

**“Protection Gaps in Europe? Persons fleeing the indiscriminate effects of generalized violence”**

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**Brussels, 18 January 2011**

**1. Introduction**

The second half of the 20<sup>th</sup> century saw an unparalleled number of armed conflicts. The International Institute of Higher Studies in Criminal Sciences (ISIS) recently found that between 1945 and 2008, some 313 conflicts took place, causing an estimated 92 – 101 million deaths, which is twice the number in World War I and II combined. Reading this study, I wonder how many displaced by these conflicts have been protected as refugees or through some other form of international protection and whether we -- the international community -- have lived up to our moral and legal responsibilities that were shaped not least by the painful experiences emerging from the Second World War.

It is fitting during the 60<sup>th</sup> anniversary year of the 1951 Refugee Convention to take stock of what we have achieved in protecting refugees and others in need of international protection and to examine remaining protection gaps. Addressing these protection gaps has been a recurring theme for UNHCR since the beginning and an inherent part of our mandate. In fact, the refugee definition in UNHCR's Statute was not limited by time or geography, unlike the refugee definition in the 1951 Convention. As a result, one of the major issues facing us has over time been the dichotomy between the institutional responsibilities conferred on UNHCR and the obligations accepted by states. To what extent are there gaps between the coverage of existing international instruments and the broader categories of people also in need of international protection? And to the extent that there are gaps, what can be done to fill them?

Today I wish to refer to one of these protection gaps, that of the applicability of the 1951 Convention and other international protection instruments to persons threatened by the indiscriminate effects of generalized violence.

Over the past sixty years, the 1951 Convention and its 1967 Protocol have afforded refugee protection to people fleeing a wide array of threats in their countries of origin. In fact, these global refugee instruments are more than just legal texts. They have served to crystallize and catalyze a grand humanitarian tradition that has

helped millions of vulnerable people at risk. As Professor James Hathaway, author of one of the seminal works about refugee law put it, the historical framework of the Convention makes clear that it was designed to protect persons within large groups whose fear of persecution is generalized, not merely those who are at risk of particularized violence.<sup>1</sup>

The Convention and Protocol equally reflect the recognition that refugee issues are of international concern, that they involve international responsibilities and make international cooperation a necessity. The Convention framework sets out a broad yet minimalist set of state responsibilities. Its fundamentals are unchallengeable and as essential today as they were in 1951. No one can contest that people should not be returned to danger, that they should not be discriminated against, that they should enjoy a minimum standard of treatment, such as freedom of movement, basic health, social and economic rights, and recognition of identity and legal status, which is particularly important in a world that is so reliant on legal identity.

The discrepancies between refugees recognized under the 1951 Convention on the one hand, and the broader group of persons in need of international protection on the other, arise in part from the way in which the definition of "refugee" in the 1951 Convention has been interpreted and applied by some states, and in part from limitations inherent in the instrument itself. Over time, these discrepancies have been reduced through the adoption of subsequent global and regional refugee instruments, international human rights and humanitarian law, as well as state practice and jurisprudence.

## **2. The changing nature of armed conflict**

Since 1945, we have not only seen an increase in the number of armed conflicts throughout the world, but there have also been major changes in the nature of such conflicts. Most significantly, civilians are playing an increasingly important role, both as participants in armed conflicts and as victims of their impact and consequences.

To give you an example: one theme affecting persons fleeing violent conflict that permeated the discussion on protection gaps in Europe during the eighties and nineties related to the diverging views that existed at the time on the 'non-state agent of persecution' issue. In UNHCR's understanding, persecution could also emanate from groups or sections of the population or even private individuals if persecutory acts are knowingly tolerated by the authorities, or, if the authorities refuse, or prove unable, to offer protection. There was, however, also a minority view according to which persecution stemming from non-state agents was not considered sufficient to meet the refugee criteria if there was no state complicity. This issue was resolved in the EU Qualification Directive in favour of the broader protection view, which recognized non-state agents of persecution.

Related to the non-state agent of persecution issue is arguably the single most important question for the European refugee protection system, that of persons fleeing the indiscriminate effects of generalized violence. The situation in Central

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<sup>1</sup> Hathaway, J.C., *The Law of Refugee Status* (Butterworths, 1991), p. 95.

Iraq, Central and Southern Somalia and certain parts of Afghanistan are obvious examples. In Afghanistan, for example, the fluid and volatile nature of conflict and the worsening security situation has led to an increased number of civilian casualties, more frequent security incidents and significant population displacement. In many parts this is compounded by sustained large-scale military operations and the struggle for territorial control.<sup>2</sup> Yet some countries have returned people to these situations after rejecting their international protection claims. Others have not. At the moment UNHCR is conducting research on the interpretation of Article 15(c) of the EU Qualification Directive. What we have found so far is an exceedingly narrow interpretation, one which would defy common sense in many cases.

The changing nature of conflict, and just as importantly, the changing nature of violence itself, are phenomena we need to grapple with. In many situations, where a seemingly perpetual cycle of violence has been part of the daily reality of people and communities for a long time, it is not only protracted (albeit emerging in different shapes and forms), but may also appear intractable in the absence of a broad-based, determined political resolve to put an end to it. This reality is sadly not always reflected in the protection provided to those fleeing such situations.

### **3. Fragile states - limits on the capacity of states to protect their citizens**

The transformation in the nature of violence is linked to a number of factors, not least the relationship between state fragility and violence. Shifts in power in fragile states are evident -- from the state to *de facto* authorities who exercise control over territory and people and who have a sense of responsibility towards them, to a myriad of private actors with no such sense of responsibility. The demobilization of paramilitary or guerrilla forces in different countries in Latin America, Asia or Africa, for example, has often led to the emergence of an array of violent criminal organizations that are not only involved in trafficking drugs, arms and people but also in the control of land for economic exploitation. These groups operate outside formal command structures, are dispersed, opportunistic and do not necessarily follow any particular objective. They may in some instances be linked to parts of the elite and are likely to act in collusion with local authorities. Their activities are more concentrated in border zones or areas where civilian state presence is weak. However, there is also a spill-over effect into the urban environment with intra-urban violence on the rise, resulting in further displacement.

Some of these actors have been able to take root in the space between the people and the state, acting in effect as a “state within the state”, offering a social order based on violence, fear and archaic forms of feudalism. As Peter Robb mentions in his book *Midnight in Sicily*, the mafia was outlawed but tolerated, secret but recognizable, criminal but upholding of order. He then continues: "The rural mafia had offered a social order based on violence and terror. It insinuated itself where ordinary human trust and solidarity had been worn away by poverty and exploitation. It was strong in proportion to the weakness of the state [and] parasitic

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<sup>2</sup> UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December 2010, HCR/EG/AFG/10/04, available at: <http://www.unhcr.org/refworld/docid/4d0b55c92.html>

of established political power."<sup>3</sup> This description holds true of many actors responsible for spawning violence throughout the world today. It is this interconnectedness between violence perpetrated by non-state actors and lack of state capabilities for protection that creates the need for international protection under certain circumstances, especially when no internal flight alternative is available.

The essential functions of a state are to provide a safe and secure environment, to guarantee the functioning of efficient institutions and basic services, including the safeguarding of human rights and the rule of law, and a capable administration. If a state cannot deliver or can only partially deliver its core functions -- for instance, by not being able to control all its territory, or because of weak or fragile state structures, and as a result is either unable or unwilling to exercise effectively its core *raison d'être* in part or the whole of its territory -- a potential need for international protection may arise. Situations of general violence, irrespective of their source, usually engender deteriorating national protection systems, with visibly damaging impacts on social systems and national governance structures. As a result, the fear of being harmed by indiscriminate violence, when such violence is generalized, is usually much broader and is embedded in a fundamental dysfunction of a social, economic and even political system.

In an interesting article about the role of the state in *The Economist's* "The World in 2011", it was noted that of 163 states covered by an index of state capability devised by the Economist Intelligence Unit (EIU), only 34 are classified as highly capable. State capabilities are rated as moderate in 38 countries while the majority of countries have either weak (38) or very weak (58) capabilities. The Economist's indicators used collectively to capture a state's ability to deliver its essential functions are intriguing and include: its recent history of stability, the security of its citizens, the level of corruption, size of the grey economy, rule of law, the quality of its bureaucracy, whether the government controls all its territory, the extent of foreign influence, the degree of ethnic fragmentation, social cohesion and trust in public institutions. I think these criteria are useful in the current context. Paul Collier's *The Conflict Trap* also speaks of the failure of development as a key indicator of cycles of conflict.<sup>4</sup>

#### **4. The meaning of the indiscriminate effects of generalized violence**

Clearly, these issues are not only a challenge to international law and international relations; but they also require further reflection in the legal context of displacement. It would be useful, in my view, to dedicate some time to this emerging question of the changing nature of conflict and violence and how it impacts on refugee protection. So what do we mean by "generalized violence", or the "indiscriminate effects of generalized violence"?

Apart from the well-known examples of situations of armed conflict or generalized violence, there are other, perhaps less visible situations where violence generates international protection needs. While violence may often seem on the surface to be

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<sup>3</sup> Robb, P. *Midnight in Sicily* (Panther, 1999), p. 36.

<sup>4</sup> P. Collier et al, *Breaking the Conflict Trap: Civil War and Development Policy* (2003).

general in nature -- general in the sense of being widespread, large-scale and indiscriminate -- a deeper excavation of the socio-economic-political context may show that the situation in fact involves many incidences of specific targeting of particular individuals or groups. Persons may be targeted on racial, ethnic, religious, political or social lines, or because they are perceived as opposing the groups in control, or simply for being an obstacle or hindrance by their presence. Violence is often not undertaken for its own sake, but has a deeper underlying motivation or purpose. This purpose or motive may be political in the sense of an attempt to destabilize or undermine the state order and establish an alternative order. The current crisis in Cote d'Ivoire, and other situations including in some parts of Somalia, Afghanistan and Iraq could be counted as examples of this. Other reasons may be economic in the sense of attempting to control valuable resources; they are in any case likely to involve many factors. Specific individuals and groups may be targeted within a context of broader violence, including gratuitous or opportunistic violence. In addition, persons who have no stake in an armed conflict or socio-economic-political order may suffer the consequences of targeted action. Is it possible to distinguish who is more in need of international protection? Is it worthwhile to do so, and if so, on what basis?

## **5. The primacy of the Geneva Convention**

The 1951 Convention and 1967 Protocol continue to provide a solid legal basis for the protection of refugees escaping from oppressive regimes, as well as groups fleeing the turmoil that often accompanies changes in undemocratic systems of government or situations of violence.

As mentioned earlier, the drafters of the Convention, including those pressing for a comprehensive coverage of both present and future refugees, assumed that the refugee concept based on a well-founded fear of persecution was adequate to cover those in need of international protection owing to a "rupture" with their country of origin. The refugee definition they crafted was meant to distinguish persons who could not obtain the protection of their country because of the situation there, from others who did not require international protection. There is no indication of any intention to single out a special category of refugees as more deserving than others. In fact, the idea was to promote a single refugee concept covering all those in need of international protection.

Today, as internal conflicts involving oppression on ethnic, religious, political or other grounds are more frequent and generate displacement, the continuing relevance of the reasons for refugee status contained in the 1951 Convention definition is evident, albeit frequently misapplied. In armed conflict or violent situations, whole communities may be exposed to persecution for 1951 Convention reasons, and there is no requirement that an individual suffers a form or degree of harm which is different to others with the same profile. Furthermore, many ordinary civilians may be at risk of harm from bombs, shelling, suicide attacks or improvised explosive devices. These methods of violence may be used in areas where civilians of specific ethnic or political profiles reside or gather, and for this reason, come within the scope of the 1951 Convention.

Most states concur with UNHCR that the Convention and Protocol apply to refugees fleeing civil wars, who have reason to fear being victimized because of their religion, ethnic origin or imputed political opinion. There is now also broad agreement that persecution within the meaning of the 1951 Convention may emanate not only from the state but also from *de facto* authorities or from groups, even individuals, in situations where the authorities are either unwilling or unable in practice to provide the persons concerned with protection that would enable them safely to remain within, or to return to, their country.

Some asylum states maintain, however, that persons fleeing armed conflict or large-scale violence cannot qualify as refugees under the 1951 Convention unless they are "singled out" for treatment different from that experienced by other members of their community. As a result, refugees fleeing ethnic or religious persecution by non-state actors in the midst of a civil war in which it is impossible for them to find safety elsewhere in their country have been rejected as refugees under the Convention in certain countries. However, once admitted, they are often authorized to remain on humanitarian grounds. In other countries, "war refugees" in identical circumstances have been accepted as 1951 Convention refugees.

The problem does not generally lie in the text or the objectives of the Convention but rather in the machinery and processes in place to implement it - or their absence. The challenge is therefore how to strengthen its application in a uniform and inclusive manner.

## **6. The need to complement the global refugee instruments**

It seems clear from the records of the drafting and from the historical context that the Convention's provisions were intended to be given an interpretation consistent with the generous spirit in which they were conceived. For UNHCR, it has always been understood that the refugee definition was meant to have an inclusive meaning, in accordance with its fundamental objective of providing international protection to all who need it. The General Assembly entrusted UNHCR with providing international protection to, and seeking durable solutions for, all refugees, whether formally recognized or not, who fall within the Office's mandate, and this mandate is not restricted by international obligations assumed by a particular state. This background is, in our view, important when discussing persons in need of international protection, including beneficiaries of subsidiary or complementary forms of protection.

In terms of corresponding treaty obligations for the so-called wider refugee category, regional refugee instruments have great value in defining standards for the treatment of all people in need of international protection, taking into account the specificities of the various regions, thus complementing the global refugee instruments. The 1969 OAU Refugee Convention has placed the international protection of refugees, in the broad sense, on a firm legal footing in Africa. The Convention incorporates the 1951 Convention definition and extends it, for instance, to persons fleeing events seriously disturbing public order. Despite its non-binding

character, the 1984 Cartagena Declaration has contributed to the development of customary regional norms for the protection of refugees fleeing conflicts and violence in Latin America. In the context of the Asian-African Legal Consultative Organization, the adoption of a revised consolidated text of the Bangkok Principles on the Status and Treatment of Refugees in New Delhi on 24 June 2001 has been an important step forward in reaching a common understanding of refugee protection in parts of the world where accession to the 1951 Convention by important host countries has not been forthcoming.

In Europe, the European Court of Human Rights has indicated that a situation of general violence in a person's country of origin could be considered of such intensity that any removal to that country would breach Article 3 ECHR. The Court limited this possibility to the most extreme cases of violence.<sup>5</sup> Also, it has made clear that belonging to a minority group which is at risk of treatment contrary to Article 3 is sufficient to enjoy protection under the ECHR. There is no need to demonstrate further distinguishing features.<sup>6</sup>

In the EU, with the adoption of Article 15(c) of the Qualification Directive, we now also have recognition -- in a legally binding, codified form -- that a protection need exists in the case of people threatened by indiscriminate violence. Nonetheless, Article 15(c) is couched in the convoluted language of political compromise and limited to armed conflict situations. The wording appears to create separate and multiple 'hurdles' which an application for protection on this ground must overcome in order to qualify.

UNHCR's comparative research concerning the application of Article 15(c) has so far indicated an extremely high threshold of indiscriminate violence and identified disparities in the measures and criteria which are used to assess the nature and intensity of violence, lack of clarity on the interpretation of various terms, as well as a reluctance to declare that conflict zones engage Article 15(c) unless the courts so determine. State practice varies significantly in this area and has -- in some states -- rendered this provision an empty shell in protection terms. Disagreement on the need for protection in some country situations seems to dominate, rather than a much needed common understanding of the nature and substance of this type of protection.

The boundaries of Article 15(c) are still to be defined. In the *Elgafaji* case, the Court of Justice of the European Union held that Article 15(c) is applicable in a context of indiscriminate violence without the applicant having to demonstrate that he or she is specifically targeted by such violence.<sup>7</sup>

However, important questions of interpretation remain after the Court's ruling. In the absence of specific criteria to assess the exceptional circumstances under which a situation of indiscriminate violence warrants the grant of subsidiary protection, Member States continue to adopt differing approaches. The added value of Article

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<sup>5</sup> ECtHR, *NA v United Kingdom*, No. 25904/07, 17 July 2008, para. 115.

<sup>6</sup> ECtHR, *Salah Sheekh v Netherlands*, No. 1948/04, 11 January 2007.

<sup>7</sup> ECJ, *Elgafaji*, 17 February 2009, Case C-465/07, para. 43.

15(c) compared to Article 3 ECHR remains an issue. Member States' domestic courts may in future seek the EU Court's assistance to clarify other aspects of this provision, such as the notions of "civilian", "internal protection alternative" or "armed conflict" that has a direct influence on the scope of protection which will be afforded.

It is a concern for UNHCR that with the emergence of these supplementary legal categories, some refugees who would otherwise fulfill the criteria of the 1951 Convention are being instead subsumed under the broader category. An even greater concern is that some persons we would consider refugees do not receive any protection at all.

## **7. Conclusion**

In conclusion, UNHCR's starting points are as follows:

First, there are those who, in UNHCR's view, meet the Convention criteria but who, because of varying interpretations, are not recognized by states as refugees under the 1951 Convention. For instance, those who fear gender-related persecution or persecution by non-state agents or, as mentioned above, those who flee persecution in areas of on-going conflict or general violence may not, in some states, be determined to be refugees. It is our view that a proper application of the 1951 Convention and the 1967 Protocol is itself key in securing international protection to these categories of persons. Limiting such persons to complementary forms of protection is, in UNHCR's view, not appropriate.

Second, there are those who might not meet the Convention criteria, for instance those who flee the indiscriminate effects of violence or of public disorder without there being a linkage to any of the Convention grounds -- this was the case when Serbia was bombed by NATO airstrikes in 1999. In such cases, complementary forms of protection are indeed a pragmatic way of responding to identified protection needs, based in part on human rights law and humanitarian considerations. For those who need some form of protection but where we agree that the 1951 Convention may not apply, a coherent protective approach would clearly be desirable, and indeed a further step towards filling an important protection gap.

International -- and EU -- law are not static, but living phenomena. In the forced displacement context, the aim must be to craft a predictable multilateral response to people at risk and in need of international protection. I look forward to a lively debate on how we can make this a reality.