

Flight in times of war

by

WALTER KÄLIN

Armed conflict always has been and still is the most important cause of flight. The 50th anniversary of the Refugee Convention provides an appropriate opportunity for re-examining the relevance of international refugee law for persons fleeing armed conflict and its multiple conceptual and legal relationships with international humanitarian law.

The Convention relating to the Status of Refugees was adopted on 28 July 1951 as an instrument aimed at solving the residual problems of refugees in Europe whose flight was caused by the events of World War II.¹ Today, it is internal rather than international armed conflict that forces human beings all over the world to abandon their homes and flee the dangers of war. For a long time, though, the Refugee Convention found little application to situations of flight caused by armed conflict but was instead mainly used to protect victims fleeing the often very stable totalitarian and authoritarian regimes in Eastern Europe and the south. It was thought that the protection of human beings in times of war should be left to international humanitarian law. However, international humanitarian law limits its protection to refugees who are on the territory of one of the parties to an international conflict. This limitation has resulted in considerable challenges to the refugee protection regime as, traditionally, refugees fleeing the perils of war to third States were not regarded as persons hav-

WALTER KÄLIN is Professor of International and Constitutional Law at the University of Bern (Switzerland). He has written extensively on refugee law and was a consultant to UNHCR on several occasions.

ing “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”, i.e. not as refugees as defined by the Refugee Convention.²

Another challenge is that the majority of persons forced to leave their habitual residences as a consequence of armed conflict do not become refugees, as they do not flee across an international border, but remain in their country as internally displaced persons. They are a part of the civilian population, but might have specific protection needs.

How is present international law dealing with these different situations and problems? To answer this question, consideration will first be given to the various situations in which civilian victims of armed conflict have to flee (part 1). The article then focuses on international refugee law and shows how, in the past decade, this branch of international law has become more relevant for the protection of persons fleeing across international borders and seeking asylum abroad (part 2). This is followed by a look at the law relating to the protection of internally displaced persons (part 3). In closing, an answer is given to the question, whether and to what extent present international law has created a comprehensive and coherent protection regime for persons fleeing the perils of armed conflict.

¹ According to its Art. 1A, para. 2, the 1951 Convention on the Status of Refugees was originally limited to the protection of persons who fled as a “result of events occurring before 1 January 1951”, and States had, according to Art. 1B, para. 1(a), the possibility to declare that this phrase should be under-

stood as “events occurring in Europe before 1 January 1951”. The temporal limitation was removed by the 1967 Protocol relating to the Status of Refugees, and only five States still retain the geographical limitation.

² Art. 1A, para. 2. For a discussion of this notion of refugee see below.

Relevant situations

Refugees under the control of a party to a conflict

In international humanitarian law, provisions on refugees can be found in the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and in Additional Protocol I.³ This means that humanitarian law is concerned only with a limited category of refugees, i.e. refugees who are under the control of a party to an international armed conflict. Such control exists in three situations: (1) nationals of an enemy State have been admitted as refugees to the territory of that party before the conflict starts or seek refuge on its territory during the war; (2) nationals of a neutral country have been admitted as refugees to the territory of that party before or during the conflict; and (3) after fleeing to an enemy State, nationals of that party come under its control again when it occupies all or part of the enemy State's territory.

Under the Fourth Geneva Convention, nationals of a belligerent State who seek refuge on the territory of an enemy State are protected as aliens on the territory of a party to the conflict (Articles 35 to 46). If such persons no longer enjoy the protection of their home country, it is prohibited to treat them as enemy aliens solely because of their national origin (Article 44). Article 73 of Additional Protocol I extends the prohibition of adverse distinction to all persons who, before the beginning of the hostilities, were regarded as refugees or stateless persons under relevant international or national instruments and designates them as protected persons. The principle of *non-refoulement*, the very cornerstone of refugee protection, is addressed in Article 45, paragraph 4, of the Fourth Convention, stipulating that: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. —

See Jean-Philippe Lavoyer, "Refugees and internally displaced persons: International humanitarian law and the role of the ICRC", *IRRC*, No. 305, March-April 1995, pp. 162-180.

Refugee nationals of a neutral State who find themselves on the territory of a belligerent State with which no diplomatic relations exist belong to the category of protected persons as defined by the Fourth Convention, and this protection is extended by Protocol I to refugees even if such relations do exist.⁴

Finally, refugees who, during an occupation of enemy territory, fall into the power of their country of origin “shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace”.⁵

Apart from the prohibitions of *refoulement*, international humanitarian law does not contain special guarantees for refugees but makes sure that, as protected persons, they are treated like other civilians. In contrast, the Refugee Convention creates, as will be set forth below, specific status rights for refugees. To the extent that enemy nationals or nationals of a neutral State are refugees in the sense of the 1951 Convention, international humanitarian law and refugee law complement each other, as refugees benefit from the guarantees of the Refugee Convention even in times of war. It is true that “in time of war or other grave and exceptional circumstances” a State party to the Refugee Convention may take “measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security”, but such measures must be provisional and must be limited to what is really necessary.⁶ The provision allows, e.g., the internment of refugees prior to their status determination,⁷ but full derogation of the Convention during an armed conflict is prohibited.⁸

⁴ See Art. 4, para. 2, Fourth Convention, and Art. 73, Additional Protocol I.

⁵ Art. 70, para. 2, Fourth Convention.

⁶ Refugee Convention, Art. 9.

⁷ Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents*

and Interpretation, A Commentary, Institute of Jewish Affairs, New York, 1953, p. 95.

⁸ Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, UNHCR, Geneva, 1963, p. 42.

Of particular relevance for refugees who are nationals of an enemy State is Article 8 of the Refugee Convention stating that “[w]ith regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality”. This provision clearly reflects Article 44 of the Fourth Geneva Convention.

Refugees on the territory of a State not party to a conflict

As mentioned above, international humanitarian law does not apply to refugees who are citizens of a belligerent State and flee to a State that is not party to the conflict they seek to escape. International humanitarian law furthermore does not specifically address the plight of those who escape internal armed conflicts by fleeing abroad. It is in these two situations that the Refugee Convention becomes particularly important.

Who is protected by the Refugee Convention and what are its main guarantees? The Convention defines refugees as persons who have left their country of origin and are in need of international protection because they have or will become victims of persecution in that country. The disregard for their most fundamental human rights by the country of origin, the involuntary nature of their departure and the fact that most often they arrive in the country of refuge without its prior permission makes them an especially vulnerable category of aliens. The Refugee Convention responds to their needs by granting them a special status that not only protects them against discrimination and against forcible return to the country of persecution (principle of *non-refoulement*), but also provides them with a series of guarantees necessary to start a meaningful new life and relating, e.g., to personal status, property, access to courts, employment, housing, education, social security, welfare or travel documents. In some of these domains, States must ensure that refugees lawfully in the country of asylum receive treatment at least equal to that which is granted to aliens generally in the same circumstances (e.g. property rights, right of

association, housing);⁹ in other domains, such refugees have the right to be treated in the same way as nationals (e.g. with regard to rationing, elementary education, or social security).¹⁰

This privileged status, however, is not accorded to all persons who have fled abroad, but only to those who are refugees as defined by Article 1A, paragraph 2, of the 1951 Refugee Convention. According to this article,

“the term “refugee” shall apply to any person who:

...

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

This definition contains several important elements:¹¹

- *Well-founded fear*: It is not necessary for the refugee to have already become a victim of persecution. Fear of future persecution is sufficient if such fear is not just subjective but has an objective basis in the facts of the case.
- *Persecution*: It usually takes the form of human rights abuse or similar harm, but must reach a certain level of seriousness in order to be regarded as relevant.
- *Convention grounds*: What distinguishes refugees from other victims of human rights violations who have left their country is the fact that they are persecuted “for reasons of race, religion, nationality, membership of a particular social group or political opinion”. Whereas the grounds of race, religion and political opinion do not

⁹ Refugee Convention, Arts 13, 15 and 21.

¹⁰ Refugee Convention, Arts 20, 22 and 24.

¹¹ For a detailed analysis of this provision see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*,

Geneva, 1992 (first edition 1979). See also James Hathaway, *The Law of Refugee Status*, Toronto, 1991, pp. 29-188, and Guy Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford, 1996, pp. 40 -79.

usually give rise to any particular problems, there is considerable debate today about the meaning of “social group”. In contrast, there is widespread consensus that “nationality” not only denotes citizenship but also ethnicity.

- *Outside the country of nationality or habitual residence:* Flight is not a necessary element of the refugee definition. Someone who has left his country without having been persecuted at that time becomes a refugee *sur place* when relevant circumstances change in a way that would make him a victim of persecution were he then to return to that country.
- *Unable or unwilling to avail himself of State protection:* This last element makes sure that refugee status is granted only if protection by the country of origin is not available to the person concerned or if he, in the light of what has happened or will happen to him, cannot be reasonably expected to ask for such protection.

These rather complex requirements show that not everyone fleeing the dangers of armed conflict will be regarded as a refugee in the sense of the 1951 Refugee Convention. In fact, courts in many countries held for a long time that refugee status could not be granted to those fleeing armed conflict. At the same time, it is obvious that even in times of war some persons might be persecuted for Convention reasons. The 1990s in particular have been marked by an increased use of armed conflict, directed against particular groups of persons, as an instrument of persecution in the sense of the Refugee Convention.

Persons displaced within the territory of their own country

As already mentioned, most of those who have to flee the dangers of international or internal armed conflict remain within their own countries and thus become internally displaced persons. International humanitarian law contains a few provisions that specifically mention the problem of internal displacement.¹² Especially important are those provisions that prohibit the deportation of

¹² See Lavoyer, *op. cit.* (note 3), pp. 171 ff.

civilians or stress that forced displacement of the civilian populations is not permissible unless the security of the persons involved or imperative military reasons so demand.¹³ Despite the limited number of such legal norms, humanitarian law is of paramount importance for the internally displaced, as they are part of the civilian population protected during international armed conflicts by the Fourth Geneva Convention and significant parts of Protocol I.¹⁴ During internal armed conflicts Article 3 common to the 1949 Geneva Convention, as well as the fundamental guarantees of Article 4 and the more specific provisions of Articles 13–18 of Additional Protocol II,¹⁵ are fully applicable to internally displaced persons.

Whereas such persons are almost fully protected during international armed conflicts, the law on internal armed conflicts is much more limited in addressing their protection needs. This is particularly true if a conflict is covered by common Article 3 only but does not reach the threshold of application of Protocol II, or if a country has not ratified the latter instrument. In such situations international human rights law becomes important, for it also affords protection for internally displaced persons who flee situations of tension, violence and disturbances characterized by widespread human rights violations but not amounting to a non-international armed conflict. It remains applicable in all those situations insofar as the State concerned has not legitimately derogated from relevant human rights conventions or that specific guarantees are non-derogable. Admittedly, like international humanitarian law, human rights law does not contain specific guarantees for internally displaced persons, but they are nonetheless fully entitled to invoke all relevant guarantees.

This is of paramount importance. Even though the factual situation of internally displaced persons is often similar to that of

¹³ Fourth Convention, Arts 49 and 147; Additional Protocol I, Arts 51, para. 7; 78, para. 1; and 85, para. 4; and Additional Protocol II, Arts 4, para. 3(e) and 17.

¹⁴ See in particular Protocol I, Part IV, Arts 48–79.

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

refugees, from a legal point of view they are not refugees. Although internally displaced persons have departed from their homes, unlike refugees they have not left the country whose citizens they normally are. As such, they remain entitled to enjoy the full range of human rights as well as those guarantees of international humanitarian law which are applicable in a given situation. This is why, in general, they should not be treated like refugees, who are very often treated in accordance with the lower standards applicable to aliens legally present in the country of refuge.

International refugee law and victims of armed conflict

As mentioned above, a traditional understanding of the relationship between international humanitarian law and refugee law maintains that refugee law was not really made to address the plight of those who had to flee the dangers of war and seek refuge abroad. At the same time, international humanitarian law does not provide any protection for this large category of persons in need of international protection. How has refugee law addressed this potential protection gap? The answers have not been universal and uniform but largely regional.

Broad refugee definitions in Africa and Latin America

Ever since the struggles for independence from colonial powers, the refugee situations in Africa have consisted predominantly of large flows of refugees crossing borders while escaping war, civil war and extensive violence. Because of their sheer numbers, it would have been impossible to distinguish, on the basis of a case-by-case determination, between those fleeing persecution for one of the reasons set forth in the Convention and those escaping the general dangers of war. Taking into account the obvious protection and assistance needs of all those flooding in, such a distinction would also have been highly artificial. The 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa, which was adopted to deal with large numbers of refugees in an adequate manner, found a solution by broadening the definition of a refugee. In addition to refugees with a

well-founded fear of political and similar persecution,¹⁶ Article I designates as a refugee

“every person who, owing to external aggression, occupation, foreign domination or events seriously disrupting public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of residence in order to seek refuge in another place outside his country of origin or nationality.”¹⁷

This definition facilitates the determination of refugees on a group basis and thus departs from the individualistic approach of the 1951 Refugee Convention. Article II on Asylum and Article V on Voluntary Repatriation make clear that, normally, countries of refuge should grant asylum or temporary residence until voluntary repatriation becomes possible.¹⁸ This concept has enabled a flexible solution to be found for many of the largest refugee crises of the past decades.

On the American continent, the refugee crisis of the 1980s in Central America reinforced the idea that a wider refugee definition was needed and that those refugees should be granted asylum until voluntary repatriation became possible. This is the approach underlying the 1984 Cartagena Declaration on Refugees¹⁹ which enlarged the refugee definition following the model of the OAU Convention.²⁰ The declaration also reiterated the binding character of the principle of *non-refoulement*.

¹⁶ Art. I, para. 1, repeats the refugee definition of Article 1A, para. 2.

¹⁷ Art. I, para. 2, 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa.

¹⁸ See, e.g. Lawyers Committee For Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention*, New York, 1995, p. 30.

¹⁹ *Cartagena Declaration on Refugees*, adopted at a colloquium entitled “Coloquio sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Huma-

nitarios” held at Cartagena, Colombia, from 19-22 November 1984.

²⁰ Art. 3 of the Declaration recommends as definition of a refugee “one which, in addition to containing the elements of the Refugee Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.

Temporary protection in Europe²¹

European countries were not ready to fill the gap between the protection guaranteed to refugees under the Refugee Convention and the larger group of persons who are forced to flee their country owing to the dangers of armed conflict or systematic and widespread human rights violations and who may not fulfil the requirements of that Convention. For a long time such *de facto* refugees, as they were then called, were denied asylum but in many countries received a so-called B-status allowing them to remain as rejected asylum-seekers until their safe return became possible.

When large numbers of asylum-seekers arrived after armed conflicts broke out on the territory of the former Yugoslavia in the early 1990s, it soon became apparent that this approach would not work. This gave rise to the notion of temporary protection. The concept was presented by the UN High Commissioner for Refugees in 1992 as an element of the Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia in order to cope with the problems caused by the flight of hundreds of thousands from armed conflict, genocide, "ethnic cleansing" and other serious and systematic human rights violations. As one author succinctly put it:

"The idea was to provide protection against *refoulement* and respect for fundamental human rights while awaiting return in safety and dignity following a political solution of the conflict in former Yugoslavia. The other intention was to avoid over-

²¹ The following is based on Walter Kälin, *Towards a Concept of Temporary Protection*, Study on behalf of UNHCR, Division of International Protection, 12 November 1996. See also Walter Kälin, *Interim Report on Refugee Procedures*, International Law

Association, Report of the 67th Conference, Helsinki, 1996, London, 1996, pp. 116-139; *ibid.*, *Interim Report on Temporary Protection*, International Law Association, Report of the 68th Conference, Taipei, 1998, London, 1998, pp. 407-426.

whelming the national refugee status procedures already considered as overburdened".²²

Some European States responded favourably to the High Commissioner's call and around 700,000 persons from Bosnia and Herzegovina and from Croatia thus found refuge in Western Europe,²³ in most cases without being formally granted refugee status. For the majority of these States, "temporary" meant that protection was limited in time until return became possible, and large numbers of refugees returned or were repatriated after the conflicts in Croatia and Bosnia ended. Temporary protection again became an issue during the 1999 Kosovo crisis, and was widely granted on those same terms by the main countries of refuge.

In both situations, temporary protection was applied on the basis of either a political decision by the governments concerned or relevant domestic legislation. An international instrument on temporary protection of a binding nature did not exist during the relevant period, but Member States of the European Union could base their policies on a 1993 Resolution on certain common guidelines as regards the admission of particularly vulnerable persons from the former Yugoslavia.²⁴ Later, the EU Commission started to work on a Directive on temporary protection. After lengthy preparations the

²² Donatella Luca, "Questioning temporary protection", *International Journal of Refugee Law*, Vol. 6, 1994, p. 535. On temporary protection, see also Morten Kjaerum, "Temporary protection in Europe in the 1990s", *ibid.*, Vol. 6, 1994, p. 444; Reinhard Marx, "Temporary protection — Refugees from former Yugoslavia: International protection or solution-oriented approach?", European Council on Refugees and Exiles, June 1994; Joanne Thornburn, "Transcending boundaries: Temporary protection and burden-sharing in Europe", *International Journal of Refugee Law*, Vol. 7, 1995, p. 459; Karoline Kerber, "Temporary protection in the European Union: A chronology", *Georgetown Immigration Law Journal*, Vol. 14, (1999, p. 1, pp. 39-50).

²³ Report of the Sub-Committee of the Whole on International Protection, UN Doc. A/AC.96/858, 17 October 1995, para. 5.

²⁴ Adopted by the Meeting of the Ministers of the Member States of the European Communities responsible for immigration in the Member States of the European Communities, Copenhagen, 1 and 2 June 1993. Reprinted with comments by Elspeth Guild, *The Developing Immigration and Asylum Policies of the European Union*, Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions, The Hague/London/Boston, 1996, pp. 293-309.

Commission, in March 2000, presented a proposal for such a directive that also addressed issues of burden-sharing in mass-influx situations.²⁵

The purpose of the Directive is “to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin ...” (Article 1). According to the proposal, the EU Council, in the event of a mass influx, would take a decision by a qualified majority vote to grant temporary protection to a specific group of persons for one year. Such protection could be extended for a maximum of another year. Asylum procedures would be suspended during that period, unless a person requested an individual determination of his/her refugee status. Beneficiaries would be given a residence permit during the duration of temporary protection, have access to the employment market and to suitable accommodation, medical services and education. They would also have a right to family reunification. Temporary protection would be ended when “the situation in the country of origin is such as to permit the long-term, safe and dignified return, in accordance with Article 33 of the Geneva [Refugee] Convention and the European Convention on Human Rights” (Article 6). If such return was not possible after two years had elapsed, States would start normal asylum procedures.²⁶

Broadening the interpretation of Article 1A(2) of the Refugee Convention²⁷

Critiques of temporary protection maintain that it excludes genuine refugees from full enjoyment of the guarantees provided by the Refugee Convention. At the same time, it is still a moot

²⁵ Proposal for a Council Directive on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 24 May 2000, Doc. 500PC0303.

²⁶ At the time of writing this article, the Directive had not been adopted but a political

consensus had been reached to adopt it soon.

²⁷ For details and references to case law, see Walter Kälin, “Refugees and civil wars: Only a matter of interpretation?”, *International Journal of Refugee Law*, Vol. 3, 1991, and “Non-State agents of persecution and the inability of the State to protect”, *Georgetown Immigration Law Journal*, No. 3, Vol. 15, 2001, pp. 415-431.

question as to whether and under what conditions persons fleeing armed conflict might qualify as refugees under its Article 1A, paragraph 2. It is not contested that among those coming from a war-torn country, Convention refugees may be found (e.g. persons persecuted for political opinions not related to the conflict). However, under what circumstances could measures taken by the parties to the conflict amount to relevant persecution? It is sometimes held that the existence of war or civil war as such does not constitute persecution. Usually, one of the following three reasons is given:

- Insofar as someone becomes the victim of military and security operations of the government against an external or internal enemy, he or she, even if singled out, is not persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, as the State is only exercising its legitimate right to defend itself against an external attacker or internal insurgent.
- In order to be considered as persecuted, a person must not just experience the plight suffered by everyone in a country. He or she must become an individual target of persecutory measures to be entitled to refugee status, not just an accidental victim of military actions directed against the armed forces of the enemy. Therefore, persons fleeing war and civil war do not meet the requirement of “differential treatment” or of being “singled out for persecution”.
- Insofar as the victim fears persecution by non-State actors (insurgents, separatist groups, etc.), some countries, most notably Germany, Switzerland and France, maintain that relevant persecution must be attributable to the State; therefore, refugee status is not granted if the State is unable to protect the victim against persecution by non-State actors.

All three arguments raise complex questions of refugee law that cannot be discussed here in detail. Suffice it to say that less restrictive interpretations of Article 1A, paragraph 2, of the Refugee Convention are not only possible but also warranted. Thus, military or security operations directed against a particular group must be regarded as racially, religiously, politically, etc., motivated if their target is a group of persons *hors de combat* who share certain racial, religious or political characteristics and if the measures taken are

disproportionate, e.g. because they are not justified by compelling reasons or are much harsher in the case of that particular group than they would be in the case of persons not regarded as (potential) enemies by the State. In such situations, victims are considered as being singled out for persecution when they become targets of unjustified military and security operations because they are regarded as untrustworthy elements or allies of the enemy who deserve intimidation and punishment. Finally, with the exception of the countries mentioned above, the large majority of countries recognize today that persecution by non-State agents is relevant if all other necessary requirements are met.

Protection of internally displaced persons: The Guiding Principles on Internal Displacement

Background

Awareness of the plight and growing number of internally displaced persons all over the world started to grow within the international community in the early 1990s. The UN Commission on Human Rights decided in 1992 to study the question of internal displacement, and a mandate was given to Dr Francis Deng, Representative of the Secretary-General on internally displaced persons. As part of his activities, the Representative submitted a comprehensive *Compilation and Analysis of Legal Norms*²⁸ pertaining to internally displaced persons to the Commission on Human Rights in 1996. The conclusion reached in this study was that there are only minor gaps in present international humanitarian and human rights law applicable to internally displaced persons. At the same time it made clear how complex and complicated the application of these provisions is in an actual situation of displacement.

The Commission welcomed the *Compilation and Analysis of Legal Norms* and requested the Representative to develop a normative framework to enhance the protection of internally displaced persons. In response to that request, a group of independent experts prepared the *Guiding Principles on Internal Displacement*.

²⁸ UN Doc. E/CN.4/1996/52/Add. 2.

Principles on Internal Displacement with a view to restating the relevant law in a short and “user-friendly” form.²⁹ These Guiding Principles were submitted to the Commission on Human Rights in 1998. Since then, they have been widely distributed.

Content

The Guiding Principles define internally displaced persons as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”. This description of an internally displaced person highlights two elements: (1) the coercive or otherwise involuntary character of that person’s movement, and (2) the fact that such movement takes place within national borders. Even though most displacement occurs during armed conflict, the Guiding Principles thus cover other situations too.

The document states in Section I, on *general principles*, that the Guiding Principles “shall be observed by all authorities, groups and persons irrespective of their legal status” (Principle 2). What does this mean? According to a traditional view, human rights provisions, apart from a few exceptions, impose direct obligations on States and State agents only. Conversely, international humanitarian law applicable in situations of non-international armed conflict³⁰ binds all parties to the conflict, including non-State actors. Individuals are indirectly bound by human rights and humanitarian law insofar as they can be prosecuted for violations amounting to war crimes, genocide or crimes against humanity. Principle 2 reflects this present state of international law, but at the same time provides guidelines for anyone dealing with

²⁹ UN Doc E/CN.4/1998/53/Add. 2. — See Jean-Philippe Lavoyer, “Guiding Principles on Internal Displacement”, *IRRC*, No. 324, September 1998, pp. 467-480; Robert K. Goldman, “Codification of international rules on internally displaced persons”, *ibid.*,

pp. 463-466; Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, Washington D.C., 2000.

³⁰ Article 3 common to the 1949 Geneva Conventions, and 1977 Additional Protocol II.

internally displaced persons, including international agencies and non-governmental organizations.

After setting forth some general principles, the document, in Section II, addresses the issue of *protection from displacement*. Of particular importance is Principle 6 explicitly recognizing a right not to be arbitrarily displaced. This right is deduced from a variety of human rights guarantees, including those of freedom of movement and choice of residence and several provisions contained in humanitarian law instruments addressing the issue of forced displacement of civilians. Paragraph 2 of Principle 6 lists some important categories of prohibited displacement, including displacement occurring as a consequence of armed conflict. By stating that displacement of civilians would be arbitrary in situations of armed conflicts, unless the security of the civilians involved or imperative military reasons so demand, paragraph 2(b) reflects several articles of the Fourth Geneva Convention on the protection of the civilian population and of the 1977 Additional Protocols.³¹

The main body of the Principles (Section III, Principles 10–23) relates to *protection during displacement*. These principles first restate the applicable human right and then try to specify the relevance of these general guarantees for internally displaced persons by setting out their meaning in the context of displacement. Many of these specifications have been derived from international humanitarian law and thus apply to situations of conflict-induced displacement. However, numerous other guarantees such as Principle 12, paragraph 3, on the protection of internally displaced persons from discriminatory arrest and detention as a result of their displacement, Principle 18 on the right to an adequate standard of living, Principle 21 on the protection of property, Principle 23 on the right of education and others also apply to persons who have been displaced by disasters or large-scale development projects.

³¹ See in particular Art. 49 of the Fourth Convention, and Art. 17 of Additional Protocol II.

The next section of the Guiding Principles deals with the issue of *humanitarian assistance*. These principles are of special relevance to organizations helping internally displaced persons. Principle 25 stresses that the primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities, and thus underlines the principle of State sovereignty. Assistance by international organizations and agencies can be delivered only with the consent of the State concerned. Such consent, however, cannot be denied for arbitrary reasons. In particular, if the government concerned is unable to provide the required assistance itself, it cannot, without lapsing into arbitrariness, prohibit access for prolonged periods of time to all organizations providing such assistance.

The document ends with the *post-displacement phase*, addressing return, resettlement and reintegration (Section V, Principles 28–30). Here, Principle 28 is important in spelling out the primary duty and responsibility of competent authorities to establish conditions and to provide the means which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence or to resettle voluntarily in another part of the country. While this does not amount to an individual right to return to one's home, Principle 28 clearly outlines the appropriate solutions to problems of displacement. Principle 29, paragraph 2, provides some guidance on property issues, although it has to be admitted that present international law is rather weak in this regard.

Legal character

The Guiding Principles on Internal Displacement are neither a declaration of the rights of internally displaced persons nor do they constitute, as such, a binding instrument. However, they reflect and are consistent with present human rights and humanitarian law. They do not replace the guarantees of these two bodies of law but try to facilitate their application by restating many of those existing legal provisions which respond to the specific needs of internally displaced persons and by spelling them out in a form that facilitates their application in situations of internal displacement. The Guiding Principles address the full range of human rights and humanitarian law

guarantees. They do not only cover civil and political rights but take economic and social rights seriously, too. Moreover, many of the specific Principles are derived from the Fourth Geneva Convention and the two 1977 Additional Protocols. They thus cover the full range of guarantees which are already binding upon States.

The Guiding Principles also clarify aspects of the protection of internally displaced persons where present international law contains certain grey areas or even gaps.

In doing so, the Guiding Principles provide guidance for all those confronted and dealing with situations of displacement. This is achieved by synthesizing the many applicable norms of international human rights and humanitarian law into clear principles, and by highlighting those more concrete aspects of human rights and humanitarian law guarantees that are of special significance for the displaced. So although not a binding legal document like a treaty, the Principles are based on hard law.

This basis is an important reason why the Guiding Principles have gained, in a relatively short period of time, considerable recognition and standing. *Inter alia*, the Commission on Human Rights, the Economic and Social Council (ECOSOC) and the UN General Assembly have adopted resolutions taking note of the Principles and of the Representative's intention to use them in his dialogues with governments, intergovernmental bodies and NGOs. In January 2000, the Security Council, in a Presidential statement, did the same.³² Regional organizations such as the Organization of African Unity (OAU) and the Organization for Security and Co-operation in Europe (OSCE) have begun to disseminate the Principles. The Inter-American Commission on Human Rights of the Organization of American States (OAS) has called the Guiding Principles "the most comprehensive restatement of norms applicable to the internally displaced" which "will provide authoritative guidance to the Commission on how the law should be interpreted and applied during

³² Promoting peace and security: Humanitarian assistance to refugees in Africa, S/PRST/2000/1, 13 January 2000.

all phases of displacement”,³³ and in its missions to different countries assesses conditions on the ground in terms of the Principles.

Finally, international and national non-governmental organizations (NGOs) have been publicizing and widely circulating the Principles and have organized workshops and meetings in a number of countries, together with regional and international organizations, to discuss how best to implement them in the field. Moreover, several governments have accepted the authoritative character of the Guiding Principles by incorporating them into their laws and policies.³⁴

Conclusions

To what extent has present international law created a comprehensive and coherent protection regime for persons fleeing the perils of armed conflict?

It is fair to say that in recent years, the international community has taken major steps forward towards such a regime. International humanitarian law addresses the needs of those refugees who, during an international armed conflict, are on the territory of a party to the conflict. It also protects internally displaced persons during international and internal armed conflicts. Such persons are furthermore protected by applicable human rights guarantees. International refugee law provides protection to those who have left their country because they have a well-founded fear of becoming victims of, *inter alia*, acts of violence carried out in the context of an armed conflict that amount to persecution. For those fleeing armed conflict who are not persecuted in this narrow sense, regional solutions have been found, such as the introduction of a wider definition of refugees in Africa and Latin America or of temporary protection in

³³ Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, 1999, Chap. 4, para. 10.

³⁴ See, e.g. Angola, Conselho de Ministros, Decreto No. 1/01, *Normas sobre o reassentamento das populações deslocadas*, Diário da

República, I Série – No. 1, 5 January 2001; Burundi, *Protocol relatif à la création d'un cadre permanent de concertation pour la protection des personnes déplacées*, 7 February 2001.

Europe. All these different instruments and sets of legal provisions complement and reinforce each other.

Despite these positive developments, problems regarding the protection of persons fleeing war persist. These include a continuing tendency to interpret the 1951 Refugee Convention too narrowly in the case of persons fleeing from areas of conflict; the fact that despite its strong roots in international humanitarian and human rights law, the legal protection of internally displaced persons is in an early formative stage; and a certain lack of coordination between and cooperation by the multiple international entities dealing with the different categories of persons fleeing situations of armed conflict.



Résumé

Fuir en temps de guerre

PAR WALTER KÄLIN

Dans quelle mesure le droit international en vigueur a-t-il créé un régime de protection cohérent et complet pour les personnes qui fuient les périls d'un conflit armé ? Le droit humanitaire répond aux besoins des réfugiés qui, lors d'un conflit armé international, se trouvent sur le territoire de l'un des belligérants. Il protège en outre les personnes déplacées à l'intérieur de leur propre pays lors d'un conflit armé international ou non international. Ces personnes sont également protégées par les garanties des droits de l'homme applicables. Le droit international des réfugiés assure une protection aux personnes qui ont fui leur pays parce qu'elles craignent avec raison d'être victimes, notamment, d'actes de violence perpétrés dans le contexte d'un conflit armé et assimilables à la persécution fondée sur les raisons énoncées dans la Convention de 1951. Des solutions régionales, telles que l'élargissement de la définition du réfugié en Afrique et en Amérique latine, ou la protection temporaire en Europe, ont été trouvées pour les personnes qui fuient un conflit armé et qui ne sont pas l'objet de persécutions au sens strict du terme.