

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

PROTECTION OF REFUGEES

IN

NON-INTERNATIONAL ARMED CONFLICTS

Background Note presented by the Office of the United Nations High Commissioner for Refugees at the 14th Round Table on Current Problems of International Humanitarian Law at the International Institute of Humanitarian Law on 12 September 1989.

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Introduction

Persons flee their country and seek protection as refugees in order to survive in safety and dignity. The immediate objective of international protection of refugees is therefore to ensure their physical safety and security. Over the last two decades, the security of refugees has been seriously endangered through physical attacks against their persons, armed attacks on their camps and settlements, militarization of their camps and their forcible recruitment into regular or irregular forces. Guaranteeing the physical protection of refugees remains one of the most difficult protection problems for High Commissioner.

That this should be the case is not entirely surprising since much of these violations of the refugees' security result from armed conflicts which spill over into a considerable number of refugee situations. Suffice to consider problems relating to the protection of refugees in a large number of countries in Asia, the Middle East, Africa and Latin America. Many of these conflicts are non-international in character - for which reason it is timely to review and reflect on the protection of refugees in non-international armed conflicts.

The present Note briefly examines some of the main issues which need to be addressed in this context. These include, the meaning of non-international armed conflicts, the nature of asylum and refugee status and standards of treatment for refugees. The main conclusions of the Note highlight that refugees are by definition civilians and benefit as a consequence from international humanitarian law norms on par with other civilians. These norms, complemented by general principles of international law, including elementary considerations of humanity prescribe humane treatment of refugees.

It should be stressed that when examining standards of treatment of refugees, the Note deals with aspects relating to the physical security of the persons concerned, since as a rule, their protection situation in non-international armed conflicts is characterized precisely by a lack of security. Additional standards of treatment relating to other aspects of refugee protection as contained, for example, in the 1951 Convention relating to the Status of Refugees, its 1967 Protocol and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa remain of course in force in countries which are parties to these instruments.

While the main portion of the Note deals with the protection of refugees in non-international armed conflicts, it is clear that such conflicts may also give rise to either the uprooting and external displacement of refugees who had originally found asylum in the country or the creation

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of cross-border movements of persons in search of protection as refugees. Although persons leaving, as opposed to staying in, non-international armed conflicts is not the main topic under consideration, the Note nevertheless takes a brief look at there is s as they relate to standards of treatment, including the granting of asylum and determination of refugee status.

Non-international armed conflicts

International humanitarian law distinguishes between different categories of armed conflict. First of all, international armed conflicts are defined in common Article 2 of the Geneva Conventions of 1949 and include all cases of declared war or any other armed conflict which may arise between two or more parties, even if the state of war is not recognized by one of them. They also include all cases of partial or total occupation of the territory of a party, even if it meets with no armed resistance. Article 1 of Protocol I additional to the Geneva Conventions relating to the victims of international armed Conflicts adds to the category of international armed conflicts, those in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination

Secondly, international humanitarian law defines non-international armed conflicts. They are covered by common Article 3 of the Geneva Conventions as well as by Additional Protocol II. Common Article 3, referred to by many as a mini-convention, provides minimum standards for protecting persons not taking active part in the hostilities "in the case of armed conflict not of an international character." As for Additional Protocol II, it provides in its Article 1 that, without modifying the existing conditions of application of common Article 3, the Protocol shall apply to all armed conflicts not covered by Article 1 of the Additional Protocol I and which take place in the territory of a party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Finally, it must be noted that international humanitarian law identifies certain levels of violence as not of a nature to constitute an armed conflict in the first place. Article 1(2) of Protocol II - additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflicts, excludes from its applicability situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. Internal disturbances, while not constituting a non-international armed conflict, nevertheless involve a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts or revolt to the struggle between more or less organized groups and the authorities in power. Similarly, internal tensions include particular situations of serious political, religious, racial, social or economic tensions or sequels of armed conflict or of internal disturbances.

Without at this stage making a thorough analysis of the article dealing with non-international armed conflicts, it may nevertheless be possible to provide some initial and general conclusions, as follows:

First of all, the mere wording of the relevant articles (particularly of Article 1 of

Additional Protocol II) tend to suggest that their applicability in any given case may not always be clear;

Secondly, a number of situations in which the safety and well-being of refugees are currently at risk will probably be considered as falling entirely outside the scope of the humanitarian law instruments for want of meeting the threshold of what can be considered an armed conflict;

As a result, and given the fact that action on behalf of the Office of the High Commissioner takes concern for the safety and well-being of refugees as its point of departure, UNHCR will also look towards standards of protection of general applicability regardless of the level of violence affecting the refugees.

The civilian nature of asylum and refugee status

Before entering into the subject of standards of treatment and protection, it is necessary to clarify the nature of the grant of asylum and refugee protection and who is meant when referring to refugees. UNHCR doctrine holds that the grant of asylum is a peaceful and humanitarian act and that refugees are by definition civilians. Persons who are actively engaged as combatants in military or armed activities, while benefiting from the protection afforded this category of persons under international humanitarian law, are not refugees.

The preamble to the 1951 Convention relating to the status of Refugees expresses the wish that all States, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent it from becoming a cause of tension between them. Article 2 of this Convention provides that all refugees have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations, as well as to measures taken for the maintenance of public order.

In the preamble to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the Heads of States and governments recognized the need for an essentially humanitarian approach towards solving the problems of refugees. Aware that refugee problems may be a source of friction among OAU member States, and desirous of eliminating the source of such discord, they expressed their wish to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside. They also expressed their determination that the activities of such subversive elements should be discouraged.

Article II (2) of the OAU Convention confirms that the grant of asylum to refugees is a peaceful and humanitarian act, and shall not be regarded as an unfriendly act by any member State. Article III contains specific regulations on the prohibition of subversive activities. Paragraph 1 of this article contains the same general obligation as Article 2 of the 1951 Convention, but adds the important proviso that refugees shall also abstain from any subversive activities against any member State of the OAU. Paragraph 2 further declares that signatory States undertake to prohibit refugees residing in their respective territories from attacking any member State of the OAU, by any means likely to cause tension between member States, and in particular by use of arms, through the press and radio.

A large number of Latin American treaties relating to diplomatic and territorial asylum contain similar provisions. The 1967 United Nations Declaration on Territorial Asylum recognizes that the grant of asylum by a State to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights is a peaceful and humanitarian act. Article 4 of this Declaration contains the additional and important proviso that States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations. One such purpose is of course the maintenance of world peace, whereas the non-use of force and non-intervention figure prominently among the fundamental principles of the United Nations. Similarly supportive language can also be found in the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter.

Finally, recourse can be had to a number of statements of inter- and non-governmental meetings. Executive Committee Conclusion No. 22 (XXXII) on the protection of asylum-seekers in situations of large-scale influx provides, for example, that asylum-seekers should not become involved in subversive activities against their country of origin or any other State. Subsequently the Executive Committee predicated its Conclusion No. 48 (XXXVIII) on Military or Armed Attacks on Refugee Camps and Settlement on the assumption that refugee camps and settlements have an exclusively civilian and humanitarian character. That Conclusion also reiterates that refugees have duties to abstain from any activity likely to detract from the exclusively civilian and humanitarian character of the camps and settlements. A similar statement is contained in the Cartagena Declaration on Refugees as well as in the Declaration recently adopted by the International Conference on Central American Refugees. Finally, it is worth recalling that in 1986, seven African Heads of State and government meeting in Rwanda declared, *inter alia*, that States must not use refugees as combatants within any type of structure, and that any persons seeking refugee status must be immediately disarmed.

In light of the forgoing, it may be concluded that the grant of asylum to refugees as a peaceful and humanitarian act, which shall not be regarded as an unfriendly act by any State, constitutes a fundamental concept in international law. Inherent in this concept, is the general obligation of States to take all possible action to ensure that refugee camps and settlements remain civilian and humanitarian and, of course, refugees are, by definition, civilians and not combatants.

Standards of treatment and protection

Contrary to the humanitarian law instruments relating to international armed conflicts, neither common Article 3, nor Additional Protocol II, contain any provisions referring specifically to refugees. Refugees may nevertheless be considered as persons being protected by these texts since as civilians "they are taking no active part in the hostilities" (common Article 3) or "they are persons who do not take a direct part or who have ceased to take part in hostilities" (Additional Protocol II, Article 4).

Generally speaking, these two articles state that civilians (refugees for our purposes) shall in all circumstances be treated humanely, without any adverse distinction. Both articles prohibit explicitly a number of acts against the persons which include:

- violence to the life and person, in particular murder and cruel treatment such as torture and mutilation;
- taking of hostages; and
- outrages upon personal dignity, in particular humiliating and degrading treatment.

On the whole, however, beyond prescribing humane treatment relatively little else can be extracted from these provisions in relation to the protection of refugees in non-international armed conflicts, although it should be noted that Additional Protocol II contains further provisions for the treatment of wounded, sick and shipwrecked and the civilian population.

However, other sources of law give guidance. In this regard, it is worth recalling that on one occasion, the International Court of Justice has recognized that obligations [of States] could be based on so called "elementary considerations of humanity" (Corfu Channel case) and that on another it held that "certain obligations were owed by a State towards the international community as a whole" (Barcelona Traction case). Such obligations, for example, "could derive in contemporary international law from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

These basic rights, which are enjoyed by all persons including refugees, may not be suspended even in exceptional circumstances. These non-derogatory rights include the right to protection against arbitrary deprivation of life, and against torture or cruel and inhuman treatment and punishment, the right not to be subjected to slavery and servitude or to retroactive penalties, the right to recognition as a person before the law and to freedom of thought, conscience and religion as well as the right to protection against discrimination.

It is consistent with these basic rights to consider that refugees in non-international armed conflicts must be protected from non-refoulement and continue to be provided at least with temporary refuge. Although neither the 1951 Convention nor the 1969 OAU Convention contain any article which explicitly provides a right to be granted asylum or refuge, both contain similarly worded non-refoulement provisions which prohibit return to a situation where the refugees' life or freedom would be threatened on the grounds which gave rise to recognition as refugees. The 1969 OAU Convention includes non-rejection at the frontier in the protection from refoulement.

These provisions have been reinforced through both the practice of States as well as their pronouncements in international fora. Prominent amongst the latter is the adoption by the Executive Committee in 1981 of its Conclusion No. 22 (XXXII) on the protection of asylum-seekers [and refugees] in situations of large-scale influx. In this conclusion, the Executive Committee recommends a set of basic human standards in accordance with which the persons concerned should be treated, which includes respect for the principle of non-refoulement and the fundamental civil rights contained in the Universal Declaration of Human Rights. Although the Conclusion does not explicitly refer to the protection of refugees in non-international armed conflicts, it contains a comprehensive set of basic human standards which are entirely consistent with the notion of humane treatment of refugees in non-international armed conflicts.

Apart from receiving humane treatment, including being protected from refoulement, however, what other standards of treatment can be identified for the protection of refugees in non-international armed conflicts? Current situations involving attacks on refugee camps and settlements may serve as a point of departure for further analysis.

In its Conclusion on the subject on Military or Armed Attacks on Refugee Camps and Settlements, the Executive Committee condemned all violations of the rights and safety of refugees and asylum-seekers and in particular military or armed attacks on refugee camps and settlements. It urged States to abstain from these violations which, it held, "are against the principles of international law and, therefore, cannot be justified." In addition to calling upon all parties to extend the necessary assistance to relieve the plight of the victims of such attacks, the Committee also urged States and other parties to ensure that the civilian and humanitarian character of refugee camps and settlements be maintained. In other words, inherent in this conclusion is the need for all parties to respect the civilian status of refugees.

There is, however, a marked increase in instances involving the recruitment of refugees into belligerent forces. Such recruitment occurs in several refugee situations and involves many thousands of refugees. Of course, recruitment into armed groups constitutes an unacceptable practice from a refugee protection perspective. It puts the life and integrity of refugees at risk and is contrary to the accepted notion that refugees are civilians and their camps and settlements have a strictly civilian and humanitarian nature.

Article 4 (3)(c) of Additional Protocol II provides that children under the age of fifteen years shall neither be recruited in the armed forces or groups nor be allowed to take part in hostilities. No such protection is, however, foreseen for persons above the age of fifteen, leaving as it does, a gap in the legal framework for the protection of refugees in situations of non-international armed conflicts.

Another area of concern relates to the means of survival of refugees. In more than one situation involving refugees in non-international armed conflicts, in addition to recruiting refugees, warring parties have pillaged camps and settlements, emptying them of essential relief items. Again some provisions of Additional Protocol II are directly relevant. Thus, for example, article 14 states that starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population. On the other, if committed simply to feed the belligerent forces but not to starve the civilian population (in this case the refugees), no prohibition would appear to apply (save what is inherent in the right to humane treatment).

In conclusion it may be stated that refugees in non-international armed conflicts have a right to humane treatment which includes benefiting from basic human rights, including protection from refoulement. More specific standards of treatment seems, however, to be required. Thus, for example, the civilian status of refugees must be respected and they should not be subjected to recruitment in armed groups. Similarly, the civilian and humanitarian nature of their camps and settlements must be respected and relief supplies should not be deviated for use by combatants. This is all the more important in order to permit UNHCR to continue its activities on behalf of refugees in a humanitarian, non-political and neutral manner.

Finally, the treatment of refugees affected by violence which is not of an intensity as to qualify as armed conflicts need to be considered. Elementary considerations of humanity dictate humane treatment also for these persons which includes respect for their fundamental human rights. This is consistent with the statement contained in the preamble of Additional Protocol II in which the High Contracting Parties recalled that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."

Refugees from non-international armed conflicts

As noted in the introduction, the protection of refugees from, as opposed to in, non-international armed conflicts should briefly be addressed although not being explicitly the subject matter of this Note. Two situations can be imagined in which the first one consists of refugees who as a result of a non-international armed conflict in the country of asylum find themselves forced to cross into a neighbouring country in order to preserve their safety. In this type of a situation, Executive Committee Conclusion No. 15 (XXX) on refugees without an asylum country is of particular relevance. In this conclusion, the Committee recommends that "where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country ... because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum-request."

The second type of situation concerns persons who leave their country of origin as a result of their physical safety or freedom being threatened by a non-international armed conflict and seek asylum and recognition and protection as refugees in another country. There is a tendency in some countries in recent years to view the 1951 Convention's definition as not applicable to persons who find themselves in this situation. Succinctly put, the argument holds that persons cannot show a well-founded fear of persecution on any of the grounds listed in the refugee definition when they are fleeing what at first sight appears to be insecurity in an armed conflict situation.

This trend has, nevertheless, been partly reversed through recent court decisions which held that when armed forces uses excessive violence against non-combatants and where that violence is directed at a particular segment of the population - in the particular instance involving a racial group - the individual applicant who has fled such threats fulfils the criteria of the 1951 Convention's definition.

While there is therefore a case to be made for considering much larger numbers of persons who have fled, for example, non-international armed conflicts, as refugees, that is not to say that they all can be considered as meeting the criteria of the refugee definition contained in the 1951 Convention. At the same time, however, there is a growing recognition that whatever their status, also other persons fleeing the effects of non-international armed conflicts deserve protection refugees. Explicit recognition thereof is reflected in the 1969 OAU Convention which considers as refugees also other persons who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order ... are compelled to leave their place of habitual residence and seek refuge in another place outside their country of origin. A similarly worded recommendation is included in the Cartagena Declaration on Refugees.

Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large Scale Influx may also be considered as applicable. This Conclusion recommends minimum standards of treatment of asylum-seekers which can be presumed to include persons seeking protection as refugees from the consequences of non-international armed conflicts. In particular, this conclusion recommends that in situations of large-scale influx, the persons concerned should be admitted to the State in which they first seek refuge, as a minimum on a temporary basis, and that they be protected from refoulement.

Finally, it goes without saying that both categories of persons displaced by non-international armed conflicts are entitled, as a minimum, to the same humane treatment as refugees who find themselves in such conflicts.

Conclusions

The foregoing summary outline of some of the main issues in the context of the protection of refugees in non-international armed conflicts suggests the following preliminary and general conclusions:

- refugees are civilians and non-combatants and benefit therefore from the protection of civilians provided for under both common Article 3 and Additional Protocol II;
- these instruments, as well as general principles of international law, including elementary considerations of humanity, prescribe humane treatment;
- although not explicitly provided for, such humane treatment should include continuing to provide at least temporary refuge as well as respect for the principle of non-refoulement and fundamental human rights;
- refugees should also be protected from recruitment into armed groups and the civilian and humanitarian nature of their camps and settlements located in areas of non-international armed conflicts should always be respected;
- the foregoing basic standards of treatment should apply not only to the protection of refugees in situations of non-international armed conflicts but also to those who find themselves in areas of internal disturbances and tensions;
- the request for asylum in a second country of refugees whose physical security or freedom are threatened by non-international armed conflicts and who as a result seek protection in a neighbouring country should be given favourable consideration by that country; and
- finally, these persons, as well as those fleeing non-international armed conflicts because of a threat to their physical security or freedom, should also benefit from humane treatment.

Geneva, 30 August 1989