allows the use of precautionary measures established in the legislation on foreigners and immigration, on asylum seekers “for reasons of health or public safety” (Cortes Generales, 2009).

Therefore, any possible broad interpretation of the right of asylum, which could have resulted from the emergence of new realities of persecution (and which would have fitted in with the conceptual separation of those fleeing voluntarily and freely), has been reduced by the refocusing of new forms of protection of immigration regulations. In which the limits inferred from the *Convention Relating to the Status of Refugees* of 1951 do not exist. In short, one can say that there has been a departure from the basis of the asylum regime. Especially due to the permeability of the weak line separating current laws on asylum and immigration and the intrusion of the assumptions of the latter into the former.

Hence it is possible to state the negative implications of discourses on migration and irregularity in asylum law, despite the meaning and nature of the latter, which can only be understood in accordance with the rights paradigm. Of those who are forced to leave for political rather than legal reasons. This calls for a review of current trends for the benefit of asylum seekers.

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