

1st Meeting

Original: ENGLISH

PROTECTION OF REFUGEES IN MASS INFLUX SITUATIONS:
OVERALL PROTECTION FRAMEWORK

I. INTRODUCTION

1. Mass displacement poses particular challenges for receiving States, for other States affected in the region and, increasingly, for the international community. States as well as UNHCR have grappled with the complexities of providing adequate protection responses in these circumstances. The need for greater clarity concerning the scope of international protection in mass influx situations is apparent, not least in view of the varying responses that have been used to address mass displacement.

2. The present note attempts: i) to describe and classify the responses to mass influx which have been developed; ii) to identify and analyse the issues at stake which require resolution; and iii) to provide recommendations which could lead to the development of coherent and practical approaches to the problem that, while tailored to the particular context, are in line with globally accepted refugee protection principles based on the 1951 Convention and 1967 Protocol.

II. EXISTING RESPONSES TO MASS INFLUX

3. Mass displacement usually makes individual refugee status determination impracticable. This may be either because systems geared to individual determinations are too unwieldy, costly and protracted in the face of large numbers of arrivals, or because there are no such systems in place. In any event, the evident and immediate need for emergency assistance and protection demand an urgent response.

4. The traditional response has been to use *prima facie* determination or acceptance on a group basis because of the obvious refugee character of the individuals concerned, without going into any formal, individual determinations. More recently, principally but not exclusively in Europe, States faced with large numbers of arrivals have adopted and indeed legislated for the device of "temporary protection", which allows them to extend protection and assistance to the group without initially going into individual status determinations. In such cases, it has been acknowledged that individual procedures under the 1951 Convention can be kept "on hold" for use if or when it becomes necessary to determine individual protection needs and consequent State responsibilities.

5. These two approaches, including an assessment of their strengths and weaknesses, are examined in the following paragraphs, with a view to identifying areas requiring further clarification and reinforcement.

A. Group Determination of Refugee Status on a *Prima Facie* Basis

a) Background

6. Group determination on a *prima facie* basis means in essence the recognition by a State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin

giving rise to the exodus. Its purpose is to ensure admission to safety, protection from *refoulement* and basic humanitarian treatment to those patently in need of it.

7. It is widely applied in Africa and in Latin America, and has in effect been practised in relation to large-scale flows in countries, such as those in South Asia, that have no legal framework for dealing with refugees.¹ This approach has also been resorted to by UNHCR in line with its Statute and subsequent General Assembly resolutions.² Under this practice, the objective evidence available on the situation or event prompting the exodus is used to determine that members of the group are at risk for refugee reasons. The specific emphasis on the objective situation set out in both the 1969 OAU Convention on the specific aspects of refugee problems in Africa and in the 1984 Cartagena Declaration, the two regional complements to the 1951 Convention, has helped facilitate such assessment. At the same time, however, specific procedures have rarely been put in place by which group determination is effected.

8. Given the very nature of mass influx, it may be difficult or impossible to provide immediately the full standards of treatment foreseen under the 1951 Convention. In its Conclusion No. 22 adopted in 1981, the Executive Committee defined minimum standards of immediate treatment in situations of large-scale influx. For UNHCR as well as for affected States, this Conclusion remains an important yardstick against which to measure such treatment in a mass influx of refugees. It is important to note, however, that the Conclusion was never intended as a substitute for standards of protection under the 1951 Convention.

b) Areas for clarification or reinforcement

9. Exclusion of persons not deserving of international protection: Since there is no individual screening in mass influx situations, the identification of armed or other excludable elements poses a particular challenge. Security concerns, as well as the maintenance of the civilian and humanitarian character of asylum require that such persons be promptly separated from the refugee population and where appropriate screened for exclusion from refugee status. The procedural elements for exclusion from refugee status in such instances need to be developed further to address this problem.³

10. Implementing appropriate durable solutions where the situation becomes protracted: Voluntary return is the most appropriate solution in mass influx situations. There are though a number of on-going and protracted situations. These require priority attention. Solutions will be inextricably linked to burden and responsibility-sharing arrangements, most likely within the framework of a specifically tailored comprehensive approach.⁴

11. Adjusting resettlement criteria: Resettlement screening and refugee status determination are clearly related but nevertheless separate processes. Normally a determination pursuant to the 1951 Convention criteria precedes resettlement processing, which takes Convention refugee status as its starting point and then brings into play additional criteria. A problem arises where a person enjoys *prima facie* refugee status, with the broader refugee criteria being the underlying basis for this, but is rejected for resettlement as not meeting a strict application of the 1951 Convention criteria. This will happen most often in displacement driven by generalized violence or conflict, often compounded by other elements contributing to the compulsion to flee. While theoretically this is

¹ Jackson, Ivor, *The Refugee Concept in Group Situations*, Martinus Nijhoff, The Hague, 1999.

² General Assembly Resolution 428(V) Annex, para.2; for UNHCR's practice see *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979 (re-edited 1992), para. 44.

³ See proposals contained in Global Consultations document (EC/GC/01/5).

⁴ See Global Consultations document (EC/GC/01/7).

understandable, it creates a number of important dilemmas. Firstly, if the number of rejected cases multiplies, as is likely when there are quotas specifically for persons from *prima facie* refugee populations, doubts are created in the minds not least of the host governments as to the refugee character of the population at large. These can put into question the continuing viability of the *prima facie* approach. Secondly, for UNHCR, the resettlement solution has to retain its flexibility as a response mechanism to address particular protection vulnerabilities in the host country. Regardless of whether an individual is a "Convention refugee" or an "extended definition refugee" (insofar as this distinction can even clearly be made), where a protection situation develops that is best addressed through resettlement, UNHCR needs the assurance of being able to pursue this solution effectively. There is, in UNHCR's assessment, a need for resettlement countries to re-consider their resettlement criteria to allow them to take into account the specificities of *prima facie* status.

B. The Provision of "Temporary Protection"

a) Background

12. Europe was faced with major displacement throughout the 1990's as a result of the successive armed conflicts in South-East Europe. States receiving large numbers of arrivals feared that their asylum systems would be overwhelmed. The fact that those fleeing were in need of international protection was widely acknowledged. Since the conflicts were expected to end promptly as a result of efforts by the international community, many European States decided in effect to suspend status determination under their existing individualized asylum systems, and offered instead "temporary protection". Related considerations have prompted some countries outside Europe to use a similar terminology and approach.

13. Temporary protection is best conceptualised as a practical device for meeting urgent protection needs in situations of mass influx. Its value in ensuring protection from *refoulement* and basic minimum treatment in accordance with human rights without over-burdening individual status determination procedures has been demonstrated. Its unclear relationship to the 1951 Convention has led, however, to a series of conceptual and practical difficulties, not least in the status and standards of treatment to be accorded to beneficiaries.

b) Outstanding areas for clarification or reinforcement

14. Defining the trigger for temporary protection: Agreeing on what constitutes mass or large-scale displacement is an essential first step in order to define the triggering factor for activating temporary protection. Mass displacement is prompted by a significant event or situation in a country of origin, which is easily recognizable as the trigger for an exodus. In numerical terms, what amounts to "large-scale" or "mass" influx will necessarily differ from country to country and/or region to region, and must be decided on a case-by-case basis. The analysis needs to take into account the size and speed of the influx balanced against the size and capacity of the receiving country to process the cases in individual status determination systems. There is a need for clearer, less equivocal recognition that there must be an actual mass influx before a temporary protection regime can become relevant. There is also a need for broader endorsement of the fact that temporary protection is not a device for use in individual cases.

15. Standards of treatment: If the crisis generating the mass displacement is of short duration, treatment should in the first instance respect the standards set out in Executive Committee Conclusion No. 22. It is recognised that those of the 1951 Convention linked to permanent residency may not be appropriate in the first instance, as the temporary protection approach is predicated on temporariness. Situations giving rise to large-scale displacement have not infrequently, however, proven to be prolonged and call for concerted attention to promoting durable

solutions, which clearly may include more permanent residence and its ensuing rights. There would be value in a more harmonized approach to standards of treatment and stay in countries employing the temporary protection device.

16. Duration and ending of temporary protection: In the context of temporary protection, the issue of when, and indeed whether, a person benefiting from it may have access to an individualised refugee status determination have remained a subject of debate. As temporary protection is an interim protection response complementary to the international refugee protection regime, access to determination procedures (or conversion to a more permanent status) should be implemented when necessary and after a reasonable time to meet enduring protection needs. The criteria for ending temporary protection in a mass influx situation need to be better defined not only for the specific situation but in general terms.

III. THE 1951 CONVENTION FRAMEWORK

17. It is accepted that the 1951 Convention and the 1967 Protocol is the basic framework within which the protection and treatment of refugees should proceed. Mass numbers may call for different practical approaches but, nevertheless, the Convention framework must always retain its proper place, as outlined in the previous paragraphs. This being said, UNHCR would also observe that in fact, there is nothing inherent in the provisions of the 1951 Convention and 1967 Protocol to preclude it being applied in mass influx situations. The stumbling block has been less the Convention itself and more the individualised processes put in place to implement it, coupled with a perception of the Convention as an instrument of integration.

18. In reflecting upon the advantages and difficulties inherent in devising new approaches to deal with mass arrivals in countries where Convention-based systems are particularly well developed and comprehensive, States may wish to reflect upon the following understandings:

- The Convention definition is capable of being applied in large-scale situations on a group basis. Individualised assessment of the subjective element of fear would normally be rendered unnecessary, as being on its face self-evident from the event or situation which obviously precipitated the flight in Convention terms.
- The Convention is a refugee protection instrument, not a migration instrument and it does not necessarily require permanency of refugee status. The refugee regime is a special one, linked to the changing nature of conditions in the country of origin. The treatment provided for in the Convention is made conditional, in the language of the different provisions, on certain criteria being fulfilled, some of them linked to permanency of stay and others linked to immediate need. It is quite possible, within the Convention, to develop a response to large-scale group arrivals, which, depending on the specific situation, can be predicated on temporariness and return.
- Issues that would benefit from closer analysis in the context of group determination under the Convention would include concepts, such as "lawful stay", the cessation threshold and persecution in the context of different conflict situations. The procedures and processes for group determination could also be examined.
- Overall however, it is important to understand that the 1951 Convention can be applied directly in large scale influxes in countries with developed status determination procedures, and this should be borne in mind in the context of developing further strategies to address these situations.

19. There is scope for examining this further and, as necessary, for identifying areas that require the clarification or development of standards. Such an examination would have the advantage of anchoring the protection response in internationally agreed parameters. It would also bring about consistency, comparability between different regional, and even national, responses, as well as predictability.

IV. CONCLUDING OBSERVATIONS

20. There are clearly distinctions between the ways in which each of these protection-based responses to mass displacement have been implemented. The overall aim is to maximise the potential of the different responses while ensuring their compatibility with international refugee protection standards. This should be coupled with a fresh look at the flexibility inherent in the 1951 Convention framework itself. In order to move towards more effective and coherent approaches to protection in mass influx, the uncertainties and inadequacies identified in the existing responses need to be addressed. Issues to be resolved in this context relate in particular to the status of the beneficiaries, the nature, content and duration of protection, as well as to the difficulty of achieving durable solutions.

20. By way of conclusion, the following elements could be considered:

(a) Mass influx will continue to affect not only host States or a regional grouping of States, but the entire international community. There is a current need to develop further the tools available to ensure protection in situations of mass influx and to maximise their potential while anchoring them firmly in the international refugee protection regime, with the 1951 Convention and its 1967 Protocol retaining its central place.

(b) As regards *prima facie* status, the problems inherent in status determination for certain groups of individuals now have to be tackled. In this context, procedural aspects to address the problem of excludable cases in the context of group determination on a *prima facie* basis should be clarified. In addition, resettlement countries are invited to review their resettlement criteria to enable them to meet the specific protection and resettlement needs in *prima facie* group situations.

(c) As regards temporary protection, there is an immediate need for better harmonisation of approaches within which acceptable standards of treatment should be integrated and access to 1951 Convention status for persons with enduring protection needs should be guaranteed.

(d) States may wish to request UNHCR to undertake a comparative study of protection-based responses to mass influx, which would include a focus on the degree of flexibility inherent in the 1951 Convention/1967 Protocol framework. In order to enhance its applicability in mass influx situations, the study could concentrate in particular on those issues which require clarification and further development of standards and law, with a view to suggesting practical and/or legal ways to address them.