

Agents of Persecution - UNHCR Position

1. This note deals with the concept of "agents of persecution" as an element in the determination of refugee status claims and states the position of the Office of the United High Commissioner for Refugees (UNHCR) with regard to the question as to whether persecution for the purposes of establishing a claim to asylum must emanate from the State or be otherwise imputable to the State.

2. This question has arisen in the course of assessing refugee status claims of persons alleging fear of persecution at the hands of non-governmental persons or entities, particularly, but not always, in the context of civil war situations. The issue then posed is whether the recognition of refugee status under the 1951 Convention and/or 1967 Protocol is justified only if direct or indirect involvement by the State of the country of origin is indicated by way of its having facilitated, aided, condoned, or tolerated the acts of persecution threatened or perpetrated upon the applicant.

3. The concept of persecution, although central to the determination of refugee status and hence to the international regime for the protection of refugees established under the 1951 Convention, is not defined in the Convention. However, the message conveyed by the Preamble to the Convention and universally understood is that persecution embraces all serious violations of human rights. Thus, the essential issue in establishing the basis and justification for the extension of international protection is the fact of an absence of national protection against persecution, whether or not this deficiency can be attributed to an affirmative intention to harm on the part of the state. The travaux preparatoires of the Convention also do not indicate that the authors of that instrument intended to require that a well-founded fear of persecution must emanate from the government or those perceived to be acting in its interest. Clearly, the spirit and purposes of the Convention would be contravened and the system for the international protection of refugees would be rendered ineffective if it were to be held that an asylum seeker should be denied needed protection unless a State could be held accountable for the violation of his/her fundamental human rights by a non-governmental actor.

4. On the specific issue at stake, UNHCR's position is that recognition of refugee status under the Convention is also justified where persecution is perpetrated by non-governmental entities, for example, irregular forces or the local populace, towards an individual on account of the grounds enumerated in the 1951 Convention, under circumstances indicating that the State was unwilling or unable to offer effective protection against the threatened persecution. That position is set out in paragraph 65 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979).

5. Hence, as regards the "agents of persecution, paragraph 65 of the UNHCR Handbook recognizes that persecution can be perpetrated by "the local populace" or "sizeable fractions of the population" as well as by the "authorities of the country". "Sizeable fractions of the population" embraces any non-governmental group such as a guerilla organization, "death squads, anti- as well as pro- government paramilitary groups, etc.. It also includes, a fortiori, non-recognized entities exercising de facto authority over a part of the national territory. The fact must be acknowledged that in today's world, serious violations of human rights and threats to life, liberty and security of person that constitute persecution are not perpetrated solely by agents of the State. Persecution that does not involve State complicity is still, nonetheless,

persecution. Non-governmental groups have persecuted individuals for reasons of race, religion, nationality, membership of a particular social group or political opinion. Under these circumstances, where their own State of origin proves unable to protect them, victims or potential victims of such forms of persecution are, equally, the intended beneficiaries of the 1951 Convention and 1967 Protocol relating to the Status of Refugees.

6. In the case of persecution that does not emanate from the State, it has to be evidenced that the State was either unwilling or unable to provide protection. In certain political contexts, e.g., where the situation is characterized by civil war, anarchy or breakdown of law and order in the whole or parts of the territory, the constituted State authority may have hardly any control over the agents of persecution. The need for protection that individuals may require against the serious violation of their human rights in such a context is, nonetheless, consistent with the terms of the 1951 Convention.

7. Moreover, the fact that several individuals in those situations share the same risks or persecution on account of their nationality, race, religion, membership of a particular social group or political opinion does not make the threat of persecution less relevant nor does it exclude the applicability of obligations under the 1951 Convention, towards those individuals concerned, on the part of the States petitioned for asylum.

8. In the particular context of civil war, UNHCR agrees with the position that asylum seekers whose reasons for flight are based solely on their area of residence being stricken by war are not covered by the 1951 Convention. It is appreciated, however, that many conflicts take place against a political background which may involve serious violations of human rights, including the targeting of particular ethnic or religious groups perceived as not sharing the political interests of their protagonists. In addition, as highlighted at the recent International Conference for the Protection of War Victims, increasingly, the conduct of war involves human rights violations which may amount to persecution within the terms of the 1951 Convention, when the elements of the refugee definition are involved. Persons fleeing situations of conflict may therefore qualify as 1951 Convention refugees, depending on the particular circumstances. The determination of refugee status will require a careful examination of the specific circumstances surrounding the applicant's claim, including an assessment of the nature of the conflict.

9. Finally, UNHCR wishes to point out that the principle outlined above reflects the approach taken by the great majority of States parties on the issue of agents of persecution. UNHCR's close involvement in the refugee status determination procedures of States parties around the world has provided it with the opportunity to observe the standard practice, in this regard, of the respective national bodies charged with refugee status eligibility determination. Significantly, the Handbook's approach is reflected in international jurisprudence, having been replicated in a number of important decisions from various jurisdictions, including Australia, Canada, France, United States and New Zealand. UNHCR would be happy to share details of these decisions.

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