

I. INTRODUCTION

1. An ever-increasing number of persons in many regions of the world are forced to flee their country as a result of generalized situations of violence threatening their safety or freedom. These victims of war, civil strife and other violence are receiving assistance and protection in some regions as refugees, but in other regions they are treated as non-refugee humanitarian cases following resort by national authorities to status determination and their rejection under the 1951 Convention relating to the Status of Refugees. There are clear, inherent ambiguities in a situation where refugees meeting broader regional definitions, but outside the relevant regions, are considered to be of international concern and are receiving international protection and assistance on a mandatory basis from the international community, but on a discretionary basis from individual States. The problem here would not seem to lie in acceptance or otherwise of the notion that persons who are determined not to be 1951 Convention refugees may be in need of and deserving protection. This is widely acknowledged. Rather, the difficulty is in delineating such groups of persons and, at the same time, in defining both the content and duration of the protection and the most appropriate solutions to be provided.
2. This note sets out some of the issues which the Sub-Committee may want to address in discussing the need for and how to devise an appropriate system of protection for these persons and the concerns such a system needs to address. The note presents the issues as open-ended to stimulate initial discussion, without at this stage proposing final answers.

II. WHETHER AND HOW TO DEVISE A PROTECTION FRAMEWORK

3. Commendable efforts at the regional level to formulate a common basis for protection and assistance to these "victims of violence" have been made in Africa and in Latin America, where many such persons are to be found. Elsewhere, States have also been prepared generously to provide protection. In so doing, however, they have resorted to variable criteria for the identification both of the circumstances which will give rise to a justifiable claim on their protection and of the standards of treatment they undertake to respect. This has secured a necessary protection but has led to differential treatment, uncertainties and, on occasion, re-exposure to danger for affected individuals, as well as unequal burden-sharing within a region and serious domestic difficulties for many States unsure about the scope of their protection responsibilities and when and how these should be brought to an end.
4. The Report of the Working Group on Solutions and Protection (EC/SCP/64 of 12 August 1991) reflects these concerns. Having examined the situation of seven groups associated with the search for asylum and refuge, the Working Group concluded by observing, inter alia, that:
"A large number of persons who cross national borders in need of international protection, but who fall outside the 1951 Convention, are receiving some protection and assistance from the international community through UNHCR, and, on an ad hoc basis, from individual States. These ad hoc measures may not always be sufficient to meet the needs of all those requiring international protection and assistance." (para. 54 (d))

The Working Group went on to recommend, inter alia, the following for decision:

"UNHCR should continue to promote a wider accession to, and more uniform implementation of, the OAU Convention and Cartagena Declaration in these instruments' respective regions of origin, as well as use them as examples on which States elsewhere might wish to draw in developing their own national legislation." (para. 55 (b)); and,

"The question of a possible application on a global basis of a refugee definition applicable to persons not protected by the 1951 Convention/1967 Protocol or by regional instruments could be considered further." (para. 55 (c))

5. Similar sentiments were shared with the Executive Committee through the most recent Note on International Protection (A/AC.96/777 of 9 September 1991), which drew attention generally to the complexities of population movements and a resulting lack of clarity about the protection responsibilities of States, the proper role for UNHCR and the appropriate solutions to pursue. This lack of clarity, it was pointed out, both contributes to, and is a reflection of, the growing disjuncture between the activities which States have commissioned UNHCR to perform and the responsibilities States are prepared to assume. Bridging the gap between these two sets of responsibilities in a way which ensures adequate protection of persons of concern to UNHCR who fall outside the 1951 Convention, while maintaining the international consensus on protection of refugees, remains a major humanitarian challenge both for UNHCR and for States generally. Furthermore, recent events in Eastern and Central Europe have lent a new sense of urgency to efforts to establish a broadly agreed legal framework and an institutional mechanism to respond to the needs of victims of ethnic and other conflict.
6. The above considerations would seem to support the proposition that the present system of ad hoc international responses and domestic national arrangements to protect persons in need, but outside any existing international regime, needs to be strengthened. They argue, in effect, for codification in some form of a protection regime for persons fleeing danger. The question

then becomes one of finding the appropriate form and a practical strategy to develop it.

7. A possibility often raised, but usually disregarded, is an additional Protocol to the 1951 Convention. The proponents argue the need for a broader regime of protection at the global level and see value in attaching it to an enduring instrument which has already attracted broad adherence. The arguments against include the danger thereby of reopening fundamental principles and precepts in the Convention itself for further consideration. In addition, it is clear that the Convention is predicated on the philosophy that durable asylum, rather than return, is the principal solution. For the very large majority of persons of concern in the present context, return at some point will be the only available solution.

8. Rather than move immediately to negotiation of a binding, globally applicable instrument, it might be judged preferable to begin to strengthen protection of non-1951 Convention refugees by ensuring first that legislation or practice at the national level reflects agreed international or regional standards. Here regional instruments, arrangements and internationally endorsed guidelines, including applicable Executive Committee conclusions, are relevant. The Working Group on Solutions and Protection felt that a more widespread application of the OAU Convention and the principles in the Cartagena Declaration, in the regions where they apply, should be ensured, either through implementation in national legislation or by States becoming party, or both, as appropriate. The Working Group also recommended that these regional instruments be used as examples on which States elsewhere could draw in developing their own national legislation.

9. Steps at the national and regional levels would be progress towards a universal regime. A United Nations General Assembly resolution, perhaps annexing a declaration, could be one course to pursue in this regard. A new international convention or additional regional instruments could then be considered - although when the time is judged right, for this would, in all likelihood, be an ambitious and controversial endeavour.

III. ISSUES AN INTERNATIONAL REGIME WOULD NEED TO ADDRESS

A. Definition

10. One issue to be considered is how to delineate clearly, for the purposes of any broadly agreed protection regime, the groups of persons of concern who should benefit. Such delineation will require a careful choice of appropriate criteria to categorize persons and determine entitlements to protection.

11. Persons of concern to UNHCR are, according to the present agenda item, one criterion to be taken into account. Persons of concern are described in a paper¹ prepared by UNHCR for the Working Group on Solutions and Protection, and consist generally of five categories of people who are within the competence of the High Commissioner. These groups are (a) those who fall under the Statute/1951 Convention definition and thus are entitled to benefit from the full range of the Office's functions; (b) those who belong to a broader category but have been recognized by States as being entitled to both the protection and assistance of the Office; (c) those to whom the High Commissioner extends her "good offices", mainly but not exclusively to facilitate humanitarian assistance; (d) returning refugees, for whom the High Commissioner may provide reintegration assistance and a certain protection; and (e) non-refugee stateless persons whom UNHCR has a limited mandate to assist.

12. In order to limit the discussion, given that the issue of internally displaced persons is a separate item in the plan of work for the intersessional meetings of the Sub-Committee, the protection needs of the internally displaced will not be considered in this note. This note will also not discuss returnees, another of the categories of persons of concern to UNHCR, since consideration of their protection needs may more usefully be undertaken in the context of discussions on voluntary repatriation and on the internally displaced. Finally, this note will not discuss stateless persons, since the subject is on the agenda for the current meeting of the Sub-Committee (see EC/SCP/1992/CRP.4 of 1 April 1992).

13. Among the remaining groups, the persons of particular interest for the present discussion are in the second category. These are, broadly speaking, the persons covered by the extended refugee definitions used, respectively, in the 1969 OAU Convention and the 1984 Cartagena Declaration. It is not unusual to hear the OAU and Cartagena definitions spoken of interchangeably, given that they both relate, inter alia, to persons who have fled situations of foreign aggression or serious disturbances of public order. In fact, although these two definitions share many elements, they differ somewhat in their approach to the nature of the danger to the individual and its basis. With respect to the nature of the danger, the OAU definition requires only that a person is compelled to leave his or her country, while the Cartagena Declaration states that life, safety or freedom must be threatened. Concerning the origin of the threat, only two factors are shared in both instruments. The OAU Convention lists two factors which do not feature in the Cartagena Declaration, while the Declaration adds three factors not found in the Convention. The differences, which might be more apparent than real, are summarized for convenience in the columns below.

<u>OAU Convention</u>	<u>Cartagena Declaration</u>
External aggression	Foreign aggression
Occupation	***
Foreign domination	***
Events seriously disturbing the public order	Circumstances which have seriously disturbed the public order
***	Generalized violence
***	Internal conflicts
***	Massive violations of human rights

14. In other parts of the world, notably in Europe, North America and Australia, non-1951 Convention persons with particular protection needs are accorded a certain status carrying with it a basic protection. The criteria for this protection and its specific content are not uniform or, in a number of countries, precisely defined. Initially, the approach taken was to admit the persons, as asylum-seekers, into the refugee determination procedures, with a temporary leave to stay being granted after rejection of refugee status. Rising numbers have provided an impetus in some countries to the development of specific legislation on the issue, with the beneficiaries of protection being those who have left their countries for reasons "similar" to those in the 1951 Convention, other "weighty or humanitarian reasons" or where "exceptional hardship" would result from being required to return. More recently, some States have introduced legislation which allows the authorities to extend temporary protection to persons in need on a group rather than individual determination basis. One of the definitions used turns on whether there is an ongoing armed conflict within the State or part of the State which would pose a serious threat to the personal safety of the individuals concerned, or whether extraordinary and temporary conditions exist in the State which prevent its nationals from returning in safety.

15. Discussions in other fora, such as in meetings under the auspices of the Council of Europe, have generally recognized those fleeing danger, or displaced in large numbers due to armed conflicts or other serious disturbances, as deserving of some sort of international protection. So far, no attempt has been made to codify the various practices into a legal instrument. One early step in this direction was the adoption in 1976 by the Parliamentary Assembly of the Council of Europe of Recommendation 773. The Assembly recognized that persons not determined to be refugees may have valid reasons for not returning to their country and recommended the development of an appropriate regional instrument setting out basic protection standards. Other European bodies, such as the European Parliament, have also considered favourably that possibility.

16. A generalized threat to physical safety or security, external displacement and a temporary protection need are common elements in all these various and different approaches to defining the persons of concern. These would also, presumably, be the basis for delineating the category(ies) of beneficiaries of any new protection framework. As a subsidiary point, it would be useful to have one agreed term to describe persons who cross national borders in need of international protection, but who fall outside the 1951 Convention. They have been variously referred to as OAU/Cartagena-type refugees, externally or internationally displaced persons, persons fleeing danger, victims of violence, humanitarian cases, de facto refugees, B-status cases, and Temporary Protected Status cases.

B. The Content of Protection

17. The assistance needs of the persons in question are outside the scope of the present paper. The following paragraphs draw attention in general terms to what might be considered minimum protection requirements for this group, bearing in mind always that "protection" here is being used in a general sense, quite distinct from its particular content and application where 1951 Convention refugees are concerned.

18. The minimum content of temporary protection might be considered to be:

- (A) respect for the right to leave one's country, including the corollary of access to a country where safety may be sought;
- (B) respect for basic human rights, i.e. humane treatment, in the country of refuge; and
- (C) respect for the right not to be returned forcibly to danger.

19. As regards humane treatment of persons enjoying temporary protection in the country of refuge, Executive Committee Conclusion 22 (XXXII) is a useful guide to appropriate standards, even though these were specifically elaborated to deal with a mass influx of asylum-seekers temporarily admitted to a country pending arrangements for a durable solution. These standards, in

summary, are:

- (A) No penalty for illegal presence.
- (B) Respect for fundamental civil rights.
- (C) Food, shelter and other basic necessities of life.
- (D) No cruel, inhuman or degrading treatment.
- (E) No discrimination.
- (F) Considered as persons before the law.
- (G) Safe and secure location.
- (H) Respect for family unity.
- (I) Assistance in tracing relatives.
- (J) Protection of minors and unaccompanied children.
- (K) Provision for sending and receiving mail.
- (L) Permission for friends and family to assist.
- (M) Arrangements to register births, deaths, and marriages.
- (N) Necessary facilities for obtaining durable solution.
- (O) Permission to transfer assets.
- (P) Facilitation of voluntary repatriation.

20. Temporary protection also implies respect for the right to return to one's country, as the most appropriate solution in the longer term, including as necessary, through assistance for return, as soon as it is safe to do so. The standards for assessing when it is safe for persons to return to their country of origin need to be identified. Basic considerations here include the degree of remaining or residual threat, reception arrangements, reintegration prospects and possibilities for monitoring on an ongoing basis. Where the standards are well-defined and applied fairly, and the assistance for the return is adequate, the voluntariness or otherwise of return should not be an issue.

21. Finally, the right of 1951 Convention refugees to asylum from persecution must also be safeguarded. It is anticipated that a number of persons in almost any mass exodus following situations of generalized violence will have a well-founded fear of persecution. There is nothing in the Convention definition which would exclude its application to persons caught up in civil war or other situations of generalized violence. Refugees are refugees when they flee or remain outside a country for reasons pertinent to refugee status, whether these reasons arise in civil war type situations, in international armed conflict or in peace time. Possibilities for identifying these persons should, therefore, not be precluded, but rather specifically provided for.

C. Basic Undertakings

22. Assuming that the agreed content of temporary protection embraces minimum rights and responsibilities identified in the foregoing paragraphs, commitments would be necessary from a range of interested parties including the country of origin, the country of refuge and concerned States generally.

23. Within a framework of international solidarity and burden-sharing, the country of origin, assisted as necessary, could undertake in some manner to resolve the situation which has generated the exodus as soon as possible, to respect the right to return to one's own country by cooperating with the country of refuge to facilitate the prompt return of its citizens as soon as possible, including by providing assurances that people will not be punished in any way for having fled, and to contribute to sharing the financial burdens imposed by its citizens' resort to flight. The country of refuge would need at a minimum to undertake to respect the right to leave one's own country by not preventing people from escaping danger, to treat them humanely and justly, to provide food, shelter, and other survival assistance, to cooperate with the country of origin to facilitate their prompt return as soon as it is safe, to abide by the agreed standards for determining when and under what conditions it is safe enough to return people, and to refrain from forcibly returning them to danger.

24. Assurance of prompt financial support may be a key element in enabling States of refuge to allow access for the persons seeking entry or countries of origin to accommodate return. There could be the explicit recognition of the need for international assistance in this regard and an international institution could be designated to coordinate the relief effort and to ensure the safety of the people involved, including through participating in tripartite commissions to serve as an intermediary with all concerned parties and to represent the interests of the affected individuals.

IV. CONCLUSION

25. An international framework to ensure protection for persons not covered by the 1951 Convention needs careful consideration and may well be judged timely. It is not, though, in itself and alone, a sufficient response to this broad and complex problem. Rather it must be seen as part of an overall strategy to prevent and resolve problems involving different groups of persons in need of protection. It must be complemented by assurances of burden-sharing and international solidarity aimed at assisting the countries affected by large-scale influx to respond more effectively to the situation. Other facets of this overall strategy would include measures to attenuate or remove the causes giving rise to the outflow of persons and/or hindering their return. In this regard, there is a need for better early-warning and strengthened conflict resolution mechanisms, enhanced promotion and implementation of international humanitarian and human rights law, including through linking assistance programmes to guarantees of respect for human rights, development of the concept of state responsibility, as well as any necessary assistance measures aimed at facilitating return and reintegration.

26. Clearly the question of whether and what protection framework to devise is a complicated one, involving many issues which would benefit from active and detailed discussion. UNHCR's Executive Committee may wish to appoint a working group to study the subject and make recommendations for further action, or the Sub-Committee may decide to keep this item on its agenda for future consideration.

¹ See Population Movements Associated with the Search for Asylum and Refuge, EXCOM/WGSP/5 of 4 December 1990, pp. 5-10. Copies separately available.