

The International Protection of the Residents of 'Camp Liberty', Baghdad, Iraq

1. I am asked to advise further on the protection status of the residents of 'Camp Liberty'. This opinion can be read together with earlier advice dated 23 May 2013 ('The Protection and Security of Refugees and Asylum Seekers in Iraq: The Case of the Refugees in Camps Ashraf and Liberty') and 1 August 2011 ('The protection of the residents of Ashraf in the province of Diyala, Iraq, considered with reference to international refugee law and the role and responsibility of the Office of the United Nations High Commissioner for Refugees').
2. In particular, I am asked to advise as to the basis in international refugee law and practice, if any, of the use by the Office of the United Nations High Commissioner for Refugees (UNHCR) of the term 'international protection need' to describe this population, rather than 'refugee', 'asylum seeker', or 'person of concern'. It is undisputed that all of this group would likely be at risk of persecution if returned to their country of origin.¹
3. Second, I am asked to advise generally on the applicability of the 'exclusion clauses', and specifically, whether any participation in any military activity at any time is sufficient of itself to exclude a person from protection as a refugee.
4. Third, I am asked to advise on the nature and content of UNHCR's responsibilities when dealing with refugees and asylum seekers in urgent need of medical treatment.

1. 'International Protection Need'

5. 'International Protection Need' is not a term of art in international refugee law or practice, and is devoid of legal content and meaning. The phrase is

¹ A useful insight into the circumstances is provided by the judgments of the European Court of Human Rights in *Abdolkhani and Karimnia v Turkey*, Application no. 20471/08, Second Section, 22 September 2009; *Keshmiri v Turkey*, Application no. 36370/08, Second Section, 13 April 2010; *Tehrani and Others v Turkey*, Applications nos. 32940/08, 41626/08, 43616/08, Second Section, 13 April 2010; and *Moghaddas v Turkey*, Application no. 46134/08, Second Section, 15 February 2011.

occasionally used in a descriptive sense, for example, in the title of UNHCR publications offering guidance to States on the treatment due to particular groups of asylum seekers.² However, there appears to be no precedent for its use outside this context.

6. The mandate of the Office of the United Nations High Commissioner for Refugees has expanded considerably over the past sixty years to encompass new groups of refugees and new situations calling for international protection. The phrase 'persons of concern' to UNHCR is often used as a shorthand phrase to describe those who fall within the High Commissioner's mandate. It is thus capable of describing refugees within the meaning of the 1951 Convention/1967 Protocol relating to the Status of Refugees, refugees expressly within the 1950 UNHCR Statute, refugees within the broader sense of general or customary international law, those within the mandate as developed by the UN General Assembly, and those whom UNHCR has determined *prima facie* to be within its mandate. As a description to be applied to groups of refugees and asylum seekers, the term 'international protection need' would only make sense if considered as equivalent to *prima facie* status.
7. This last situation can arise in the case of groups of refugees who face substantially the same risk of persecution or other prohibited treatment in their country of origin, and for whom international protection is urgently required, either because of the numbers involved or because the situation in their immediate country of refuge is dangerous or precarious. In UNHCR's practice, a protection emergency includes any situation where the life or well-being of refugees will be threatened unless immediate and appropriate action is taken, for example, where events suddenly place in danger refugees who had previously enjoyed asylum.³

² See, for example, UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan', 6 August 2013: UN doc. HCR/EG/AFG/13/01.

³ See, UNHCR, *Handbook for Emergencies*, 3rd edn., 2007, 4.

8. The practice of *prima facie* classification is well-established in UNHCR doctrine and understood by States.⁴ Indeed, in 2011, UNHCR was urged to respond to the life-threatening emergency then facing the residents of Camp Ashraf by making such a *prima facie* determination, thereby putting States at large on notice of the urgent need for protection and solutions. It will be recalled that *prima facie* status is without prejudice to the application of exclusion, if evidence sufficient by international standards subsequently comes to light with regard to any particular individual.
9. Use of the term '*prima facie*' does not qualifying the assessment of entitlement to international protection; rather, it reflects the necessary focus on objective conditions, including an immediate protection emergency. Had this approach been adopted in 2011, it is reasonable to suppose that considerable time and resources would have been saved, and that the process of seeking solutions would have been well under way.
10. Use of the terminology of 'international protection need' to describe the residents of 'Camp Liberty' is likely to be misunderstood by States, particularly those familiar with UNHCR practice; unfortunately, it also raises a number of other, more general concerns. Like every United Nations agency, UNHCR is bound by the principles of fundamental human rights, including non-discrimination. In the absence of all the necessary information, it nevertheless appears that UNHCR may be treating this group of refugees differently, on account of their political opinion or other status. Unless it is able to show that the differential treatment is justifiable in accordance with international law, then UNHCR will have acted in violation of the principle of non-discrimination.
11. In this connection, and as a basis for comparison, it may be relevant to consider UNHCR's conduct in the past, and its readiness in 2005-2006 to conduct the

⁴ UNHCR frequently makes group determinations and did so, for example, in 2006 when responding to the needs of Uighur refugees and asylum seekers in Kyrgyzstan in what, 'with the threat of deportation... ever present', was even then characterised as a 'protection emergency'. See UNHCR, 'Country Operations Plan, Overview, Country: Kyrgyzstan, Planning Year: 2006.

necessary interviews with PMOI and ex-PMOI members by video-link, to recognize them as refugees, and to document them accordingly. From what has been reported so far, it would appear that UNHCR has been unable to meet relevant international standards for the determination of refugee status, including those which it has set for itself.⁵

2. Exclusion

12. Both the UNHCR Statute and the 1951 Convention provide for the *exclusion* from refugee status of individuals who are not considered to 'deserve' protection.⁶ As UNHCR notes in regard to the procedural standards which it has set for itself:

'Examination of the applicability of the exclusion clauses must be conducted *on an individual basis*, under procedures that incorporate appropriate standards for due process. The individual concerned should be informed of the considerations that have given rise to the exclusion examination and should have the opportunity to consider and respond to them.'⁷

13. In electing to use the language of 'international protection need' and in refraining from accepting the refugee character of the residents of 'Camp Liberty', UNHCR appears to be hinting that exclusion is a 'live issue'. In the absence of hard evidence in any particular case, however, and bearing in mind

⁵ UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', Geneva: UNHCR, 2005; see also 'UNHCR's RSD policy: Quick guide': <http://rsdwatch.wordpress.com/unhcrs-rsd-policy-a-guide/>

⁶ The UNHCR Statute states that the High Commissioner's competence shall not extend to anyone, 'In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights': UNHCR Statute, para. 7(d). See also Article 1F, 1951 Convention relating to the Status of Refugees.

⁷ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, Geneva: UNHCR, 2005, section 4.8 (emphasis supplied).

the US authorities' thorough screening of this caseload in 2003-2004, these implications must be categorically rejected; the presumption of innocence and entitlement to international protection ought clearly to prevail.

14. As judicial decisions in many different jurisdictions have emphasised, exclusion decisions must be based not only on attribution to the individual of the relevant conduct, but also on serious and credible evidence.⁸ UNHCR itself has repeatedly affirmed that membership of a group or association which may have engaged in 'excludable conduct' is not itself a sufficient basis to deny, let alone withdraw, refugee status; see, in particular, UNHCR's 2003 'Guidelines on the Application of the 'Exclusion' Clauses'.⁹
 15. Moreover, with regard to former combatants, UNHCR's 'Guidelines on Exclusion' also confirm that they are not *per se* excludable, but only if there are serious reasons to consider that, as individuals, they have committed acts or offences falling within Article 1F of the 1951 Convention.¹⁰
3. UNHCR's responsibilities towards refugees and asylum seekers
16. The UN General Assembly has repeatedly stressed that 'the protection of refugees is primarily the responsibility of States, whose full and effective cooperation, action and political resolve are required to enable the Office of the High Commissioner to fulfil its mandated functions...'¹¹

⁸ For a recent example upholding this general principle, see the 19 November 2013 judgment of the German Federal Administrative Court: BVerwG 10 C 26.12.

⁹ UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/05, 4 September 2003, paras. 19, 20, 26.

¹⁰ UNHCR, 'Guidelines on the Application of the Exclusion Clauses', above note, para. 20. The PMOI formally renounced military activities more than ten years ago, and had not engaged in combat for many years prior to that decision. The US authorities and the ICRC determined that the residents of Ashraf were 'protected persons' within the Fourth Geneva Convention, that is, 'non-combatant'. No reasons have been advanced for rejecting this decision.

¹¹ See, for example, UNGA res. 68/141, 18 December 2013, paragraph 7.

17. But international protection also engages the responsibility of UNHCR – that is its primary function, set out in paragraph 1 of its Statute. Moreover, the General Assembly has also emphasized that international protection,
- ‘includes, in cooperation with States and other partners, the promotion and facilitation of the admission, reception and treatment of refugees in accordance with internationally agreed standards and the ensuring of durable, protection-oriented solutions, *bearing in mind the particular needs of vulnerable groups and paying special attention to those with specific needs...*’¹²
18. Many matters of detail will not be covered by international law, but the overall objectives of protection clearly include the security, safety and well-being of refugees and asylum seekers. UNHCR is the United Nations refugee agency, and its responsibility to the General Assembly is a priority matter in its relations with other UN bodies. Where the safety and well-being of refugees and asylum seekers are at risk, UNHCR ought therefore to do its utmost to ensure that risks are avoided or minimised, and that needs are met.
19. It follows that if the host government requires refugees to be documented in order to access medical treatment, then UNHCR should either issue the appropriate certificates itself, or arrange for the service to be undertaken by others. Subject to adequate supervision, it may delegate this responsibility, but it cannot avoid it.
20. In this regard, it is to be noted that the United Nations Assistance Mission for Iraq (UNAMI) is a subsidiary organ of the UN Security Council, and that its primary functions are advice and support to the Government of Iraq across a variety of fields.¹³ Nothing in the mandate of UNAMI or the Special Representative of the Secretary-General specifically provides for competence to

¹² Ibid., paragraph 24 (emphasis supplied).

¹³ UNAMI was established by UN SC resolution 1500 (2003), 14 August 2003.

protect refugees or to monitor the human rights of refugees and asylum seekers in Iraq; insofar as UNAMI may engage in activities which benefit refugees, it does so at the request of the Government of Iraq.¹⁴

21. As a matter of principle, therefore, and in line with international law and long-standing institutional arrangements, UNHCR retains primary responsibility for international protection and solutions in the case of refugees in Iraq.¹⁵ It is UNHCR which, in accordance with international law and practice, ought to intervene with the Government of Iraq and other stakeholders to ensure the international protection of the residents of Camp Liberty; and it is UNHCR whose officials, experienced in practice and in the applicable law, ought to monitor the human rights and humanitarian situation of those in need and act to ensure that the necessary services are provided.

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¹⁴ UN SC resolution 2110 (2013), 24 July 2013, paragraph 2.

¹⁵ See UN SC resolution 2110 (2013) 24 July 2013, 'noting the important role of the Office of the United Nations High Commissioner for Refugees, *based on its mandate...*' (Preambular paragraph 11, emphasis supplied).