'International Law and the Legacies of Refugee Protection'

Notes for a Presentation at the Conference on

'Psychosocial Well-Being of Women Forced Migrants in the Western Balkans – Then and Now'

Musée Internationale de la Croix-Rouge et du Croissant-Rouge

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1. Introduction

The current 'crisis' in Europe has prompted concern and discussion, not only on the region's perceived capacity to cope with forced migration, but also on whether Europe's institutions and, indeed, those at the international level, are fit for purpose. Some say that the nature of forced migration has changed. Whereas the 1951 Convention, with its definition apparently premised on the individual with a well-founded fear of persecution was appropriate in earlier times, the drivers of flight today are so generalised that most of those in search of refuge fall outside its scope.

Even a little historical knowledge will upset this rather narrow view of displacement. What the drafters knew and understood in 1951 came from thirty years of experience in which little, if any, distinction was made between the individual and the group, whether they fled for reasons particular to themselves, or because of indiscriminate violence, for if it was indiscriminate by reference to the *individual*, it was commonly discriminate enough by reference to the group at risk.

In 1951, the bombing of Guernica was still within memory, no less than the terrible record of summary executions by Falangist forces as the Spanish civil war wound down to its conclusion in December 1938 and January 1939, when nearly 500,000 refugees crossed into France in a little over two weeks. The massive displacements which transfigured Europe in the following years were due, not just to conflict, but also to programmes of mass persecution, and then to the general assaults on groups and classes that came with the political upheavals of the late 1940s.

As the post-war period moved on, States party to a regime based on the 1951 Convention turned increasingly to *procedures* for the determination of refugee status as a management tool in the exceptional regulation of asylum; the focus thus turned towards the individual, and away from the group. Indeed, the 'group' frequently caused apprehension among potential asylum countries. What if *all* non-whites living under apartheid were potential refugees in the sense of international law? Or *all women*, in this or that country? Or *everyone* seeking to escape conflict?

How could that be managed? The response, often enough, was dichotomous – with formal refugee status in the sense of the 1951 Convention/1967 Protocol limited to individuals found to have a well-founded fear of persecution; and 'humanitarian protection' accorded to those at risk for other, more generalised reasons. One regrettable consequence was that the latter were then often perceived as 'not quite refugees', even though their risk of serious harm might be no less, the reasons for flight no less compelling, and the conflict or violence from which they fled no less devastating.

In international armed conflict, developments in weapons technology led or contributed to tactical changes, and to assaults not just on the military, but also on the country's infrastructure, such as water and electricity supplies, and so, if indirectly, on the civilian population. Internal conflicts followed a similar pattern, with deliberate, intentional attacks on civilians, identified by reference to factors, actual or imagined, which ought to be as irrelevant to protection during conflict, as to the enjoyment of rights, particularly life and liberty, at any other time. 'Ethnic cleansing' entered, or re-entered, the language, with killing and persecution driven by perceived opposition, religious distinction, youth and, in particular, gender. Women and girls were, and are, singled out for persecution and abuse, not only because of those differences, but also because attacks on them are seen as doubly harmful to the opposition.

Much of this, perhaps all of it, was known and understood when Europe faced the refugee crisis of the 1990s, with the break-up of Yugoslavia. But the protection that ought to have been extended, according to the letter and the spirit of international law, was often half-hearted. The belief that those in flight from vicious conflict were 'not quite refugees' led European States into half-measures, such as temporary protection – an approach urged on them by UNHCR, not so much as a matter of principle, as in the hope that this might help to overcome their reluctance to provide asylum. For European States, then as now, have difficulty accepting the implications of conflict close by, and are especially keen that whatever is done should be temporary, short-term.

And so it was, and so it is today. The latest proposals for reforming Europe's dysfunctional system of asylum and protection are oriented, not just to keeping refugees away from Europe, but also to a perception that the needs of those who do get through are essentially temporary, particularly if, like so many of those in flight from conflict, they are consigned to Europe's category of subsidiary protection. However, they are refugees in the sense of international law, and no one is able to define 'temporary' in any meaningful way. The result is so much wasted opportunity, so much additional harm.

As we can see from our recent history, the first problem, the first crisis, is that of attitude and perspective, coupled with lack of commitment to the European project. The situation in Lesbos, or in Greece, or in Macedonia, or in Serbia, or in Italy, or in Bulgaria, or in Turkey, is not a problem for those countries alone, but one for Europe. Moreover, there is

no simple answer, and the movements of desperate people between States will only be moderated through concerted, long-term action across the widest spectrum of causes and motivations. Solutions, too, demand programmes and policies that look ahead, perhaps to refugees returning one day, but at the very least and at once, to whatever can be done now to heal and strengthen those who have already suffered.

2. Reality check

A number of judgments by European courts in Strasbourg and Luxembourg, helped along also at the national level, have nevertheless consolidated the legal position of those in flight and at risk if returned, and the matrix of State responsibility itself has been confirmed. Just as the combination of context, knowledge and engagement (plus the claim to manage movement) explains why European States are legally responsible for the protection of those crossing the Mediterranean, so it explains why EU States are responsible at various junctures, as a matter of EU law and as a matter of general international law, for the safety and well-being of those seeking refuge in Europe, whether they come directly or through intermediate countries.

It also explains why measures taken to prevent access, which leave those affected to survive or subsist as best they can, may be incompatible with human dignity, and thus with Article 3 of the European Convention of Human Rights and Article 4 of the EU Charter of Fundamental Rights. The EU's 'organising principles' – sincere cooperation, solidarity, fair sharing of responsibility – require concerted action whenever the community faces a large influx of refugees and asylum seekers, but strictly legal issues are also engaged. First, in imposing controls or other restrictions at its internal or external frontiers, EU Member States are applying EU law and this requires certain preliminary steps. It also entails momentarily stepping back from the traditional focus on the individual in context, potentially at risk of harm, in order to consider first the *group* and its need for protection.

3. Groups in distress

This approach, though rooted in European law, draws by analogy on long-established practices of group or *prima facie* determination of refugee status, albeit with an altered focus on immediate protection. It is rooted in objectively verifiable facts, and in common knowledge. In addition, it serves two distinct purposes: it is a practical, pragmatic response in situations of large-scale movement; and it allows an immediate response in situations of protection emergency. It makes sense because, given the objective evidence, the refugee character of those concerned is hardly in doubt, and because the group has immediate protection needs which call for an extraordinary response and exceptional measures.

This is familiar language, with many of the underlying concerns already reflected in the EU's 2001 Directive on Temporary Protection which, following on from Europe's experiences of the break-up of Yugoslavia and events in Kosovo, recognised that an actual or imminent mass influx in the future might pose a risk to the capacity of national asylum systems.

Many have wondered why this Directive has not been activated in the present crisis. Perhaps the language of 'solidarity' and a 'balance of effort' appears alien to the Visegrad group and, indeed, to a number of Ministers of the Interior elsewhere in the EU; or perhaps it is the fact that the Council Decision on the existence of a mass influx would be binding on all Member States in relation to those concerned. That seems to go against the grain in many quarters. Short-term self-interest and blatant disregard of the EU's organising principles have clearly driven policy and practice in some Member States, as has the woeful lack of basic decency and common humanity.

Yet, even though it has not yet and may never be activated, the Temporary Protection Directive lays down a number of 'markers' for what ought to be the EU's framework response, from the immediate challenges of reception and protection, to the next steps.

First, the measures adopted must be, 'linked and interdependent for reasons of effectiveness, coherence and solidarity'. Secondly, what counts in the characterisation of large-scale displacement is an essentially objective perspective – the focus is on those who have had to leave their country *or* region of origin and who are unable to return in safe and durable conditions because of prevailing conditions. This means, in particular but not exclusively, those who have fled areas of armed conflict or endemic violence, or who are at serious risk, or have been victims, of systematic or generalised violations of their human rights.

It is not a court, tribunal, or official which decides on temporary protection by reference to all the circumstances relevant to the individual, considered in social and political context. On the contrary, it is a political decision and, by qualified majority, the European Council determines the existence of a mass influx, and whether the reasons for temporary protection persist. The decision – a truly European one – 'shall have the effect of introducing temporary protection for the displaced persons to whom it refers, *in all the Member States...*'.

Not everything is straightforward, however. Besides identifying the group in question and a time frame, the decision must include information from Member States on their reception capacity – clearly, an expectation of sincere cooperation which has proven sorely misplaced in the present crisis. In addition, temporary protection lasts for a maximum of one year, with possible extension for a further year. It may also be terminated by the Council, basing itself on the 'fact that the situation in the country of origin is such as to permit... safe and durable return... with due respect for human rights and fundamental freedoms and Member States' obligations regarding *non-refoulement*...'

While recent events demonstrate the need for an effective, immediate response capacity both within and between States, the Temporary Protection Directive nevertheless has a number of weaknesses. It rightly focuses attention on the 'drivers' of mass movement – armed conflict, generalised violence, human rights violations – but what is also needed, first, is recognition that those on the move will commonly be in desperate need of shelter and assistance, just as receiving or transit States will want and need to identify and register those arriving. The Directive does not speak effectively or comprehensively to the *operational* dimensions of receiving large numbers.

Secondly, an effective institutional and legal basis is required, which will enable a concerted EU response which includes the provision of reception facilities, and a measure of control and organisation, both for better management, to bring assurance to those on the move, and to permit the prompt identification of those with special needs. Experience shows that such facilities will likely be needed at borders, both within Member States and, ideally on a previously negotiated stand-by basis, within the territory of non-Member States which find themselves *en route*.

Well-structured, coordinated and organised reception, premised on recognition of the conditions producing flight, is essential to a humanitarian and effective response; it will meet the immediate need for care and assistance, open the way to considered and defensible assessments of overall protection needs, and help to avert the unseemly rush to engage in summary denial of entry and removals inconsistent with international law and the EU's legal standards, and/or which pass on an insupportable burden to 'front-line' EU or non-EU States.

4. Lessons to be learned

The necessity of protection is itself driven by obligations, which are rooted in EU law, human rights law, and general international law. The triggers for responsibility, and therefore for liability in the case of non-compliance, are knowledge of groups at risk, awareness of the applicable law, and capacity for action. Even if individual States are stretched – and they are – the capacity of the EU is not; and this means that concerted, direct support must be provided for those States, whether in personnel, funding or other resources, so that the necessary levels of protection can be ensured for all those in need.

Those affected must not be left to subsist in conditions incompatible with human dignity, or inconsistent with Article 3 of the European Convention or Article 4 of the EU Charter. Moreover, they will need to be implemented in active cooperation with other Member and non-Member States of the EU. That may well mean the provision of temporary accommodation at borders or even straddling borders, and it also demands cooperation in

identification, assessment of immediate needs, and a pathway to regular process according to law.

Immediate protection is the necessary preliminary step towards the effective implementation of any 'common' European asylum system as a constituent part of the overall goal, namely, an area of freedom, security and justice open to those who, forced by circumstances, seek protection in the region.

Immediate protection is no less an essential legal step – an obligatory and contingent stage towards ensuring human dignity, realising the protection of the Convention and the Charter, and avoiding arbitrary treatment, including the risk of summary collective expulsion, *refoulement*, or denial of judicial protection.

Not to provide protection in such circumstances would be nothing less than an abuse of right (*abus de droit*). Presently, there is a real danger that control powers being asserted and exercised will exceed any permissible scope and undermine the rule of law, which is the very foundation of Europe. The consequential harm caused to those who have already suffered hardly needs emphasis, anymore than the continuing vulnerability of so many in search of refuge.

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Commentary

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