

Obligations concerning the Return of Nationals  
to a State Party to an internationally recognized  
Armed Conflict

by Tom Clark

Coordinator, Inter-Church Committee for Refugees

Abstract

This paper uses three cases to review the several ways in which Canadian churches have argued that the Fourth Geneva Convention and Protocol II obligate a state contemplating return of a national to a state involved in an internationally recognized conflict.

The first case examines explicit obligations for a state which is a party to an armed conflict concerning return of refugees and protected persons. The second case involves implicit obligations concerning return of such persons by states which are signatories to the Fourth Convention and Protocol II but which are not at war. The third case shows how the principles can be logically extended to states which are similarly situated with respect to the return of nationals. It is deduced that the Fourth Convention and Protocol II relate protection of persons to a set of human rights which the receiving state must be able to uphold with respect to returned refugees or protected persons. Moreover, this protection precludes any form of discrimination in its application.

The paper goes on to discuss the implications of the protection under the Fourth Convention and Protocol II for the protection offered to refugees under the 1951 Geneva Convention and 1967 Protocol relating to the status of refugees. It is argued that the relationship between the notion of protection and a set of human rights to be respected impinges on the application of the definition used to recognize a refugee. Also, it clarifies the content of what is at issue in the prohibition of refoulement; that is the threat to "life or freedom" on return. Finally, the Fourth Convention and Protocol II establish a social group which appears relevant to the application of the definition of refugee.

The paper concludes that if there is to be convergence between the implications of the Fourth Convention and Protocol II and of the 1951 Geneva Convention and 1967 Protocol, protected persons fleeing a recognized international conflict should almost invariably be recognized as refugees.

Relevant Articles from the Fourth Geneva Convention and Protocol II thereto

(1) Purpose of the Fourth Convention of August 12, 1949  
Introducing the Fourth Convention, the Red Cross notes "Strictly speaking this Convention introduces nothing new in a field where the doctrine is sufficiently well established. It adds no

specifically new ideas to International Law on the subject, but aims at ensuring that, even in the midst of hostilities, the dignity of the human person, universally acknowledged in principle, shall be respected." <sup>1</sup>

(2) Article 1

Signatories to the Fourth Geneva Convention agree to "undertake to respect and to ensure respect for the present Convention in all circumstances".

(3) Article 4

According to the first paragraph of Article 4 "persons protected...are those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals."

(4) Synopsis of Article 3

"Common Article 3" to all four Geneva Conventions requires signatory states to prohibit "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon human dignity, in particular humiliating or degrading treatment", and in general to treat all persons not involved in such conflict "humanely,

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<sup>1</sup>. The Geneva Conventions of August 12, 1949: ICRC 12 87, page 16)

without...distinction founded on race, colour, religion, sex, birth, wealth or other similar criteria" and to provide judicial due process. (Note that Protocol II prohibits the threat of these prohibited acts.)

(5) Synopsis of Article 45

The two paragraphs of Article 45 most pertinent for this paper are: a) "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."

b) The paragraph which makes clear that protected persons shall not be transferred to a Power by a Detaining Power until "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention."

(6) Purpose of Protocol II

The introductory clauses reveal the intentions of the signatories: "Recalling that the humanitarian principles in Article 3 common to the Geneva Conventions ... constitute the foundation of respect for the human person in cases of armed conflict not of an international character.

"Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person.

"Emphasizing the need to ensure a better protection for the victims of those armed conflicts..."<sup>2</sup>

#### (7) Scope of Protocol II

The first article itself defines the purpose and scope:

"Article 1 ... This Protocol, which develops and supplements Article 3 common to the Geneva Conventions... shall apply to all armed conflicts ... in the territory of a ... Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

#### (8) "Humane Treatment" under Protocol II

Articles 4, 5, 6 form the expanded common Article 3 from the 1949 Geneva Conventions.

Article 4 "Fundamental guarantees" includes "1. All persons who do not take a direct part or who have ceased to take part in hostilities ..." This article contains most of the human rights of common Article 3 given above.

Article 5 gives expanded provisions with respect to persons whose liberty has been restricted.

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<sup>2</sup>. (Protocols additional to the Geneva Conventions of August 12, 1949: ICRC, Geneva 1977, page 89)

Article 6 provides detailed obligations relating to the application of legal due process to penal prosecutions.

1. Explicit Application of the Fourth Geneva Convention, Case 1

An Iraqi couple arrived by air at Toronto International Airport on January 9, 1991. They claimed to be refugees. During their examination at the airport, their baggage was searched and a list of ammunition was found in the man's notebook. Also found were the forged Saudi passports used to travel. The couple were detained. The Minister of Immigration signed a Security Certificate under the Immigration Act which has the effect of (1) automatic detention for an indefinite time and (2) giving the Minister the right to deny access to refugee determination procedures. The Minister denied this access. In addition, the couple were separated. The separation, diet and medical examination of the woman, who was pregnant, were particularly inappropriate for a devout Muslim. Other aspects of the detention allegedly violated the UN Minimum Standards for the Treatment of Prisoners. The Minister announced she would return the couple to Iraq.

On January 15, 1991, Canada was at war with Iraq and the couple fell under the Fourth Geneva Convention as Protected Persons under article 4. Canada had obligations under common Article 3 as expanded by Protocol II. Arguably, Canada was at least in violation of Protocol II Article 5 items 1.(d) "they shall be

allowed to practice their religion" 2.(a) "except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under immediate supervision of women". Under the Fourth Convention the detention had become problematic. Under Article 43 of the Fourth Convention, any Protected Person interned has the right to have the action reconsidered as soon as possible. The Minister's Security Certificate prevented this. The return to Iraq would now be improper irrespective of any determination of refugee status. Under Article 45, the couple could not be returned to a country where they might have reason to fear persecution for their political opinions. One of them had previously been detained and tortured in Iraq and they would certainly have been persecuted again for being members of an opposition party. Also under Article 45, the couple could only be transferred to Iraq if Canada were satisfied that Iraq was willing and able to apply the Convention. For Civilians, applying the Convention means at least fulfilling common Article 3. This Iraq could not fulfil with certainty as an internationally recognized violator of human rights.

The Inter Church Committee for Refugees reported the case to the International Committee of the Red Cross via the Red Cross, Ottawa. In a sudden and unexpected decision, the Federal Court overturned the Security Certificate days before a press conference scheduled for March 14, 1991. The press conference

would have linked Canada's poor treatment of civilians under these rules of war with Iraq's treatment of prisoners of war.

### Reflections on Case 1

(1) It is important to reflect on why these treaties work at all. It is sometimes argued that "reciprocity" makes the rules of war effective. Army A treats prisoners of war fairly because it wants Army B to treat prisoners of war fairly. However, this case reveals a reciprocity which is more subtle. Some things which one state, Canada, cares about, such as the treatment of prisoners of war, could be undermined by Canada's failure to fulfill all aspects of the treaty. No doubt this more subtle concept of reciprocity has some force with regard to other treaties and agreements such as the Helsinki Accords.

(2) It is important to reflect on what happened between January 9 and January 15. In signing the Geneva Conventions and Protocol II states intended to extend the protection of human rights of civilians into war situations. The implication is that without the war, these protections would or should have existed. What would happen to a similar Iraqi couple who arrived just after the war was concluded but where the objective situation with respect to their return remained substantially similar or worse in Iraq? Canada has obligations to treat people equally with respect to their human rights. Indeed, the rights to equal treatment and



non-discrimination are deeply entrenched in a variety of UN treaties.<sup>3</sup> The human rights at issue in returning an Iraqi couple remain unchanged by the war's ending. International law tends to allow excuses (derogations) from states who can fail to live up to human rights obligations in extreme threatening situations such as national mobilization or invasion. For a state such as Canada which was little touched by the war, there would be greater expectation to protect these persons in time of peace than in time of war. How does a state maintain equal treatment after a war? These thoughts have implications for asylum and refugee determination procedures which will be further discussed below.

Implicit Obligations under the Fourth Convention and Protocol II - Case 2

The case Re Medina and the United States Board of Immigration Appeals<sup>4</sup> provides a basis for discussing further the obligations which extend to Parties who are not at war.

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<sup>3</sup>. For example Article 26 of the Covenant on Civil and Political Rights. See also General Conclusions 18 of the UN Human Rights Committee on Non Discrimination and their General Conclusions 15 on the treatment of Aliens.

<sup>4</sup>. Collection of Lectures: Texts and Summaries, Twentieth Study Session International Institute of Human Rights, Human Rights and the Judiciary, Appendix II-E.

Jesus Del Carmen Medina, a Salvadorean woman, managed to enter the United States in 1980. In 1985, her case was considered by an immigration judge who then denied her request for asylum and for the withholding of her deportation, which are separate provisions in the United States law. In the decision, the judge ruled that Articles 1 and 3 of the Fourth Convention were self-executing and that immigration judges could apply the Convention and customary international law. The judge, however, denied Medina's claim on the ground that El Salvador was not in violation of the Convention. The Board of Immigration Appeals ruled that at most article 1 of the Convention requires governments who are not a Party to armed conflict to refrain from encouraging other states to violate Article 3. It doubted that article 1 was intended to require governments to ensure that Parties not under their control refrain from committing violations. In addition, the Board found that the right to temporary refuge had not become a customary norm of International Law.

#### Reflections on Case 2

(1) At the very least, this case shows that certain articles of the Convention are legally at issue in cases of return from a country not a Party to a conflict.

(2) There are recent decisions of the European Commission and Court on Human Rights which confirm the principle that a

returning state is required to anticipate the deprivation of human rights by the country to which the person is returned.<sup>25</sup> Hence if Article 3 and Article 1 together apply, contrary to the "doubt" of the BIA, they do impose a duty on governments to ensure that violations of rights of civilians under their control will not occur as a consequence of return to another state which is a Party to a conflict.

(3) The BIA rejection of the notion of a customary norm is also narrow. In most countries, including the United States, the majority of civilians who have fled from a conflict are not in fact returned. Forcible return is limited to a minority of highly visible but random exceptions to the rule.

(4) On a more cautious note, the primary purpose of the 1949 Geneva Conventions and the Protocols thereto is to limit the effects of war on the warring forces and civilian populations. The International Committee of the Red Cross rightly focusses its energy on compliance of the Parties at war with the Conventions. Nonetheless, the concern of the Fourth Convention and Protocol II is for rights of the civilian person. That concern travels with the civilian. As the purposes listed above indicate, signatory states intended that these provisions for war time would complement human rights and humanitarian standards otherwise in

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<sup>25</sup>. For example, the Soering Case of the European Court of Human Rights, 1989.

place in peace time. The force of the Fourth Convention and Protocol II lies not just in isolation, but as a clarifying tool for the implicit protections of other human rights treaties which continue in force in peace time.

3. Arguing against the return of Salvadorean & Lebanese Nationals  
- Case 3

The Inter-Church Committee for Refugees has used the Fourth Convention and Protocol arguments to advocate against forcible returns of Lebanese and El Salvadorean civilians in Canada to conflicts in their home countries. However, the arguments relating to the Fourth Convention and Protocol II did not stand alone. They formed part of a package of potential violations of several other human rights treaty provisions as a consequence of return of these civilians.

In the correspondence, Canada was described as "similarly situated" to a Detaining Power under the Fourth Convention as far as a civilian national from El Salvador is concerned. In other words, from the point of view of the civilian, it would be no different if Canada were a Party to the conflict. Perhaps it should be argued that Canada is "better situated" because treaties usually make some waiving of obligations (derogations) in time of invasion, national mobilization for war or other extreme circumstance. The Fourth Convention affirms obligations

to certain human rights (common Article 3) even in time of war. The two tests in the Fourth Convention can be paraphrased: 1) Will the returned person face persecution for political beliefs or religious reasons? (Article 45) 2) Will the receiving country, El Salvador, honour obligations under the Convention and Protocol II? The latter may be interpreted: Can El Salvador be expected to fulfill common Article 3 or Protocol II? (Article 45 explicitly, also Article 1 and 3 together implicitly). The first test depends on the individual. However, since El Salvador is under investigation by the UN for gross and systematic violations of human rights, the second test appears to allow a more general protection to all civilians. Finally, we argue that equal treatment of persons requires that these considerations which would protect civilians in a Canada at war should at least protect similarly situated civilians in a Canada at peace.

### Reflections on Case 3

(1) The churches did not set out from an academic position that a number of provisions from a number of human rights treaties applied. The task was to list all the treaty provisions that spoke against removal of Salvadoreans or Lebanese. They encompassed constitutional rights and treaty rights. There were substantive rights such as equality rights and rights to security of person. There were procedural rights. These were well

represented in the rights in common Article 3 of the Fourth Convention.

(2) Often specific concepts such as "persecution" or specific rights such as protection from "cruel treatment" are debated in the case of individual refugees. Yet the case developed against deportations of civilians to conflict situations in Lebanon or El Salvador hinged on the joint weight of the arguments.

(3) In its examination of Canada under Article 40 of the Covenant on Civil and Political Rights, October 22, 23, 1990, the UN Human Rights Committee concluded that "The 1951 Convention related to the Status of Refugees should be interpreted in a manner consonant with obligations under the Covenant." This relates explicitly to equal treatment and non-discrimination referred to above. These principles require that Canada apply the 1951 Geneva Convention in a manner consonant with the 1949 Geneva Conventions and Protocol II thereto. It remains to explore what this "consonant" application means.

(4) Article 45 of the Fourth Convention has similarities with the 1951 Geneva Convention relating to the status of refugees. In the former, persons cannot be returned to persecution. In Article 33 of the latter persons found refugees are not to be returned to persecution. Under Article 45, the receiving state must be willing and able to uphold the 1949 Convention, including the

human rights in common Article 3. Under Article 1 of the 1951 Convention on refugees, the person can enjoy protection as a refugee if, by reason of a well-founded fear of persecution, the person is unwilling or unable to avail himself of the country of nationality. A common element is the inability of the state of nationality to protect. Article 45 provides a useful complement to the 1951 Geneva Convention because it gives a returning state an objective tool to measure appropriateness of return. Common Article 3 provides pertinent human rights whose violation would constitute a well-founded fear of persecution. Their potential violation would also add specific meaning to the threat to life or freedom in the principle of non-refoulement.

(5) A national, fleeing war to a Party to the conflict, is part of a social group, Protected Persons, defined by Article 4 of the Fourth Convention. Beyond the parties to the conflict, this social group does not exist. If the person moves on to a third country, not a party to the conflict, the person would be a member of a social group within the meaning of the 1951 Geneva Convention relating to the status of refugees. A person with the same fear of persecution who fled directly to the third country would face discrimination in the respect of her rights at risk in return if not treated as if she were part of this social group. This group is very inclusive. Almost all citizens from a conflict can claim the same protection against return.

### General Conclusions

There is evidence that elements of the Fourth Geneva Convention and Protocol II influence the obligations of a signatory state not a Party to the conflict with regard to civilians from a Party to the conflict on their territory.<sup>6</sup> Obligations to treat persons equally whether at war or at peace require a consistent application of these provisions as interpretive tools alongside the 1951 Geneva Convention and 1967 Protocol relating to the status of refugees. The human rights provisions in common Article 3 and the test in Article 45 of a state's ability to adhere to these provisions are a means of clarifying and applying the concept of persecution within the refugee definition, Article 1 of the 1951 Geneva Convention. These considerations require that the civilian person facing potential return to a conflict in which the receiving state manifestly cannot fulfill obligations under common Article 3 would be almost invariably a Convention Refugee.

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<sup>6</sup>. It is not the view of the author that the applicability of the Fourth Geneva Convention should be argued in court in isolation. There are invariably a number of human rights treaties which impinge on the return of a national to her home country. It is the compounded simultaneous impact of the several obligations to protect human rights which a court should be asked to consider.