

# The cross-fertilization of international humanitarian law and international refugee law

by

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**I**nternational refugee lawyers sometimes have a problem of identity. They are used to living in a small cosy house, of which they know each room and cranny and, if any, each hidden place. After all, the 1951 Refugee Convention and its 1967 Protocol, taken together, contain less than 60 articles. Attempts to provide a more ambitious and more comprehensive treaty-law framework have failed, except on one continent, Africa, where the OAU in 1969 adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa. The problem is that this tiny house cannot accommodate refugee protection in its entirety. Whereas the codification process has been put on hold, the refugee problem has inexorably grown in scope, magnitude and complexity. The logical — and rather pragmatic — response has been non-treaty legal expansion, either by using existing buildings around the tiny house or by erecting, sometimes hastily, legal annexes. The latter have taken on diverse forms, including the adoption of national implementing legislation, jurisprudential developments, and the creation of soft law (through United Nations General Assembly Resolutions and the Conclusions of the United Nations High Commissioner's Executive Committee). As to "squatting" in

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existing buildings, refugee law has made use of two sister branches of law: human rights law and international humanitarian law.

While much has been written about the interface between refugee law and human rights law, a great deal remains to be said about the relationship between humanitarian law and refugee law.

Firstly, international humanitarian law and refugee law come into contact quite naturally when refugees are caught up in an armed conflict. In that case, such people are at the same time refugees and conflict victims. Logically, they should be under the dual protection of refugee law and humanitarian law, which should apply concurrently. Secondly, international humanitarian law and refugee law, instead of applying concurrently, can apply successively, forming a sort of continuum in terms of protection. In other words, a victim of armed conflict may be forced to leave his or her country because he or she does not obtain adequate protection from international humanitarian law, for instance in all conflicts where there are gross violations of human rights and grave breaches of humanitarian law. In such circumstances, those grave breaches constitute a substantial part of the refugee definition and become the determining factor triggering refugee protection. Thirdly, international humanitarian law may have influenced refugee law in that the latter may have “borrowed” from the former concepts, principles or rules, either at the standard-setting level or at the interpretation stage. One of the cardinal principles of international refugee law, the exclusively civilian character of refugee camps and settlements and, more broadly, of asylum, has been shaped and permeated by a founding principle of international humanitarian law, namely, the principle of distinction (the prohibition of attacks against civilian populations and civilian objects). Another example is the exclusion from the protection of the Refugee Convention of persons who have committed a war crime.

This article will be confined to a brief and non-exhaustive discussion of the first two aspects of the relationship between international humanitarian law and refugee law.

## Refugees caught up in an armed conflict: the concurrent application of refugee law and international humanitarian law

### The refugee in international and non-international armed conflict

The question of whether refugees are protected by international humanitarian law has been discussed on many occasions in the *International Review of the Red Cross*,<sup>1</sup> and there is no need to return here to an issue that is rather technical. Both as civilians and as persons who do not enjoy the protection of their government, refugees are protected by humanitarian law treaties and by customary law, in the context of both international<sup>2</sup> and non-international armed conflict. In addition, refugees in armed conflict continue to be protected by international refugee law. An antithetical or *a contrario* interpretation of Article 9 of the 1951 Convention leads to the conclusion that the Convention “is to be applied not only in normal peace time, but also in time of war...”.<sup>3</sup> Article 5 clearly allows for the concurrent application of the Convention and other instruments granting “rights and benefits” to refugees. In other words, protection by international refugee law does not result in the abolition of broader rights granted by other treaties, such as international humanitarian law treaties. What are the implications and the consequences, for both refugees and States parties, of such concurrent application of refugee law and international humanitarian law? Does concurrent application

<sup>1</sup> See Françoise Krill, “ICRC’s action in aid of refugees”, *IRRC*, No. 265, July-August 1988, pp. 328-350; Jean-Philippe Lavoyer, “Refugees and internally displaced persons: International humanitarian law and the role of the ICRC”, *IRRC*, No. 305, March-April 1995, pp. 162-180; International Committee of the Red Cross, “Internally displaced persons: The mandate and role of the International Committee of the Red Cross”, *IRRC*, No. 838, June 2000, pp. 491-500.

<sup>2</sup> With respect to international armed conflicts, there is a small deficiency or gap in the protection offered by the Geneva Conventions. The gap has been largely but not entirely bridged by Article 73 of Protocol I. See Krill, *op. cit.* (note 1), p. 330 f.

<sup>3</sup> Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, UNHCR, Geneva, 1997, p. 42.

increase protection for refugees and create additional obligations for States?<sup>4</sup> What value does international humanitarian law have for refugees caught up in armed conflict?

The two chapters of international law have different histories and represent two different challenges to the “sacrosanct” principle of State sovereignty. In its written form, international humanitarian law came into being in the mid-nineteenth century, while refugee law, like human rights law, is a creation of the twentieth century. Unlike international humanitarian law, refugee law was not designed for the special circumstances existing in times of war. During armed conflict, refugee law has certain weaknesses, which can be partly corrected by humanitarian law:

1. Article 9 of the 1951 Convention relating to the Status of Refugees allows a Contracting State to take “provisionally measures” against asylum-seekers or refugees “in time of war or other grave and exceptional circumstances”. Though this provision lays down a certain number of safeguards and limitations, it authorizes a Contracting State to derogate from all the provisions of the Convention. Unlike other human rights treaties, the 1951 Convention does not contain a set of core rights which cannot be waived in any circumstances, so there is a risk of refugee rights being suspended in time of war. Fortunately, international humanitarian law contains important complementary safeguards; it also urges States to show the greatest restraint in applying special measures to protected persons.<sup>5</sup>

2. International refugee law is based on the assumption that refugees are, with some exceptions, accorded the same treatment as aliens in general.<sup>6</sup> In times of war, however, aliens are usually the first to see their rights restricted or reduced. Under Article 7 of the 1951 Convention, such limitations or derogations could affect refugees. Also pertinent is Article 44 of the Fourth Geneva Convention, which reads as follows:

<sup>4</sup> Nehemiah Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*, reprinted by UNHCR, Geneva, 1997, p. 67.

<sup>5</sup> See in particular Part III of the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

<sup>6</sup> Article 7 of the 1951 Convention.

“In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.”

The interpretation of this rule makes it clear that the status of a refugee as an alien is largely artificial and should not lead to automatic curtailment of his or her rights:

“People who are in fact the first victims of the Power at war with their country of asylum and who are in certain cases in favour of the latter’s cause, obviously cannot be treated as enemies. The purely formal criterion of nationality must therefore be adjusted, for it rests on an essentially legal and technical conception, and the strict application of such a contradiction would be in contradiction to human reality and contrary to justice and morality.”<sup>7</sup>

It is interesting to note that Article 44 of the Fourth Geneva Convention expressly served as a precedent for the inclusion of Article 8 in the 1951 Convention, thus establishing a link between humanitarian law and refugee law.

3. It is generally accepted that dissident groups who, in a non-international armed conflict, control part of a territory, including its refugee population, are bound neither by refugee law nor by human rights law. However, there is no serious disagreement over the question of whether international humanitarian law is binding upon dissident or insurgent groups in internal armed conflict. The nearly unanimous answer is “yes”, despite the fact that such groups are not party to international treaties. The reasons given for such an obligation for the insurgent side have not always been convincing,<sup>8</sup> but they have not been seriously challenged. The main and most consistent arguments developed in favour of such an interpretation are as follows:

<sup>7</sup> Jean S. Pictet (ed.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958, p. 264.

<sup>8</sup> François Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 1994, p. 380.

- Article 3 common to the four Geneva Conventions (as well as most provisions of their Additional Protocol II of 1977), is clearly addressed to both sides, stating that “*each* Party to the conflict shall be bound to apply...” (emphasis added). By definition, the “other” party to an internal armed conflict is one or more dissident groups.
- Fundamental rules of international humanitarian law<sup>9</sup> are not only codified as treaty law but have become customary law. Thus, they apply in all circumstances, regardless of whether a party to an armed conflict has formally accepted them or not.
- Rules of international humanitarian law govern not only the conduct of States, or those representing a State, but also the conduct of individuals.
- Violation of these rules incurs individual criminal responsibility, not only during international armed conflicts but also during internal armed conflicts. This is quite a new development. Both Article 3 and Protocol II say nothing at first sight about criminal responsibility and the prosecution of war crimes. In the *Tadic* case, however, the Trial Chamber of the International Tribunal for the former Yugoslavia recognized the existence of a customary rule extending individual criminal responsibility to situations of internal armed conflict.<sup>10</sup>
- The Rome Statute of the International Criminal Court has now clarified some of the points that were still unclear in the Statutes of both ad hoc International Tribunals.<sup>11</sup> According to Article 8 of the Rome Statute, the Court shall have jurisdiction over war crimes, including those committed during armed conflicts that are not international in character. In addition, Article 25(1) is uncompromising with respect to individual responsibility:

<sup>9</sup> Including Article 3 common to the 1949 Geneva Conventions and several provisions of the 1977 Additional Protocol II.

<sup>10</sup> Judgment of Trial Chamber II in the *Dusko Tadic* case, 7 May 1997, para. 613.

<sup>11</sup> For the former Yugoslavia and Rwanda, respectively.

“A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.”

The binding character of international humanitarian law for dissident groups is crucial for refugee protection. When refugees are caught up in an internal armed conflict and find themselves under the territorial control of a non-governmental entity, they are left with no other protection than that afforded by humanitarian law. As pointed out above, international refugee law is not binding for dissident groups; it is addressed exclusively to States. The obligation of non-governmental armed groups to respect the rights of refugees is therefore based on international humanitarian law and not on refugee law.

International humanitarian law has further advantages over refugee law:

- The four 1949 Geneva Conventions — which, with their 1977 Additional Protocols, constitute the core of international humanitarian law — have been ratified or acceded to by 189 States,<sup>12</sup> compared with 140 States party to the 1951 Refugee Convention and/or its 1967 Protocol.<sup>13</sup>
- The rules on denunciation are different. While a denunciation of the 1949 Geneva Conventions and their Additional Protocols “shall not take effect until peace has been concluded”, a denunciation of the 1951 Refugee Convention automatically takes place one year from the date on which it is received by the Secretary-General of the United Nations.
- Finally, the rules of international humanitarian law cannot, by their very nature, be either derogated from or renounced, as they are a compromise between the concepts of “military necessity” and “humanity”.
- In situations where humanitarian law and international refugee law apply concurrently, it is not impossible that a norm of humanitarian law might be at variance with a norm of refugee law. Which norm should prevail in such a case? How should inconsistencies or

<sup>12</sup> As at 1 May 2001.

<sup>13</sup> As at 1 May 2001.

differences between norms belonging to two different treaties be resolved? To answer these questions the human rights/humanitarian nature of both treaties, which calls for a more dynamic approach to interpretation, should be taken into account. Since both international humanitarian law and international refugee law aim to protect human beings and to secure their basic rights, the norm which offers the best protection to the individual concerned should then prevail. The best interest of the protected person should always be the prime consideration.<sup>14</sup>

### **Prisoners of war released at the end of hostilities who refuse to be repatriated and apply for asylum**

One of the most interesting examples of the concurrent application of international humanitarian law and refugee law is the issue of prisoners of war who, at the end of hostilities, refuse to be repatriated and instead apply for asylum in the detaining State. From a refugee law perspective, a former soldier who has been disarmed and detained by the enemy State can be a refugee. The only conditions for being a refugee are the following:

- applicants must meet the conditions set forth in Article 1, A (2) of the 1951 Refugee Convention, in particular, they must have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- there must be no serious reasons for considering that they committed a war crime or a crime against humanity during the time they were fighting; and
- they are required to lay down their arms and cease military activity in the country of asylum.

In many cases of international armed conflict, when prisoners of war are released at the end of the hostilities the reaction of the “Power on which the prisoners depend” — in other words, their country of origin — is ambiguous. Released prisoners of war may be

<sup>14</sup> See, e.g., Malcolm N. Shaw, *International Law*, 4th ed., Cambridge University Press, 1997, p. 658.

seen as heroes who have suffered for their country, but they may equally be regarded as traitors or cowards who have been captured instead of accepting a courageous death, or even as collaborators with the enemy. (Though a clear violation of the Third Geneva Convention, a long captivity can be used by the Detaining Power to obtain intelligence from its prisoners.) In the latter two cases, a prisoner of war who is repatriated to his/her country of origin might have a "well-founded fear of persecution" based on one of the five grounds spelled out in the 1951 Refugee Convention. In most cases, the claim to a fear of persecution will fall under the heading of "membership of a particular social group", as released prisoners of war can constitute a category of persons who are perceived as disloyal to their country. This interpretation is in line with the authoritative recommendation of the UNHCR *Handbook*, which states:

"Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook (...) of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies."<sup>15</sup>

In other cases, the claim can be based on "political opinions" (not necessarily expressed, but rightly or wrongly attributed to the applicant by the authorities of his/her country of origin), "race", "nationality" or "religion".

From a refugee law perspective, the repatriation of such individuals who have a credible claim would amount to a violation of the principle of *non-refoulement*.

In international humanitarian law, the treatment of prisoners of war, including their release and repatriation, is governed by the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War. Two provisions of this Convention are central to the issue of release and repatriation of prisoners of war, and

<sup>15</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol*

*relating to the Status of Refugees*, Geneva, January 1992, p. 19.

their inter-linkage with the principle of *non-refoulement* is crucial for refugee protection.

Article 109 of the Third Geneva Convention concerns the release and repatriation of sick and injured prisoners of war during hostilities. The article's third paragraph states that "no sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities". This prohibition constitutes an absolute legal guarantee against *refoulement*, the latter being precisely defined as forcible return or return against the will of the person concerned.

Unfortunately, Article 109 of the Third Geneva Convention applies only in rather exceptional situations. The large majority of prisoners of war are not so sick or injured that they are released and repatriated during hostilities. The release and repatriation of able-bodied prisoners of war (including those who are not seriously sick or seriously wounded) will usually take place at the end of hostilities and will not be governed by Article 109, but by Article 118 of the Third Convention. This is a vaguer and more ambiguous provision and does not take the wishes of the prisoners of war into account. Its first paragraph merely states, quite unequivocally, that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities". Taken out of its broader context and interpreted literally, this provision may well be seen as incompatible with the principle of *non-refoulement*:

"The conjunction 'and' between the words 'released' and 'repatriated' may, therefore, create the impression that any prisoner of war who is released after the cessation of hostilities must also be repatriated irrespective of his will. In fact, when in the course of the Geneva Conference of 1949, a proposal was made to add to Article 118 a paragraph granting prisoners of war the option of not returning to their country if they so desire, it was rejected in a vote, owing to the apprehension that such a provision would serve as an escape clause for a Detaining Power wishing to

retain prisoners on the pretext that they are unwilling to be repatriated.”<sup>16</sup>

The apprehension of States was mainly based on the fact “that at the end of the Second World War a number of States had kept prisoners of war in captivity for a very long time for various reasons. Every effort was therefore made to ensure repatriation as soon as possible after the end of the hostilities.”<sup>17</sup> The proposal, made by Austria, to include a clause giving prisoners of war the option of not being repatriated to their country of origin was rejected on other grounds:

“The Soviet delegation opposed the Austrian suggestion because prisoners of war might not be able to express themselves with complete freedom. Furthermore, the proposed provision might give rise to undue pressure on the part of the Detaining Power. The delegate of the United States concurred in such views and the Austrian proposal was rejected ‘by a large majority’.”<sup>18</sup>

Not long after the adoption of the 1949 Geneva Conventions, and almost coincidental with the adoption of the 1951 Refugee Convention, the issue of whether prisoners of war can be forcibly repatriated to their country of origin became a major concern in the negotiations leading to an armistice during the Korean War. Thousands of Chinese and North Korean POWs, when interviewed by the United Nations Command, said that they would resist forcible repatriation, because if they were returned, “they would be executed or imprisoned or treated brutally in some way”.<sup>19</sup> In other words, they expressed a fear of persecution and asked not to be forcibly returned to such persecution or torture.

Although none of the parties to the Korean conflict had ratified the 1949 Geneva Conventions, all of them gave assurances at the beginning of hostilities that they would apply them *de facto*. They

<sup>16</sup> Yoram Dinstein, “Refugees and the law of armed conflict”, *Israel Yearbook on Human Rights*, Vol. 12, 1982, p. 102.

<sup>17</sup> Jean S. Pictet (ed.), *Geneva Convention relative to the Treatment of Prisoners of War: Commentary*, ICRC, Geneva, 1960, p. 543.

<sup>18</sup> Christiane Shields-Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Schulthess Verlag, Zurich, 1977, p. 170.

<sup>19</sup> *Ibid.*, p. 158.

accordingly examined the issue of repatriation in the light of Article 118 of the Third Convention, but they disagreed as to the article's meaning. Negotiations were long and arduous, but eventually ended with all parties signing a special Agreement on Prisoners of War which incorporated the principle that the will of a prisoner of war should be respected. This principle meshed with the nearly contemporaneous resolution of the General Assembly of the United Nations, adopted on 3 December 1952, that "force shall not be used against prisoners of war to prevent or effect their return to their homelands and no violence to their persons or affront to their dignity or self-respect shall be permitted in any manner or for any purpose whatsoever..."<sup>20</sup>

Today it is no exaggeration to say that an interpretation that takes into account the will of the prisoner of war is not only in line with the spirit of the Geneva Conventions, but also reconciles international humanitarian law and refugee law by giving precedence to the principle of *non-refoulement*. It may also be said that this interpretation is authoritative.

"The point of departure here is that every prisoner of war must be afforded free choice whether or not to return to his country. But this right must be exercised in such objective conditions (out of the control of the Detaining Power) that there cannot be any doubt as to the free exercise of that choice. The option of repatriation is bestowed on the prisoner of war personally, and not on the two States concerned (the country of origin or the Detaining Power)."<sup>21</sup>

The Commentary on the 1949 Geneva Conventions published by the ICRC proposes the following interpretation of Article 118 of the Third Convention, an interpretation that fully conforms to refugee law principles and standards:

"1. Prisoners of war have an inalienable right to be repatriated once active hostilities have ceased. In parallel (...) it is the duty of the Detaining Power to carry out repatriation and to provide the necessary means for it to take place....

2. No exceptions may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually.”<sup>22</sup>

The ICRC, which in most international armed conflicts has been able to assume invaluable humanitarian and protection functions vis-à-vis prisoners of war and has almost systematically been a substitute for a Protecting Power, has consistently held the view that prisoners of war at risk of being persecuted in their country of origin must not be repatriated. In the context of the 1990-1991 Gulf War, ICRC delegates interviewed all Iraqi POWs who had expressed their unwillingness to be repatriated and determined that they should be treated as asylum-seekers.<sup>23</sup>

Article 118 of the Third Geneva Convention, as interpreted during successive international armed conflicts, has proved to be a good example of the complementary character of international humanitarian law and refugee law: they do not simply overlap, but instead represent a legal and institutional “hand-over”. As long as prisoners of war are held in captivity and there is no obligation to release them, they are protected by the Geneva Convention. They have POW status and are under the responsibility of the Detaining Power.<sup>24</sup> But as soon as there is an obligation to release them, those who would be at risk of persecution in their country of origin are entitled to have their

<sup>22</sup> *Op. cit.* (note 17), pp. 546-547.

<sup>23</sup> Peter Rowe (ed.), *The Gulf War in International and English Law*, Sweet and Maxwell, London, 1993, p. 203.

<sup>24</sup> The responsibility of the State detaining POWs is clearly stated in the Third Geneva Convention, Art. 12, para. 1, which reads as follows: “Prisoners of war are in the hands of the enemy Power, but not of the

individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them”. — POWs must at all times be treated humanely and are entitled in all circumstances to respect for their persons and their honour (*ibid.*, Arts 13 and 14).

claim examined and their refugee status determined by the Detaining Power. This State is no longer merely the Detaining Power but must assume a different responsibility/obligation deriving from refugee law and principles that include, but are not limited to, the principle of *non-refoulement*. Institutionally, the ICRC's mandate to monitor compliance with international humanitarian law should end on the day UNHCR takes over, although in practice some overlapping will be necessary in order to avoid a protection gap.

Thus released prisoners of war who refuse to be repatriated for fear of persecution become "classic" asylum-seekers whose case should be examined in the light of all refugee law rules and principles. If the applicants are deemed to have a well-founded fear of persecution based on one of the five grounds specified in the 1951 Refugee Convention, they will then be granted refugee status, unless there are serious reasons for considering that they have committed a crime that excludes their entitlement to such status, in particular a war crime or a crime against humanity at the time they were engaged in hostilities.

### **The successive application of international humanitarian law and refugee law — or refugee law as a response to non-respect for international humanitarian law**

International humanitarian law is based on the premise that despite the existence of armed conflict, persons not (or no longer) taking a direct part in hostilities must be protected and treated humanely. The law creates a "humanitarian or human rights reserve" in which the civilian population can be protected. Respect for international humanitarian law means that protection must be granted where hostilities take place, and that civilians are not forced to cross international frontiers in order to obtain international protection. If international humanitarian law is grossly violated in a country at war and civilians there can no longer be protected from being targeted, those who flee their homeland will become refugees. Refugee status is then based on the inability or unwillingness of parties to a conflict to respect international humanitarian law, which means that there is a

clear correlation between grave breaches of that law (often constituting war crimes or even crimes against humanity) and refugee protection.

In this section, consideration will first be given to the linkage between the refugee definition and non-respect for international humanitarian law in the country of origin, and then to another important aspect of the humanitarian law/refugee law “continuum”. In modern conflicts, refugee situations are often created by population transfer policies or forced displacement. In such circumstances, which may include the practice of ethnic cleansing, “population transfers are not merely a feature of the war, but its principal objective”.<sup>25</sup> Such forced movements of civilians, which are a clear violation of international humanitarian law, call for international protection under refugee law.

#### War crimes and refugee status

The key question here is whether the victim or the potential victim of a war crime who has fled his/her country of origin and has sought asylum in another country is a refugee meeting the rather strict definition of Article 1 A. (2) of the 1951 Convention. While consensus exists that such victims deserve international protection, at least temporarily, some argue that they are not *stricto sensu* refugees, but persons fleeing a situation of war or armed conflict and not persecution. In other words, they would meet the extended definition of the 1969 OAU Convention, but not the stricter one embodied in the 1951 Refugee Convention.

Such an approach has often been guided by practical considerations. Armed conflict produces mass displacements, and it is often impractical to determine refugee status during large-scale influxes. In the specific context of non-international armed conflict, States may argue that claimants have been victimized by non-State elements and that to be applicable the 1951 Convention, though silent on the issue, requires persecution by the State and its agents. Finally, it would be

<sup>25</sup> Christa Meindersma, *Human Rights Transfers and Population Exchanges*, UNHCR, *Concerns in Situations of Population* Geneva, February 1997, p. 77.

politically untenable to insist on granting “permanent” asylum to large groups of people affected by conflict when both host governments and their local populations have become increasingly unsympathetic to the plight of refugees.

Under the 1951 Convention, a refugee is someone who is outside his/her country of origin and has a well-founded fear of being persecuted for one or more of five specific reasons. The fact that persecution took place or was likely to take place during peace or war is not relevant and is not part of the definition. In other words, “there is nothing in the refugee definition which would exclude its application to persons caught up in a civil war”<sup>26</sup> or in an international armed conflict.

The crucial question to ask is whether the relevant individuals have “only” fled from areas affected by war (in which case they may not necessarily meet the strict definition of the 1951 Convention), or whether they have, in addition, been exposed to persecution. In the latter case, these individuals would be refugees according to the 1951 Convention, on condition that the persecution is based on one of the five grounds specified therein.

As many scholars have rightly pointed out, the concept of persecution is not defined in the 1951 Refugee Convention and has not been given a uniform interpretation.<sup>27</sup> But there is agreement that some acts, because of their intrinsic unlawfulness and gravity, are always considered to be persecution. This is particularly the case of a “straightforward threat to life or liberty”<sup>28</sup> and of “the violation of non-derogable human rights”.<sup>29</sup>

Less serious acts might also constitute persecution, depending on their consequences for the victims.

Under Article 8 of the Rome Statute of the International Criminal Court, war crimes are grave breaches of the Geneva Conventions or serious violations of the laws and customs applicable

<sup>26</sup> Pirkko Kourula, *Broadening the Edges: Refugee Protection and International Protection Revisited*, Martinus Nijhoff Publishers, The Hague, 1997, p. 110.

<sup>27</sup> See in particular Guy Goodwin-Gill, *The Refugee in International Law*, 2nd ed.,

Clarendon, Oxford, 1996, p. 66, and Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1, Sijthoff, Leiden, 1972, p. 188.

<sup>28</sup> *Ibid.*, p. 69.

<sup>29</sup> Kourula, *op. cit.* (note 26), p. 92.

in armed conflicts. A less technical but more enlightening approach is also found in the said Statute, which lists war crimes among “the most serious crimes of concern to the international community as a whole” (Article 5), as well as among “atrocities that deeply shock the conscience of humanity” (Preamble). War crimes are offensive to human dignity and, as such, always constitute persecution. A number of related questions nonetheless still need to be answered before concluding that a person fleeing a war crime situation is a refugee according to the 1951 Convention.

First, as has already been mentioned, the war crime concerned must be attributable to one of the five reasons recognized by Article 1 of the 1951 Convention. Recent armed conflicts have shown that most war crimes are committed because of the victims’ ethnic background — what the 1951 Convention would call “race” or “nationality”. Mass deportations and practices such as ethnic cleansing fall within this category. Groups of civilians or individual civilians are also targeted because they are (often falsely) accused of siding with the enemy; in other words, they are deemed to hold a certain political opinion. Membership of a particular social group might also play an important role, as parties to a conflict tend to succumb to the influence of group mentality when they resort to criminal behaviour (collective punishment).

Second, in the context of an armed conflict it is important to determine whether an individual has to show that he/she has been individually singled out or specifically targeted. The answer will very much depend on the nature and type of conflict. In a conflict where international humanitarian law is extensively flouted, where war crimes or crimes against humanity are part of a plan or policy and where armed elements are totally undisciplined, it is likely that all civilians belonging to or associated with the “enemy” side will have a well-founded fear of persecution within the meaning of the 1951 Convention. As Goodwin-Gill puts it, where large groups are seriously affected by unlawful practices, it would be wrong, in principle, to limit the concept of persecution to measures immediately identifiable as direct and individual. The “singling out” or “targeting” requirement should be discarded when there is a clear pattern of persecution of

persons similarly situated to the applicant.<sup>30</sup> In this respect, it is important to emphasize that the 1951 Convention does not necessarily require that there be individualized persecution or fear of persecution, but instead places greater stress on the likelihood of persecution. There are instances when persecution is not selective but generalized, targeting the group or even the entire population or “where it is clear that persecutory measures are applied completely at random”.<sup>31</sup> In such cases, the likelihood of persecution exists not on an individual basis but on a group basis, and the group in question can sometimes be the whole population.

Third, with regard to agents of persecution, UNHCR has always maintained the view that persecution is normally related to action by the authorities of the country, but can also be related to acts committed by non-State actors if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.<sup>32</sup> Fear of persecution and the unavailability of protection are interrelated concepts. In situations where part of a territory is under the rebels’ control, the government is unable to offer protection to that part of its population. When war crimes are committed by the dissident side, in violation of Article 3 common to the Geneva Conventions or of Protocol II, civilians often have no other option than to flee to another country. Persecution means precisely that there are no local remedies against serious abuses. It represents the failure of a State to protect its citizens, either against its own agents or against any other elements. As Walter Kälin puts it, “the unwillingness of refugees to avail themselves of the protection of their country of origin is well founded if this country is unable to provide the minimum of safety and security that serves as the very foundation of the legitimacy of State power”.<sup>33</sup>

**30** Goodwin-Gill, *op. cit.* (note 27), p. 77.

**31** Grahl-Madsen, *op. cit.* (note 27), p. 175.

**32** *Handbook*, *op. cit.* (note 15), p. 12.

**33** Walter Kälin, “Non-State agents of persecution and the inability of the State to protect”, in International Association of Refugee Law, *The Changing Nature of Persecution*, 4th Conference, October 2000, Berne, Switzerland, published by Institute of Public Law, University of Berne, 2001, p. 59.

Finally, it is important to note that in a war context, and especially in conflicts eliciting a pattern of war crimes/crimes against humanity, victims of persecution often lack what we call an “internal flight alternative” or a “relocation” possibility. It would be both inhumane and illegitimate to require victims or potential victims of “atrocities that deeply shock the conscience of humanity” to move to another location where he/she is likely to witness or experience similar atrocities.

### **Prohibition of forced movement of civilians**

Concerning the prohibition of forced movement of civilians, international humanitarian law is much more explicit than international human rights law. The law on international armed conflicts applies in the event of armed conflict between two or more States, including situations of total or partial occupation of the territory of a State party to the Geneva Conventions. In cases of occupation, the Fourth Geneva Convention prohibits the deportation and transfer of the inhabitants of the occupied territory. Article 49 reads as follows:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated...”

Article 49 clearly, unequivocally and absolutely prohibits all forms of deportation from the occupied territory to the territory of other States, including that of the Occupying Power, or the forcible transfer of populations or individuals within the occupied territory, including practices such as ethnic cleansing. The only putative exception to this principle is found in its paragraph 2. But it is not a true exception, as that paragraph covers situations different from those stipulated in paragraph 1. Paragraph 2 authorizes the Occupying Power to evacuate the civilian population “when overriding military considerations make it imperative”.<sup>34</sup> Evacuation for imperative military reasons is not the same act or the same concept as deportation. The ICRC’s *Commentary* on the Geneva Conventions gives as an example of the former “the presence of protected persons in an area [which] hampers military operations”.<sup>35</sup> Evacuations for political, religious or racial reasons cannot be considered as exceptions covered by paragraph 2, whose wording is both restrictive and clearly limited to military considerations. Of course, evacuation is authorized when it is in the interest of the civilian population. Under Article 58 of Additional Protocol I, parties to a conflict have, in particular, the duty to remove the civilian population under their control from the vicinity of military objectives.

When an evacuation in accordance with Article 49, paragraph 2, of the Fourth Convention is undertaken, the Occupying Power must be guided by two principles. First, evacuation must be undertaken in a dignified manner and, second, it must in principle not involve displacement beyond the border. Under Article 147 of the Convention, unlawful deportation or transfer is a grave breach. The criminal character of deportation by the Occupying Power has been confirmed both in the Statute of the International Tribunal for the former Yugoslavia (Articles 2 (g) and 5 (d)) and in the Rome Statute of the future International Criminal Court (Article 7 (d) and Article 8, para. 2 (a)(vii) and (b) (viii)). When deportation is carried out as part of a widespread or systematic attack on any civilian population, it is not only a war crime but also a crime against humanity (Article 7 of the Rome Statute).

34 *Commentary, op. cit.* (note 7), p. 280.

35 *Ibid.*, p. 280.

With regard to the situation of aliens on the territory of a party to an international armed conflict, there is no provision similar to Article 49 of the Fourth Geneva Convention. This difference can be explained as follows. In an occupied territory the local population, which is otherwise without any international protection, has to be protected. Non-nationals who happen to be on the territory of a party to the conflict are protected by international law. It is generally admitted that a State has the right to deport individual aliens (with the notable exception of persons who have a well-founded fear of persecution). But as the ICRC's *Commentary* phrases it:

“...practice and theory both make this right a limited one: the mass deportation, at the beginning of the war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted. (...) Moreover, expulsion, if it does take place, must be carried out under humane conditions, the persons concerned being treated with due respect and without brutality. Persons threatened with deportation must be able to present their defence without any difficulty being placed in their way and must be granted a reasonable time limit before the deportation order is carried out, if it is confirmed...”<sup>36</sup>

The prohibition of any mass or individual deportation that is not based on legitimate State security or military considerations can be deduced from Article 45 of the Fourth Convention and from Article 75 of Additional Protocol I. Article 45 applies to protected persons, including refugees, and contains in its fourth paragraph the principle of *non-refoulement*, whereas Article 75 applies without distinction to all persons affected by armed conflict, sets out the principles of humane treatment and respect for the person and honour of all, and prohibits humiliating and degrading treatment.

Protection against forced displacement exists not only during international armed conflicts but also during internal armed conflicts. In terms of refugees, protection during internal conflicts is essential, as most refugee crises are directly or indirectly linked to non-international armed conflicts. Additional Protocol II contains a rather

<sup>36</sup> *Ibid.*, p. 266.

remarkable provision, Article 17, which is inspired by Article 49 of the Fourth Convention. Though much shorter than Article 49, Article 17 of Protocol II sets out the same principle (prohibition of forced movement of civilians) and the same restrictively defined exceptions (security of the civilian population and/or imperative military reasons). Paragraph 2 adds that “civilians shall not be compelled to leave their own territory for reasons connected with the conflict”. Violation of that provision is a war crime (ICC Statute, Article 8, paragraph 2 (e)(viii)) and can also be a crime against humanity (Article 7, paragraph 1 (d)).

### Conclusion

Since the adoption of the 1951 Refugee Convention, refugee law and international humanitarian law have interacted in many ways. Such interaction has been unavoidable for three main reasons. First, throughout the latter half of the twentieth century, armed conflicts have probably been the main cause of refugee flows. Secondly, both refugee law and humanitarian law aim at granting international protection for the “unprotected”, often in different situations but sometimes concurrently. Thirdly, both the ICRC, the “guardian” of international humanitarian law and UNHCR, the “guardian” of the 1951 Refugee Convention and its 1967 Protocol, are major humanitarian players, confronted with similar constraints and problems in their respective operations and working on the basis of a similar “code of conduct”.

Recent developments have led and will continue to lead to a closer interface between the two branches of international law. At this point in time, three relatively new avenues towards progressive rapprochement can be identified:

- The first is the debate on the protection of more than 20 million people displaced within their own country. One of the most positive outcomes of this debate has been the drafting of the Guiding Principles on Internal Displacement, a text which reflects and is consistent with existing international law, in particular human rights law, international humanitarian law and refugee law (as applied by analogy to displaced persons).

- The second avenue is the consolidation of international criminal law and international criminal jurisdictions through the establishment of the ad hoc Tribunals for Rwanda and the former Yugoslavia and the adoption of the Rome Statute of the International Criminal Court. International criminal justice will have a dual impact. On the one hand, those responsible for persecuting individuals and thus creating refugee situations may be prosecuted for war crimes or crimes against humanity. On the other hand, international courts produce judicial decisions that play a role in the progressive development of the law. Some of these decisions may be relevant for refugee protection. A precedent exists with the judgment of the ICTY Trial Chamber II in the *Kupreskic* case,<sup>37</sup> which gives an interpretation of what is meant by the notion of persecution in international refugee law.
- Finally, the third avenue that could lead to rapprochement is the largely unused domain of State responsibility for wrongful or illegal acts, including grave breaches of international humanitarian law and the creation of refugee flows, a responsibility which can entail the payment of compensation for loss caused.



<sup>37</sup> *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, paras 588 and 589.

## *Résumé*

### **Les interactions entre le droit international humanitaire et le droit international des réfugiés**

par STEPHANE JAQUEMET

*Les liens entre le droit international des réfugiés et le droit international des droits de l'homme sont étroits. Il en est de même entre le droit international des réfugiés et le droit international humanitaire. À l'aide de deux exemples, l'auteur met en évidence l'interdépendance de ces deux branches du droit. Il démontre d'abord que la situation juridique de la victime d'un conflit armé et celle du réfugié ne sont pas identiques, même si elles sont étroitement liées, et soulève ainsi la question de l'application cumulative des deux ordres juridiques. Il examine ensuite un deuxième point d'interaction entre ces deux ordres, à savoir le sort juridique des personnes qui ont fui leur pays d'origine à cause de violations graves du droit international humanitaire (crimes de guerre) et établit finalement que droit humanitaire et droit des réfugiés non seulement peuvent s'appliquer simultanément, mais encore s'influencent mutuellement.*