Commentary

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Dr Feliciano has, in his most interesting paper, set the refugee debate squarely in its surrounding framework of International Humanitarian Law. In this way he has sketched for us a picture of the intricate intersection between the law, political perspective and social attitudes, which now govern the situation.

My role as commentator will be to highlight some of the issues covered by Dr Feliciano and, in so doing, to move away from the more general discussion of problems and principles hitherto raised and to concentrate on particular protections afforded to refugees under the 1949 Geneva Conventions and the 1977 Protocols.

As Dr Feliciano so clearly points out, the problem for Humanitarian Law begins with the continuum of time and events within which large groups of people, after a period of rising levels of coercion and tension within a particular region, become a critical mass and begin to flow across the boundaries into neighbouring States.

Dr Feliciano's thesis is that in order to be of maximum effectiveness, International Humanitarian Law must concern itself with all stages of the refugee's progress from his country to where he is ultimately and finally resettled. By the term "International Humanitarian Law" Dr Feliciano has explained that he means that segment of International Law infused by principles of humanity. This is a substantially wider concept than the perhaps more traditional notion of Humanitarian Law encompassing the Hague and Geneva Conventions and Protocols. On the basis of Dr Feliciano's definition, it would be unwise to disagree with his statement that Humanitarian Law must involve itself even in the antecedent stage where government acts are taking place in the State of origin of the refugee, which acts might be characterised as "refugee producing" behaviour. But for Dr Feliciano's expansive definition of Humanitarian Law, many protagonists of Humanitarian Law might well have taken him to task in his argument, for many are firmly convinced that the International Committee of the Red Cross and International Humanitarian Law should stay out of such political arenas lest all that has been achieved in the way of protection of the individual in the armed conflict situation be placed in jeopardy.

International lawyers and other human rights campaigners have, of course, long been studying ways and means of defusing the "refugee producing" behaviour that Dr Feliciano speaks of. This is being done by means of a two-pronged attack: on the one hand there is the long standing prohibition of the kind codified in the United Nations Charter on the use of aggressive force on the part of States in their dealings with one another. The outlawing of aggressive warfare as a means of settling disputes has, it must be acknowledged, achieved success of a sort — for almost forty years another full-scale global conflict has been averted. On the other hand, the period since the Second World War has

seen an escalation in the number of more contained regional conflicts. This has resulted in massive waves of refugees fleeing their countries of origin in search of safety and succour elsewhere. This has led many cynics to comment that nations are only prepared to pay lip service to the injunction against warfare. There can be no doubt that if States were really to take it seriously, the world's refugee problem would instantly be halved. The equation is a simple one — fewer wars, fewer refugees and fewer displaced persons.

Apart from the general prohibition on the use of force, as Dr Feliciano points out (above p 116) there are in existence a variety of legal norms found both in many multilateral conventions and in general International Law that forbid precisely the gross, widespread and systematic violations of fundamental human rights which have in the past precipitated or materially contributed to massive cross-border flows of peoples desperately seeking a more bearable life, a more human quality to existence.

It is no mere coincidence that the Charter has coupled together its attempts to outlaw the use of aggressive force with its exhortation to observe certain basic human rights. Those who bore the responsibility of framing the Charter realised, with a clarity born out of the agony that was the Second World War, that violations of human rights went hand in hand with the outrage of war, whether or not the war was classified as an external or internal armed conflict. These attempts and others like it to promote fundamental human rights within individual countries must therefore be seen as attempts to prevent future wars.

The United Nations Charter is only one of a myriad of international instruments which stress the need for the international community to preserve and foster the protection of human rights. All these instruments have, to a greater or lesser degree, adequately pinpointed and identified those violations of human rights which may combine to form the foundation of "refugee producing" behaviour of States. There is no real need for any further international treaties or conventions of this kind. Together, these instruments comprise a comprehensive and instructive manual, serving as they do the dual functions of cataloguing the antisocial behaviour to be remedied or avoided and at the same time seeking to impose on governments obligations of a moral or legal character, which, if respected, would undoubtedly eliminate many of the current causes of the mass movements of refugees. This being the position, I am left in some doubt as to what else refugee law might be able to achieve in this regard although extra legal, that is to say, political and social, measures may well be called for.

I would like at this point to focus some attention on that part of Dr Feliciano's paper dealing specifically with mass flows of refugees in times of armed conflict (above p 124). In other words, situations where the events precipitating the outflow of refugees are events of war. As Dr Feliciano has put it, these are situations of armed conflict which have reached a certain degree of intensity and a certain geographic spread and which may be characterised either as an international or internal armed conflict.

In these situations a variety of legal norms may be mobilised to work in favour of the refugee. Different legal norms will operate depending on the particular circumstances.

The first situation to consider is one where the refugee flees to a country *not* participating in the armed conflict. The recent war in Vietnam is a case in point.

Many thousands of refugees fled during the course of the war to neighbouring countries not directly involved in the war, including Thailand, Malaysia and Hong Kong. Even now, in the postwar situation, the flow of refugees has not yet abated, while many of the refugees who arrived prior to the cessation of hostilities still remain in refugee camps.

In analysing what protection International Humanitarian Law affords the unfortunate refugees in such a situation, the definition of Humanitarian Law becomes all important. This is because as far as the receiving or host countries are concerned, Humanitarian Law, in its narrow sense of the Geneva Conventions and Protocols, does not apply in anything but a peripheral way. The simple reason for this is that the receiving States are not participants in the conflict.

The refugees here derive protection not from the Geneva Conventions and Protocols, but from those principles of refugee law developed through custom, State practice and in international instruments.

Dr Feliciano has suggested (above p 125) that where civilians fleeing from approaching combat or from belligerent attacks upon them, cross the frontier into neutral territory, the neutral State may give refuge and succour to the fleeing civilians without committing an unneutral or unfriendly act against the other belligerent. His rationale is that such acts would be in line with the spirit of the provisions of Article 132 of the Fourth Geneva Convention of 1949 (Civilians) which encourages neutral States and belligerent parties to enter into agreements, during hostilities, for the release and accommodation in the neutral countries of certain classes of civilian internees detained by the belligerent parties. However, while Article 132 might conceivably be of some assistance to certain groups of displaced persons, it is unlikely to be of any practical use in relation to refugees properly so called, since the ties of nationality have here been shattered. The refugees have no government which would be willing to look after their interests or to enter into agreements on their behalf.

Dr Feliciano also contends, albeit diffidently (above p 126), that the rule of *non-refoulement* should be deemed applicable where rejection at the frontier or expulsion by the neutral power of civilian refugees would place them in substantial danger of death or serious injury. Despite the non-applicability of Article 132 and purely on the basis that the so called "normal" rules of refugee law will apply in such sitaution, I would agree with this submission: the rule of *non-refoulement* has by now become part of substantive International Law and it is operative both during periods of peace and war.

Dr Feliciano has, however, gone beyond this statement of the doctrine of *non-refoulement*. He has further submitted (above p 126) that the doctrine should be deemed applicable not only in the case of fleeing civilians but also in the case of soldiers fleeing from capture by the enemy. As he points out, the Fifth Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land (1907) *authorises* (although it does not obligate) a neutral State to receive and grant refuge to troops. He would wish to see this principle utilized to afford refuge to fleeing soldiers. The problem with this type of approach is that the rule of *non-refoulement* was developed in relation to the needs of civilian refugees. However admirable the aim and the objective to be achieved in terms of saving life, the *non-refoulement* rule cannot simply be

adopted to afford protection to fleeing soldiers. Any attempt to extend the rule in this way might well result in undermining the effectiveness of the existing protection. Thus, in order to apply the doctrine of *non-refoulement*, one would have to establish not only that the soldiers were fleeing and in need of shelter, but also that they had become refugees. Dr Feliciano has attempted to describe all fleeing soldiers as refugee troops, but so long as soldiers form part of an army representing an established government it could not seriously be contended that they are refugees, as they still have a government to whom they can turn for aid. The situation may be different where the fleeing soldiers are part of a rebel band, because in such a situation they have no government willing and able to take care of them and therefore could conceivably come within the traditional notion of refugees. However the problem even in these circumstances remains that such protection would amount to an extension of existing norms of protection which States might not be willing to extend to armed troops. Refugees have traditionally been conceived of as fleeing civilians and as such have been granted protection by the international community. Soldiers, on the other hand, have always been treated in an entirely different fashion.

There can be no doubt that attitudes in Europe and the Western world to the idea proposed by Dr Feliciano will have been conditioned by the terms of the 1951 Refugee Convention. Under this Convention the lack of national protection goes to the essence of refugee status. Attitudes on the African continent, though, might well be different. This is because the OAU Convention on refugees added to the definition of statutory refugee an important expansion of the term, that is, it provides that the term refugee:

> "shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

Under this expanded definition it is possible to envisage the situation where soldiers, even soldiers of the State, may become refugees.

To revert, though, to the discussion of non-combatant refugees, let us envisage a situation where a regional war is taking place and where refugees find themselves within the war zone. In such situations the 1949 Geneva Conventions as well as the 1977 Protocols contain a variety of provisions which are pertinent to the situation.

Refugees who were received into the country of refuge *before the outbreak of hostilities* appear to be afforded the greatest degree of protection. Article 70 of the Fourth Geneva Convention covers the situation in which the refugee flees from his country of origin to his country of refuge and sometime later his country of origin occupies his country of refuge. The problem here is that although the refugee was a protected person in relation to the authorities of the country of refuge, as a national of the Occupying Power, he ceases to be a protected person as soon as he falls under the control of that Power. Article 70 seeks to afford such a refugee at least some limited protection. The Article in its entirety provides:

> "Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the

occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.

Nationals of the Occupying Power, who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, 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."

The idea behind the first paragraph of Article 70 was to afford a measure of protection to inhabitants of an occupied country in respect of events or actions which had taken place prior to the outbreak of hostilities. Such inhabitants were not to be penalised, for instance, for having assisted their own country's troops or for having belonged to a political party banned by the occupying authority or for having expressed publicly political views that conflicted with those of the occupying authority. The rule limits the penal jurisdiction of the Occupying Power to acts committed during the period in which it is in actual occupation of the territory. This is based on the fact that occupation of alien territory is, in principle, temporary in nature.

The second paragraph of Article 70 relates to nationals of the Occupying Power, who, before the outbreak of the armed conflict, sought refuge in what was later to become the occupied State. It provides that such persons are not to be arrested, prosecuted, convicted or deported from the occupied territory by the Occupying Power. This injunction is derived from the notion that the right to asylum or refuge enjoyed by them before the occupation began should be respected by their home country when it takes over as Occupying Power in the territory of the country of asylum.

Although Article 70 does not expressly extend the protection of refugees, there is no doubt that it affords protection to that category of persons who would fit the definition contained in the 1951 Refugee Convention. It should be observed, too, that Article 70 is unique in character and this very uniqueness places limitations on how it is to be interpreted. It is the only provision dealing with nationals of an enemy State (who happen to be in the occupied territory) in a part of the Convention (Part III) which otherwise deals solely with non-nationals of the Occupying Power. Article 70 will not therefore apply to nationals of the Occupying Power who are not refugees, nor will it apply to persons who became refugees *after* the outbreak of hostilities. Perhaps those responsible for drafting this provision believed that providing similar immunity to those who sought refuge in an enemy State after the outbreak of hostilities would be too great an incentive for treason and the evasion of military or other onerous war time obligations.

Two groups of refugees fall outside the ambit of the protection afforded by Article 70.

The first group are refugees who commit offences *after* the outbreak of hostilities. Jean Pictet, in his *Commentary* on the Fourth Geneva Convention (at p 351) remarks that, in making this reservation, the plenipotentiaries to the 1949 conference wished to make allowance for the possibility of nationals of a belligerent, who had taken refuge abroad, having been guilty in wartime of

action prejudicial to their home country (for instance, propaganda broadcasts). If such acts had been committed before the outbreak of hostilities, those responsible for them could not be prosecuted by the Occupying Power, as they amounted to no more than political agitation. Once war has broken out, however, such agitation becomes treason and the higher interests of the State take precedence over the protection of the individual.

The second exception concerns nationals of the Occupying Power who have committed "ordinary" criminal offences before the outbreak of hostilities and who have sought refuge in the occupied territory to avoid the consequences of their criminal, as distinct from political, actions. Even where such persons have been given "refuge" by the government of the Occupied territory, they cannot be classified as refugees even according to the narrow standards contained in the 1951 Geneva Convention, as their fear of prosecution does not stem from political action of any sort. The absence of protection in this event is entirely justifiable.

It should be noted that Article 70 does not speak in terms of criminal offences, but rather of common law offences which, according to the law of the occupied State, would have justified extradition. The legislation of the occupied State rather than that of the Occupying Power serves as the criterion for the definition of offences under the common law. This reference to the law of the occupied State is in keeping with the tradition that allows the host country of the fugitive to extradite him for ordinary criminal offences. Where an alleged offence exhibits features of a political offence and at the same time those of an offence against the common law, the sometimes thorny question of extradition has always been decided according to the legislation of the host country. Article 70 retains this peace time initiative. It also provides a further important safeguard that will be of benefit to "genuine" refugees, in that the Occupying Power will not be able to arrest and deport refugees in an arbitrary fashion, but only if that power can produce proof that the charges against them are sufficient to warrant extradition. Under current International Law, States applying for extradition have to show a prima facie case; this is a normal judicial safeguard. As a result, the Occupying Power would not be able to take refugees into custody and send them back to its territory merely by alleging that they are guilty of common law offences. It must furnish adequate proof in support of its allegations.

Refugees within the war zone will also be afforded protection by Article 44 of the Fourth Geneva Convention read together with Article 73 of the First 1977 Protocol.

Article 44 places all parties to a conflict under the obligation, in applying the measures of control mentioned in the Convention, not to treat as enemy aliens, *exclusively* on the grounds of their nationality *de jure* of an enemy state, refugees who do not, in fact, enjoy the protection of any government.

The effect of Article 44 is to place refugees in a somewhat more favourable position than enemy aliens in that it exhorts the Detaining Power not to subject refugees to measures of control merely on the basis of their *de jure* nationality of an enemy State. The rationale behind foreign refugees being treated differently from enemy aliens is that enemy aliens who enjoy the protection of their governments would naturally tend to sympathise with those governments and might as a result constitute a threat to the Detaining Power. Hence the measures

of restraint contained in Part III of the Fourth Geneva Convention may be justified. With refugees the contrary is to be presumed — the very fact that refugees have fled their country of origin presupposes that they are at odds with that country's political system and would not wish to promote it. In these circumstances it is quite feasibile for belligerent States to exempt refugees from precautionary measures taken against enemy aliens.

One note of caution might be sounded in analysing the effects of Article 44. This is that Article 44 is couched in negative terms. It operates merely to ensure that refugees are not to be subjected to the same measures of control as enemy aliens exclusively or merely on the basis of their *de jure* nationality. It does not confer any absolute right of exemption from security measures on such refugees, so that merely possessing the status of refugee will not of itself ensure immunity. Article 44 ultimately establishes that formal nationality is only one of a variety of factors that the Detaining Power should take into account in deciding whether the refugee constitutes any threat to its existence. It invites belligerents to take into consideration a whole set of circumstances which may reveal what might be called the "spiritual affinity" or "ideological allegiance"of a refugee.

This of course brings me back to the point made by Dr Feliciano early on in his paper (above p 114), that it is generally impossible to isolate only one reason behind refugee flows; a multiplicity of factors are inevitably involved in such mass movements of people. If on an analysis of all these factors it is found that amongst the refugees are those whose political convictions or activities do represent a danger to the security of the Detaining Power, the latter would be entitled to impose the authorised measures of control to the same extent and subject such refugees to the same conditions as any other persons protected under the Convention.

From the above brief analysis it may be seen that Articles 44 and 70 of the Fourth Geneva Convention deal only with limited aspects of the relationship between refugees and the host country or between refugees and the Occupying Power of which they are or were nationals. These two Articles do not have any application to the other issues dealt with in Parts I and III of the Fourth Convention, which lay down more comprehensive fundamental principles of protection of civilian persons who are "protected persons" under the Convention.

The gaps in the protection of refugees were brought to the attention of the Second Conference of Government Experts by the United Nations High Commissioner for Refugees who expressed the view that the provisions of Articles 44 and 70 were not sufficiently comprehensive to afford the necessary protection for all refugees. He therefore recommended that all refugees and stateless persons be considered as protected persons under the terms of Article 4 of the Fourth Geneva Convention. This recommendation of the High Commissioner became the genesis of what was to eventually emerge as Article 73 of the First Geneva Protocol 1977 which reads as follows: "Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without an adverse distinction."

In the case of stateless persons, it appears that they in any event could be regarded as protected persons within the ambit of Article 4 of the Fourth Geneva Convention. This Article defines as protected persons "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". The exclusions to this category are all nationals of various sorts, and so would not apply to stateless persons.

Article 73 of the First Geneva Protocol may therefore merely have the effect of restating in more explicit terminology an existing obligation to treat stateless persons as protected persons.

With respect to refugees who had that status prior to the beginning of hostilities, Article 73 has the following effects:

(i) all alien refugees in the territory of Parties to the conflict become protected persons (even if they fall within the nationality-related exceptions stated in the second paragraph of Article 4 of the Fourth Geneva Convention); and

(ii) refugees who are nationals of an Occupying Power are entitled to all of the protections afforded to protected persons under Parts I and III of the Fourth Geneva Convention.

This is a substantial improvement over the limited protection currently afforded to this group of refugees under Article 70 of the Fourth Geneva Convention. Among the new benefits they will enjoy as protected persons is the unencumbered immunity provided by paragraph 1 of Article 70 of the Fourth Convention against arrest, prosecution, or conviction for all acts committed or opinions expressed *before the occupation,* excepting only breaches of the laws and customs of war. Under Article 73, therefore, the reach of a country's treason laws against its dissident nationals who became refugees before the outbreak of hostilities will be curtailed in certain circumstances.

One major limitation to the extension of protective measures afforded by Article 73 is that it stipulates that only those refugees who have been granted refguee status *before* the beginning of hostilities are to be given the protection afforded to protected persons under Parts I and III of the Fourth Geneva Convention. As a result, it would appear that refugees who become refugees as a result of events occurring *before* the outbreak of hostilities are in a more protected position than those who are obliged to leave their homes *because of* the hostilities.

On a more optimistic note, however, it seems that those people who become refugees as a result of hostilities could presumably still invoke the protection of Article 44, where available, and in this way at least avoid being classified automatically as enemy aliens. Apart from this, the protection afforded by Article 4 of the Fourth Geneva Convention will remain intact. This means that, except for refugees who are nationals of the Occupying Power, and those who fall within the other exceptions mentioned in the second paragraph of Article 4, refugees are protected persons under the Fourth Convention.

To conclude my commentary, I would like very briefly to mention some additional Articles in the Fourth Convention and First Geneva Protocol that will have particular bearing on the protection of refugees.

Firstly, Article 85 of the First Protocol, which concerns the repression of

breaches of the Conventions and of the Protocol, includes in its definition of grave breaches acts described as grave braches in the Conventions that are committed against persons protected by Article 73 of the Protocol — that is to say, people who have acquired refugee status before the outbreak of hostilities will be afforded the protection of Article 85.

Secondly, Article 26 of the Fourth Convention read with Article 74 of the First Geneva Protocol which relates to dispersed families will undoubtedly be of a special help to refugees. Article 26 places upon parties to a conflict the duty to facilitate enquiries made by members of dispersed families themselves with the objective of renewing contact with one another and of meeting. The emphasis in Article 26 is placed on the facilitation by States parties to the conflict in respect of *enquiries* by *family members* and only incidentally does it contain an obligation to encourage the work of international organizations engaged in such tasks.

The new Article 74 provides for a different emphasis. It establishes that the High Contracting Parties and the parties to the conflict shall facilitate in every possible way the *reunion* of families dispersed as a result of the armed conflict situation.

Article 74 does not limit assistance to enquiries made by dispersed family members themselves (as did the earlier Article 26). Instead it proposes that the High Contracting Parties and the parties to the conflict are to encourage in particular the work of the humanitarian organizations engaged in the daunting task of reuniting families. The new Article 74 thus reaffirms and strengthens the original measures by providing the necessary legal basis for agencies such as the Central Tracing Agency of the Red Cross to proceed about its work.

PART III

TRADITIONAL ASIAN APPROACHES TO THE PROTECTION OF VICTIMS OF ARMED CONFLICT AND THEIR RELATIONSHIP TO MODERN INTERNATIONAL HUMANITARIAN LAW