

1st Meeting

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THE CIVILIAN CHARACTER OF ASYLUM:
SEPARATING ARMED ELEMENTS FROM REFUGEES

I. INTRODUCTION

1. Displacement resulting from internal conflicts often leads to mixed movements of populations, which include not only refugees and other civilians but also armed elements seeking sanctuary in neighbouring countries. The presence of such elements in an influx of refugees, or in camps or refugee-populated areas, threatens the civilian nature of asylum creating serious refugee protection problems as well as security concerns for host communities and receiving States. The situation can be complicated further when those claiming to be former fighters seek asylum as refugees.

2. The issue of maintaining the civilian character of refugee camps has been discussed by the Standing Committee in the context of “a ladder of options” to support and strengthen the capacity of receiving States to maintain the civilian nature of refugee camps and ensure the physical protection of refugees.¹ It has also received the attention of the United Nations Security Council.

3. The ladder of options outlined a host of measures which States and the international community could consider undertaking to ensure the civilian nature of refugee camps and refugee-populated areas. This paper singles out those that specifically concern the separation of armed elements from refugee populations. It also considers the problems that arise when former fighters seek asylum. It discusses the relevant legal principles and operational considerations, the responsibilities of receiving States and the role of UNHCR, and proposes for consideration a series of measures through which the civilian character of asylum and that of refugee camps can be upheld.

II. OVERALL CONSIDERATIONS

4. The presence of armed elements in a refugee population impacts on fundamental principles of refugee law, namely:

- The humanitarian and non-political nature of asylum;
- The civilian character of refugee camps and settlements;
- The principle of *non-refoulement*; and
- Asylum for all those who meet the refugee criteria.

¹ *The Security and Civilian and Humanitarian Character of Refugee Camps and Settlements* (EC/49/SCINF.2); and *The Security, Civilian and Humanitarian Character of Refugee Camps and Settlements: Operationalizing the “Ladder of Options”*, (EC/50/SC/INF.4).

III. INTERESTS AT STAKE

5. The presence of armed elements in refugee camps or refugee-populated areas have grave consequences for the security and welfare of refugees. In a number of situations it has led to the breakdown of law and order in camps, and resulted in serious human rights violations, notably forced recruitment, and physical and sexual abuse. An environment of violence complicates the pursuit of durable solutions and endangers the integrity and security of humanitarian operations. The deterioration of security also affects host communities and generates hostility towards refugees. Camps which are militarized, used as bases to rest and recuperate or to hide, for those who have committed atrocities, become the target of attacks, endangering all their inhabitants, as well as the surrounding population. In some regions this has led to a dangerous broadening of the conflict into the host State itself, jeopardizing the continued grant of asylum for hundreds of thousands of refugees.

6. Drawing a clear distinction between refugees on the one hand, and armed elements and others not deserving of protection under international refugee instruments on the other, is therefore in the interest of States, of refugees and of UNHCR. The international community also has a stake in the matter: in successive resolutions, the United Nations Security Council has recognized that situations where refugees are vulnerable to harassment or to infiltration by armed elements may constitute a threat to international peace and security² and that, conversely, the provision of security to refugees and the maintenance of the civilian and humanitarian character of refugee camps and settlements could contribute to the maintenance of international peace and security.³

IV. ROLES AND RESPONSIBILITIES

7. The United Nations Charter and international humanitarian law as well as international refugee law are relevant in defining the roles and responsibilities with regard to the separation of armed elements from refugee populations. ⁴ When persons engaged in armed conflict cross an international border without genuinely having laid down their arms, they are deemed to be carrying out a military agenda. Allowing the pursuit of such an agenda is inconsistent with the obligations of member States to maintain international peace and security, and friendly relations between States, as defined in the Charter and United Nations General Assembly resolutions. ⁵

8. Relevant provisions of international humanitarian law make it incumbent upon a neutral third State to disarm combatants engaged in international conflict, separate them from the civilian population and intern them at a safe location away from the border. Alternatively, States must take such other measures as are deemed necessary so as to neutralize the combatants and ensure that they do not take up arms again to continue to engage in conflict or pose a threat to others. It can be argued that this obligation of third States has become a customary norm of international law,

² Security Council resolution 1296 of 19 April 2000.

³ Security Council resolution 1208 of 19 November 1998

⁴ See: 5th Hague Convention Article 11; 1951 Convention relating to the Status of Refugees Article 9, and United Nations Charter Article 2 paragraph 4.

⁵ Resolution 2625"[N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State."

and as such applies to both international and internal armed conflicts.⁶ It follows that in the context of an internal conflict, when armed elements cross the border together with refugees and other civilians, host States are responsible for separating, disarming and interning them, or taking other measures to neutralise them. In view of the implications for international peace and security, the international community, and in particular the United Nations Security Council, should assist and support States in carrying out this task.

9. The humanitarian and non-political character of asylum is acknowledged in the preamble to the 1951 Convention, and relevant provisions of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The latter expressly prohibits subversive activities by refugees. Those carrying out military activities from a neighbouring state cannot be considered to be refugees, and therefore fall outside the ambit of international refugee protection and the mandate of UNHCR. They are the responsibility of the State in whose territory they find themselves. However, international refugee law recognizes that former fighters, deserters and draft evaders may have a claim to refugee status, providing they have not been responsible for activities which could exclude them from international protection.⁷

V. IDENTIFICATION, SEPARATION AND INTERNMENT OF ARMED ELEMENTS

10. The identification, separation and internment of armed elements present both legal and practical difficulties. International humanitarian law does not define fighters in an internal conflict because of the reluctance of States to confer a formal "combatant" status upon those whom they consider as rebels and insurgents. However, if such persons are to be identified for the purpose of separation, some clear criteria are needed.

11. In one recent case, UNHCR has devised a working definition using the generic criteria applicable to combatants in international armed conflict. Accordingly, the term "armed element" is applied to any person who is "a member of an armed or military organization or establishment, whether regular or irregular, or has been participating actively in military activities and hostilities, or has undertaken activities to recruit or train military personnel, or has been in a command or decision-making position in an armed organization or establishment, or has arrived in the receiving country carrying arms or in military uniform, or having presented himself in the receiving country as a civilian, assumes or shows the intention to assume any of the above attributes."

12. Notwithstanding these criteria, identification in the context of persons fleeing from internal conflict remains difficult, as it is not easy in practice to distinguish those who have been engaged in combat from those who have not. Members of militia rarely wear military uniforms, or may hide their uniform or arms and mingle with civilians. The volatility of modern internal conflict frequently leads to patterns of mobilization, demobilization and remobilization, as well as the forced recruitment of children and other civilians in the war effort, making it difficult to distinguish between fighters, former fighters and others. In situations where the persons are visibly identifiable, for instance by their heavy arms, they may be superior in strength to the host government authorities and pose a threat to those who seek to disarm them.

⁶ United Nations Charter (in Article 2 paragraph 4), 5th Hague Convention Article 11, Articles 48-54 (Protocol I) and Articles 13-14 (Protocol II); 1951 Convention relating to the Status of Refugees paragraph 5 of the Preamble; United Nations Declaration on Territorial Asylum Preamble, and the Preamble; OAU Convention governing the specific aspects of refugee problems in Africa, Preamble and Article 3 (2). In addition, there are also obligations under refugee law to preserve the civilian and humanitarian character of refugee camps and refugee settlements.

⁷ UNHCR Handbook on the Determination of Refugee Status, paras 167-174.

13. Given these problems, preventive measures are more likely to be effective. The OAU Convention calls on countries of asylum, for reasons of security, to settle refugees at a safe distance from the frontier of their country of origin. The location or relocation of refugee camps at a sufficient distance from the border and the area of conflict creates a disincentive to use them as a base for military activities. Regular policing of refugee camps and refugee populated areas is important both to enhance security of the refugees and discourage infiltration by armed and criminal elements. Ironically, many host States fear that allowing refugees to move inland may jeopardize national security, and refuse sites further inland.

14. Failing the location of refugees away from the zone of conflict, early intervention at the point of entry on the frontier provides the best opportunity for a receiving State to disarm and separate armed elements from refugees.

15. Once separated and disarmed, the fighters should be interned at a safe location from the border, or otherwise prevented from continuing their armed struggle or endangering the refugee population. Those confined are entitled to the basic necessities of life, and to be protected from forcible return to their own country under international humanitarian law. In most cases child soldiers require special protection and assistance measures.

16. Responsibility for the protection and assistance of interned fighters rests with the host State and falls outside UNHCR's mandate. In international armed conflict, the International Committee of the Red Cross (ICRC) is mandated to monitor the situation of prisoners of war, including those interned in a third State. In non-international conflicts, ICRC has defined its responsibilities primarily in relation to the theatre of war. Outside the theatre of war, the responsibility for protection and assistance of armed elements who are interned lies with the host State. However, political considerations and the lack of capacity and resources often deter the States concerned from carrying out these tasks effectively, leaving the armed elements in the refugee camps or in easy reach of them. In developing its position on security in camps and refugee-populated areas, UNHCR has underlined the need for political and military assistance from other States and the United Nations to assist the host State to carry out its responsibilities. It may also be appropriate to consider whether other international organizations with relevant expertise can provide support, e.g. with logistics or monitoring of the internees.

VI. ASYLUM CLAIMS FROM FORMER ARMED ELEMENTS

17. In most mass influx situations, asylum is granted as a result of group determination on a *prima facie* basis, with no individual examination of claims. Problems can arise when asylum claims are made by individuals having participated in the armed conflict, but who claim to have been demobilized, demilitarized, or to have deserted prior to or after entering the host country.

18. In principle, these former armed elements should be regarded as civilians having abandoned their military activities. If they apply for asylum or arrive in a country as part of a refugee influx, they could therefore be considered as asylum-seekers. In practice, however, for reasons explained earlier, it may be difficult to establish that they have genuinely and permanently laid down their arms. It may not always be clear who is a deserter or a demobilized person, and who is merely seeking "rest and recuperation" before returning to military activities.

19. Furthermore, because of the frequent violations of international humanitarian law and human rights in internal conflicts, there is a possibility that persons who have been engaged in armed activities have committed atrocities, which would exclude them from international protection under the refugee instruments. The absence of procedures to deal with exclusion in the context of mass influx situations poses a major operational challenge in refugee protection.

20. Because of their special circumstances, former fighters involved in internal conflicts should not automatically benefit from refugee status through group determination on a *prima facie* basis. Nor should they be considered as asylum-seekers until it has been properly established that they have genuinely and permanently given up their military activities. Their claims should be examined individually in a special procedure, with a dual purpose: first to establish the civilian character of the applicant, and then to examine the refugee claim. The responsibility for the procedure rests with the host State. Once the civilian character of the applicants has been established, they can be considered as *bona fide* asylum-seekers. UNHCR can play a role, in line with its mandated responsibilities, to advise and assist States in determining the refugee character of the claimants.

21. Given the paramount importance of protecting the security of refugees and maintaining the civilian nature of asylum, those who desert or renounce military activities after having entered the host country and seek asylum should be held separately from the refugee population, pending verification of their civilian status. The 1951 Convention recognizes the possibility of such provisional measures. Separation is not appropriate, however, where the civilian status of an individual is evident. The length of time for which such individuals may be held should be reasonable, taking into consideration the circumstances of their situation, including any hardship arising from the separation of families.

VII. FAMILY MEMBERS

22. Where refugee status is based on group determination, family members of armed elements should be treated *prima facie* as refugees, unless there is reason to believe that there may be grounds for exclusion based on their own activities. Although UNHCR generally advocates family unity, family members of armed or former armed elements, particularly women, children and the elderly, should not be placed in internment camps in the interests of their own safety and well-being. They may need to be protected against retaliation or harassment by the local population or other refugees because of their family connections. The principle of family unity also requires that former armed elements, who are provisionally confined pending clarification of their status, should be reunited with their families as soon as they are found to be refugees.

VIII. CONCLUSION

23. Solutions are possible only in circumstances where States are committed to action. The separation of armed elements is one element in an overall strategy to preserve the civilian and humanitarian character of asylum. Assuring the security of refugee-hosting areas is an ongoing process. It is unlikely to succeed in the absence of other efforts to ensure the security of refugees, including preventing the incursion of arms and armed elements across borders, and adequate policing of refugee camps and surrounding areas. These activities go far beyond the mandate and expertise of humanitarian organizations and require a commitment of will and resources from States and political organs of the United Nations.

IX. RECOMMENDATIONS

24. The issue of separation brings into play a number of considerations, covering both refugees and non-refugees, and requiring concerted and coherent efforts by a range of State and non-State actors, political and humanitarian. It exposes dilemmas and operational constraints that are not susceptible to quick or easy solutions. The following points are offered as a basis for a conclusion on concrete measures to address the problem:

- (a) The failure to separate, disarm and intern armed element threatens the non-political and humanitarian character of asylum and undermines the ability and willingness of States to receive and protect refugees. Drawing a clear distinction between refugees, on the one hand, and armed elements and others not deserving of protection under the refugee instruments, on the other, is, therefore, in the interests of States as well as refugees and UNHCR.
- (b) Host States have the primary responsibility for separating armed elements from refugees and other civilians, disarming them as necessary and interning or taking other measures to neutralize them. The international community should support and assist States in carrying out this task.
- (c) Those deemed to be continuing military activities cannot be considered to be refugees, and fall outside the ambit of international refugee protection and the mandate of UNHCR.
- (d) To prevent militarization, refugee camps and settlements should be located at a reasonable distance from the border, and should benefit from adequate security arrangements, so as to deter infiltration by armed elements.
- (e) Armed elements should be separated from the refugee population at the earliest moment, preferably at the point of entry at the border.
- (f) Once separated and disarmed, the armed elements should be interned at a safe location from the border, or subjected to other similar measures. While responsibility for internees rests with the host State, efforts should be made to identify mechanisms for international support and assistance to the States concerned, including an appropriate international organization to assist and monitor the situation of the internees.
- (g) Former armed elements should not automatically benefit from refugee status through group determination on a *prima facie* basis. They should not be considered as asylum seekers until it has been clearly established that they have genuinely and permanently given up armed activities.
- (h) Special procedures should be established for screening former armed elements who wish to seek asylum, in order to verify that they have genuinely and permanently forsaken all armed activities and that they are not excluded from refugee status.
- (i) UNHCR should develop operational guidelines to assess individual claims for refugee status, in the context of group determination of a mass influx, where there is a likelihood of exclusion.
- (j) Those who desert or renounce military activities after having entered the host country should be held separately from the refugee population until their status as civilians has been resolved positively. The separation should be for a limited period pending verification, and they should be reunited with their family members upon recognition.
- (k) Where refugee status is based on group determination, civilian family members of armed elements or former armed elements should be treated as refugees and should not be interned.