Refugee law and international humanitarian law: parallels, lessons and looking ahead

A non-governmental organization's view

by
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There is a conceptual parallel between international refugee law and international humanitarian law. Both originated in the need to address the protection of persons in the hands of a State of which they are not nationals. By contrast, international human rights law was developed to protect persons against abuses by their own State. International humanitarian law and human rights law have grown closer over the years. International humanitarian law has extended its reach into non-international armed conflicts, and human rights law has been recognized as applying to all individuals within the territory or jurisdiction of a State, even if only temporarily, including during times of armed conflict (though some restrictions can be applied to non-nationals and also during times of armed conflict or similar emergency). Similar developments are beginning to happen in relation to refugee law, but a radical rethinking is needed.

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The changing nature of refugee situations

Geo-political dynamics since the end of the Cold War have thrown new light on root causes of refugee movements and other forced displacement, and on the responses and solutions. Although the issues of large-scale refugee movements and the links to armed conflict and internal strife were acknowledged in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, at the time these were perceived as being regional problems. Now refugee movements and other forced displacement are increasingly recognized as taking place more generally in the context of armed conflict or mass expulsion.

The compilation and analysis of legal standards relevant to internally displaced persons, drawing on international human rights law, international humanitarian law and refugee law (by analogy, since by definition it only applies directly to those outside the borders of their own country), and the 1998 Guiding Principles on Internal Displacement, were a breakthrough in recognizing the importance and value of seeing the relationship between these three branches of international law and drawing on the strengths of each. The same has yet to be achieved for refugees, although an interesting example of an early linkage was UN General Assembly resolution 33/165 in 1978. This gave quasi-refugee status to those who had to leave South Africa because of their refusal to enforce the *apartheid* system by serving in the South African military or police forces. (The resolution is known as the CO/Apartheid Resolution and is phrased in general terms but this was its *raison d'être.*) In 1989, the Convention on the Rights of the Child became the first human rights treaty to explicitly include international humanitarian law and refugee law. However, the further tendency within the human rights movement to segregate children from mainstream human rights has meant that the Convention has not yet been as effective a springboard as it might have been.

In the past, "custodians" of different areas of international law have been more concerned to guard their distinctiveness and specificity than to develop the relationships between them. The challenge to legal thinking and its application in the area of refugee protection is as much one to the non-governmental organizations

(NGOs) as to others, since amongst NGOs, too, the tendency has been for each to work within their own "stream" of law. The time has come to accept the logic of the now well-recognized fact that all three branches are designed to enhance the protection of the human person. This implies that rather than starting with the law and deciding whether it is applicable, the starting point should be the factual situation and seeing which legal framework, or combination of frameworks, provides the greatest protection for the individual or group concerned.

It is ironic that although the whole rationale of international refugee law, as set out in the 1951 Convention relating to the Status of Refugees, is the protection of human rights, it is only recently that the human rights of refugees have started to receive serious attention. In part this may be because at the time of the creation of the Office of the High Commissioner for Refugees this issue was seen as a temporary problem which would soon be solved, and because human rights law itself was in its infancy, and so the High Commissioner's mandate was perceived as being "humanitarian". In practical terms, the Cold War dynamic that characterized many years of responses under the 1951 Convention meant that refugee protection was not often explicitly recognized as "needing" international human rights law to back it up.

At the ends of the spectrum, the distinction between the subjects of international humanitarian law and of refugee law is clear-cut: the individual asylum-seeker from classic political persecution is clearly different from the captured combatant in an international armed conflict. What, however, of the mass outflow from East Timor to West Timor following the referendum on independence, or the one from Rwanda into (then) Zaire and Tanzania which included persons who were undoubtedly combatants, some who were not and many whose status was unclear? What of the foreigners in Thailand, some of whom claim to be refugees but whom the government (not a party to the 1951 Refugee Convention or the 1967 Protocol) categorizes as illegal migrants? Features common to all these situations are their "group" nature, and their relationship to situations of internal armed conflict or internal tension or strife.

At the same time, the protracted nature of some of the situations of displacement which persist without being resolved in one of the "traditional" refugee ways — return, resettlement in a third country or local integration — has highlighted the need to rethink or develop the body of law applicable. Over recent years, NGOs have started to recognize the need to apply international human rights law to refugees and asylum-seekers, and to make use of the regional and international human rights bodies and mechanisms which apply these standards.[1] The question which now arises is whether international humanitarian law applies (beyond the specific articles in the 1949 Fourth Geneva Convention and the 1977 Additional Protocol I which provide for the treatment of refugees as protected persons in situations of armed conflict[2]) and is, in some circumstances, more beneficial or appropriate to refugees and displaced groups. In particular, the designation of obligations owed to particular groups which is characteristic of international humanitarian law may be helpful in these situations, particularly if supplemented by the more individualistic, rights-based approach of international human rights law in relation to specific individuals.

Some examples:

Example 1 — Separation of armed elements

In discussing militarization of refugee camps and separation of armed elements, at the March 2001 meeting of the UNHCR Global Consultations on International Protection, UNHCR and those concerned with refugees focused on the separation of armed elements in order to preserve the safety and civilian character of the refugees and the camps. This is understandable, but it leaves unresolved what is to happen to those "separated out" and could be taken as

1 See for example the decisions of the UN Committee against Torture with regard to returning individuals to situations where they are likely to be tortured and the reports of the Working Group on Arbitrary Detention concerning detention of asylum-seekers.

2 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 44, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, Article 73.

implying, if not actually stating, that (a) they are not entitled to make an asylum claim and (b) they should be returned. The NGO statement recognized the "complex weave" of the various streams of international law which may apply in mass influx situations.[3] It noted that these "*may* permit a strictly circumscribed 'separation' of some individuals, but only in very particular circumstances"[4] and that there is a need for clarification of:

- the legal basis for lawful "separation" activities;
- the rights of the various categories of separated persons;
- the procedural safeguards attaching to a separation exercise;
- the entities responsible for carrying out and monitoring such activities; and
- the conditions for termination of separation (tied to the particular purpose determined for the activity).

Amongst the particular NGO concerns was the danger of the tainting or stigmatizing of those separated, with consequent greater risk for these individuals.[5] The ICRC pointed out that international humanitarian law provides for such persons to be disarmed and interned, and that this is the duty of a neutral State (i.e. the host State to which refugees have fled as a result of armed conflict) with regard to members of the armed forces of parties to a conflict.[6] Thus neutral host States are obliged to separate combatants and other armed elements from refugees, to disarm and intern them, and to provide them with the food, clothing and relief required by humane standards. Furthermore, the ICRC has a role in visiting such internees and

3 UNHCR Global Consultations on International Protection, 8-9 March 2001, Geneva. Statement by the Lawyers Committee for Human Rights on behalf of NGOs, Agenda Item 2(ii): Civilian character of asylum, including separation of armed elements and screening in mass influx situations, as well as status and treatment of ex-combatants.

4 *Ibid.* Emphasis added.

5 *Ibid.*

6 The Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, of 1907, governs relations in the event of international armed conflict. Its provisions are deemed to have attained the status of customary law, and it is considered by the ICRC to apply by analogy to situations of internal armed conflict.

performing on their behalf its traditional protective activities for persons deprived of their liberty for reasons related to an armed conflict.[7]

The ICRC also cautioned against assuming that every former combatant should be excluded from the protection of the 1951 Refugee Convention — rather, each individual case should be considered on its own merits, and Article 1 F. of the Convention should be interpreted restrictively.[8] Simply having borne arms is not in itself justification for exclusion from refugee status, though continuing to participate in military activities may be justification for *non*-inclusion (and is also explicitly prohibited under the OAU Refugee Convention).

This clarification of the application of international humanitarian law and its relationship to refugee law in this type of situation is extremely helpful. However, in practice the host State may need assistance in carrying out such separation and disarmament.[9] Since this is an obligation under international humanitarian law, the ICRC and the other States party to the Geneva Conventions bear a responsibility for ensuring that such assistance is forthcoming.

Example 2 — Detention and internment

The issue of detention features in refugee law, humanitarian law, and human rights law. The applicability of international human rights law to refugee protection in the context of detention has

7 UNHCR Global Consultations on International Protection, 8-9 March 2001, Geneva. Statement by the ICRC on "The civilian character of asylum: Separating armed elements from refugees".

8 This approach is reflected in the Summary Conclusions from the UNHCR Expert Roundtable on Exclusion and Cessation, Lisbon, 3-4 May 2001. See paras (4) and (14).‹http://www.unhcr.ch/issues/asylum/globalconsult/main.htm›.

9 This was acknowledged in the UNHCR Regional Symposium on Maintaining the Civilian and Humanitarian Character of Asylum/Refugee Status, Camps and other Locations, Pretoria, South Africa, 26-27 February 2001, which was held as part of the UNHCR's Global Consultations on International Protection. See e.g. Key Conclusions and Recommendations, para. 2(c).

acquired increasing clarity over recent years.[10] Notwithstanding this, the scope and content of the protections accorded to refugees and the limitations thereto under Article 31 of the 1951 Convention deserve further clarification.[11] Article 31 of the 1951 Convention prohibits the imposition of penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom was threatened. Article 31, paragraph 2, in particular, prohibits restrictions on freedom of movement other than those which are necessary. The principal practice which raises questions of violations of Article 31 of the 1951 Convention is administrative detention of asylum-seekers, which in many cases has punitive qualities despite, and sometimes because of, its administrative character.

In broad terms, international human rights protection clearly applies to refugees and asylum-seekers in situations where international humanitarian law would not apply, including Article 9 of the 1966 International Covenant on Civil and Political Rights which prohibits arbitrary and unlawful detention.

UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers of 10 February 1999 specify that the concept of detention, from an international refugee protection perspective, includes detention in closed refugee camps. The guidelines provide that:

> "For the purpose of these guidelines, UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is

10 See e.g. A. *v. Australia*, Communication No. 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993. See also: "The scope and content of the principle of *non-refoulement*", Opinion of Sir Elihu Lauterpacht CBE QC, and Daniel Bethlehem, Barrister, of 20 June 2001. Paper prepared for a forthcoming UNHCR Expert Roundtable on Articles 33 and 35 of the 1951 Convention, which draws heavily on international human rights law in clarifying the scope and content of international refugee law, in particular the principle of *non-refoulement*. See ‹http://www.unhcr.ch/issues/asylum/globalconsult/nr_opinion.pdf›.

11 As part of UNHCR's Global Consultations on International Protection an Expert Roundtable is to be held in Geneva in November 2001 to examine the scope of Article 31 of the 1951 Convention.

substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory."[12]

In addition, these Guidelines espouse the broad principles which govern applicable human rights standards in the imposition of detention, i.e. detention may only be resorted to, *if necessary*:

- to verify identity;
- to determine the *elements* on which the claim for refugee status or asylum is based (emphasis added);
- in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents *in order to mislead* the authorities of the State in which they intend to claim asylum (emphasis added);
- to protect national security and public order.[13]

It is clear from this that detention must be justified in the individual case, but international refugee law must draw heavily on international human rights law in order to determine whether this is the case. Such an approach is certainly not reflected in much State practice, even where specific findings of violations have been made.

Although the prohibition on arbitrary detention is not stated as a non-derogable right under Article 4 of the International Covenant on Civil and Political Rights, the permissible circumstances for derogation are limited. Since derogation is permitted only in time of public emergency threatening the life of the nation, it is likely that, in the context of asylum, measures of derogation are permitted which are contrary to the State's other obligations under international law.[14]

The (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War contains in its Part III,

12 UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers, Geneva, 10 February 1999, Guideline 1. See ‹http://www.unhcr.ch/issues/asylum/guidasyl.htm›.

13 *Ibid.*

14 The Human Rights Committee is preparing a new General Comment on Derogations which considers, *inter alia*, the implications of the requirement that States Parties, when derogating from their obligations under the International Covenant on Civil and Political Rights, must not do so in a way that is incompatible with their other obligations under international law, and the role of the Committee in supervising this. — On this question see also Louise Doswald-Beck and Sylvain Vité, "International humanitarian law and human rights law", *IRRC*, No. 293, March-April 1993, pp. 94-119.

Section IV, regulations for the treatment of internees, the international humanitarian law equivalent of administrative detainees. Article 79 stipulates that the parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78. These articles limit measures of control to "assigned residence or internment". Moreover, they impose further requirements: they limit the said measures to situations where the security of the Detaining Power make them *absolutely* necessary; stipulate that decisions to place persons in assigned residence or internment must be reviewed "as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose"; provide for a periodic review to be carried out at least twice yearly; specify that the period of internment or imprisonment imposed, in the event of the commission of an offence, must be *proportionate* to the offence committed; and require that decisions to place in assigned residence or internment must be made according to a regular procedure and in accordance with the provisions of the Convention. The procedure must include the *right* of appeal for the parties concerned, with appeals to be decided with the *least possible delay.* In the event of the decision being upheld, it shall be subject to *periodic review*, if possible every six months, by a competent body.[15]

The particularly valuable aspects of these provisions include their relevance for group situations as well as for individual ones, and their suitability for application to long-term detention or internment.

Example 3 — Ambiguous status and armed groups

Example 1 related to situations in which the State is neutral, but what if the State or its armed forces are not neutral? Again, international humanitarian law might provide as useful a framework as any in seeking to address the situation of the East Timorese forcibly expelled from East Timor into West Timor after the ballot in which the East Timorese people voted overwhelmingly in favour of independence. They were held in camps with extremely restricted access. The

15 See also Additional Protocol I, Article 11.

presence of UNHCR was cut short on account of the killing of three of its staff and because the capacity to ascertain whether or not those in the camps wished to return to East Timor was limited. According to Human Rights Watch, "[t]housands of East Timorese are effectively being held hostage by the very same militias that drove them from their homes in the first place".[16] It seems likely that some were actually being held hostage, while others were being intimidated by threats or by the abduction of family members as hostages.

International humanitarian law not only prohibits hostage-taking (in both international and non-international armed conflicts), but also applies directly to *all* parties to an armed conflict, not only to government armed forces or where the actions can be attributed to the government through a chain of command or control or a failure to act to prevent them. An added complexity was the question of whether the East Timorese in West Timor should be seen as refugees, as internally displaced persons or as internees, given the disputed status of East Timor. International humanitarian law provides certain standards for the minimum humane treatment of persons whose liberty has been restricted in both international and non-international armed conflicts.[17] These standards are worth considering in relation to the situation of ambiguous camps. Furthermore, applying this framework might enable the ICRC to visit such persons.

Monitoring and supervising implementation of the law

An interesting point is that both international humanitarian law and refugee law have a body mandated to provide protection and assistance. This system has both strengths and weaknesses. Clearly, the practical protection and assistance provided by UNHCR and the ICRC are essential. Nevertheless, UNHCR could benefit from the experience of the ICRC by, for example, developing:

16 Human Rights Watch Press Release, 15 December 1999.

17 For non-international armed conflict, see Art. 3 common to the 1949 Geneva Conventions and Art. 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

- policies on when it should "go public" on violations of the rights of refugees, and on when it should withdraw or decide against involvement in specific situations;
- its advisory services' capacity in relation to governments' laws, policies and practices, including model legislation or principles for such legislation;
- a best practices manual or compilation, including examples of the kinds of national institutions which should be developed for the protection of refugees and asylum-seekers.

However, UNHCR is increasingly finding itself in situations closer to those of the ICRC and facing difficult decisions as to how far it raise the subject of violations of the rights of refugees with governments without endangering its own staff or being thrown out of the country. UNHCR also has the problem that the behaviour of some of its major donors is not above reproach, and they do not like being criticized either. This is why the lack of an independent treaty-monitoring body with fact-finding powers and complaints mechanisms is problematic. Although international humanitarian law does provide in Article 90 of 1977 Additional Protocol 1 for an International Fact-Finding Commission, this is a voluntary provision which has yet to prove its worth and is applicable only to international armed conflicts (despite the willingness expressed by the Commission to act with regard to non-international conflicts as well). Discussions about possibly developing a monitoring mechanism with regard to the 1951 Refugee Convention and its 1967 Protocol, as well as more broadly, are taking place as part of the UNHCR Global Consultations on Refugee Protection.[18] However, the reactions by States to criticism from the human rights monitoring mechanisms suggest that they will not be enthusiastic about establishing an effective procedure for monitoring their compliance with refugee and asylum standards. The better

18 See e.g. Walter Kälin, "Supervising the 1951 Convention on the Status of Refugees: Article 35 and beyond", prepared for the Cambridge Expert Roundtable (9-10 July 2001).

option may yet be to increase the use of existing mechanisms to seek to enhance the implementation of all the different aspects of international law applicable to refugees or those in refugee-like situations.

Conclusion

It is clear that in some situations international humanitarian law provides protections that are either stronger than or complementary to those of international refugee law. In contemporary international legal thinking (which often stands at odds with international political thinking), it is becoming increasingly clear that no international legal framework can or should be seen in isolation. Although the development in human rights law may not by itself be determinative of the interpretation[19] of elements of the 1951 Refugee Convention, the law on human rights that has emerged as an essential part of the international legal order must be taken into account for purposes of interpretation. In the same way, it is useful to draw on the protections afforded to internees under international humanitarian law, and to extrapolate from these with regard to detention under international refugee law. In addition, where circumstances of refugee flight are conducive to the direct application of international humanitarian law, it may bring considerable clarity to practices and principles which directly affect refugees and asylum-seekers. This is likely to be particularly so in situations of mass influx and expulsion. It is important to recall here, as with human rights law, that there is no reason why refugee law and international humanitarian law should not run in parallel.

The fundamental point raised here is that although the linkage and relative strengths (and weaknesses) of human rights law in relation to both refugees and situations of armed conflict are being increasingly recognized and applied, the same is not yet the case with international humanitarian law and refugee law. Rather than beginning with the law and presuming which situations it does or does not apply to, the better approach is to examine the situation and then consider which law provides the best protection, or whether a

19 See Lauterpacht and Bethlehem, *op. cit.* (note 10).

combination (or application by analogy) is a better option. In the same way, if some persons fall outside the scope of the law — e.g. those deemed not to be eligible for refugee status for one reason or another — the question of what happens to them and whether they are protected by international humanitarian law, as well as human rights law, should not be forgotten. Such consideration should apply not only to the standards, but also to the body mandated to act in relation to those standards: in some circumstances, the ICRC may be better placed than UNHCR to provide protection.

Finally, both refugee law and international humanitarian law share the strengths and weaknesses of having a field-based protection and assistance agency. The experience of the ICRC could be used to improve UNHCR's practice in some respects, but both streams of law would benefit from enhanced treaty monitoring and implementation procedures. The question of developing these procedures in relation to refugee law is under discussion as part of the UNHCR Global Consultations on Refugee Protection.

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Résumé

Droit des réfugiés et droit international humanitaire : parallèles, leçons et perspectives d'avenir. L'opinion d'une organisation non gouvernementale

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Un parallèle conceptuel existe entre le droit international des réfugiés et le droit international humanitaire. Tous deux ont pour origine la nécessité d'assurer une protection aux individus se trouvant sur le territoire d'un État dont ils ne sont pas des ressortissants. Tous deux sont en outre dotés d'une institution qui a pour mandat d'assurer protection et assistance aux personnes relevant de leur champ d'application. De plus en plus, des réfugiés et d'autres groupes sont déplacés en raison de conflits internes ou de troubles civils. Pourtant, la relation qui existe entre les deux domaines du droit international et la capacité du droit international humanitaire de compléter, renforcer et favoriser le développement ou l'interprétation du droit des réfugiés n'ont pas évolué de manière à répondre aux situations sur le terrain. Le moment est venu d'engager un réexamen approfondi.