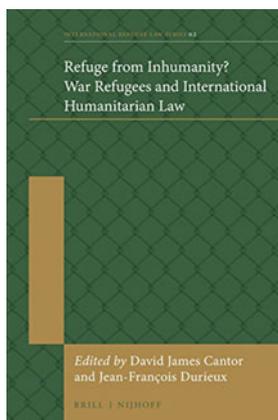


## BOOK REVIEW



# Refuge from Inhumanity? War Refugees and International Humanitarian Law

**David James Cantor and Jean-François Durieux (eds)\***

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David James Cantor and Jean-François Durieux's edited volume *Refuge from Inhumanity? War Refugees and International Humanitarian Law* explores the legal dimensions of the significant protection gap for those fleeing violent conflict. The authors of the eighteen chapters each assess different scenarios, and aspects of the existing international protection regime, in a bid to clarify and potentially expand the boundaries of legal protection currently available for war refugees. The analysis is underpinned by the omission of any explicit protection for those fleeing conflict in the 1951 Refugee Convention<sup>1</sup> and looks to international humanitarian law (IHL) for a potential solution.

The opening section by David Cantor sets the scene by outlining characteristics shared by IHL and international refugee law (IRL), and exploring the ways in which the two regimes interact, before assessing how IHL may assist in the interpretation of IRL. His purpose is to lay the conceptual groundwork for the detailed analysis of the interrelationships between the two bodies of law which follows.

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The remainder of the book is divided into five further sections which are grouped thematically. The second section builds on Cantor's argument in his opening chapter; that IRL and IHL, alongside international human rights law (IHRL), must be used in conjunction with one another rather than being treated as autonomous. Hugo Storey recalls his previous argument that international protection fails to address the needs of those fleeing conflict with reference to the correct body of law<sup>2</sup> and argues for the development of a comprehensive framework and guidance to address this. This is well supported by Stéphane Jaquemet's chapter, which argues that IRL, IHL and IHRL should be repositioned in relation to each other, to work towards a continuum of protection. Hélène Lambert's chapter in the same section focuses on how causation is analyzed by refugee decision-makers and posits prioritizing "constitutive causation". Lambert argues that assessing the material situation of war refugees and understanding the construction of threat in their social environment can enable us to better understand a refugee's reason for leaving, and therefore potentially lead to better-quality decision-making by those determining asylum cases.

The third section looks at different grounds for including or excluding individuals from a claim for asylum based on the Refugee Convention. Here Vanessa Holzer provides a timely assessment of how persecution can be identified in a non-international armed conflict (NIAC). Eric Fripp assesses the case of combatants and ex-combatants, while on a similar thread, Geoff Gilbert looks at those who are explicitly excluded from making claims under the Refugee Convention. Both leave the door open for some members of these groups to make claims for asylum based on the Refugee Convention, though Gilbert cautions that the level of variation and complexity in this area is too great to make a conclusive argument.

Regional systems and directives and the implications of applying IHL at the regional level come under scrutiny in the fourth section. The first two chapters in this section look at the expanded refugee definitions enshrined by the Organization of African Unity (OAU) and by Latin American countries in the Cartagena Declaration. Maja Janmyr provides a conceptual analysis of "civilian" and "humanitarian", comparing their ascribed meanings in IHL and by the United Nations High Commissioner for Refugees (UNHCR). The remaining three chapters in the section look at the European Union (EU). They are united in their hesitancy around using IHL as a primary reference point for asylum cases, and their belief that more must be done to improve the consistency of asylum decision-making within the EU.

Protection for war refugees against being returned to conflict zones is assessed in the fifth section. Here each of the three writers supports the view that IHL and the law of armed conflict (LOAC) more broadly provide some

1 Convention Relating to the Status of Refugees, 28 July 1951, UNTS 137 (entered into force 22 April 1954) (Refugee Convention).

2 See Hugo Storey, "Armed Conflict in Asylum Law: The 'War-Flaw'", *Refugee Survey Quarterly*, Vol. 31, No. 2, 2012, pp. 1–32.

protection against return to conflict zones, especially where individuals are at risk of suffering torture or inhumane treatment, though this optimism is not unreserved. David Cantor shows that certain forms of protection against return exist in universally ratified treaty law, but illuminates a protection gap for those in third-party States or those who become refugees after the outbreak of conflict. Reuven Ziegler argues that a protection lens can be applied to Article 3 common to the four Geneva Conventions to apply *non-refoulement* provisions to third States. Françoise Hampson, on the other hand, posits that IHRL can more usefully be drawn upon to provide clarity in this area, given that those resisting return are likely to be out of the conflict zone and IHL will therefore not hold.

The final section looks beyond legal provisions for protection of refugees, taking the view that law is only one mechanism in a broader set of international norms which can enhance protection available to those fleeing war. Jennifer Moore picks out protection-related commitments in the Millennium Development Goals and in the Responsibility to Protect, highlighting the seemingly high levels of international commitment to the protection of those fleeing conflict. Guy Goodwin-Gill develops the idea of “temporary refuge” as an alternative to full asylum or citizenship and shows the strong foothold it has gained in customary international law. These final chapters underwrite the pleas made earlier in the book to take a more open-minded and innovative approach to the protection of those fleeing conflict.

The detail and clarity provided by most of the authors ensure that the book is useful for practitioners hoping to advance protection afforded to those fleeing violent conflict. The specificity of the analysis with regard to particular scenarios or areas of law makes it easy to identify which section or chapter would be of use, and some authors conclude with very clear recommendations.

A common characteristic throughout the book is a sense of pragmatism and a desire to clarify rather than further mystify this complex legal area. For example, Vanessa Holzer walks the reader through different NIAC scenarios in which contraventions of IHL that violate the principles of distinction, proportionality and military necessity can be interpreted as persecution. This provides a number of ways in which those fleeing a NIAC can appeal for protection on the basis of the Refugee Convention, which if applied could potentially open up protection to a number of claimants. Equally, on the point of clarification, Maja Janmyr highlights a potential confusion, or misunderstanding, originating from the different meaning ascribed to the terms “civilian” and “humanitarian” and implores the UNHCR to clarify how it uses these terms. This could be straightforwardly implemented to make a tangible difference at the intersection of IHL and IRL in the refugee camp context.

The detailed enquiry into the potential use of IHL to further the protection of those fleeing conflict also raises a number of cautions worthy of note for those looking to use IHL to support IRL. Realism about the limitations of IHL provided weight to points that are optimistic about its utility. A number of the authors drew attention to the fact that the purpose of IHL is not to provide protection for those fleeing war and that there are some cases where its application may actually

reduce potential levels of protection. For example, Tamara Wood argues that applying IHL to the OAU's expanded refugee definition may reduce the numbers eligible for protection under situations of occupation and external aggression, and that the criteria for analyzing conflict offered in IHL is not designed for protection and may therefore not further its cause. H el ene Lambert also cautions about the types of evidence and criteria used in IHL, given its static and positivist nature, in contrast to the fluidity of conflict and the difficulty in finding conclusive evidence in conflict contexts.

In terms of applicability, the book comes into its own in the three chapters focusing on the EU. C elene Bauloz and Evangelia Tsourdi both focus on aspects of Article 15(c) of the EU Qualification Directive that generate concrete recommendations. Bauloz in particular provides clear direction about how the confusing and perhaps contradictory terms within Article 15(c) could be defined and interpreted to have their best effects.

Moreno Lax's standout chapter looks at the interrelationships and impasses between public international law, EU law and IHL. She pushes for a systemic understanding of the EU legal order, seeking to contribute not only to the understanding of a particular Article or scenario, but to the "advancement of the 'constitutional *telos*' of the system as whole",<sup>3</sup> and reminding us of the Charter of Fundamental Rights as a primary reference point for understanding EU legal norms. The utility of this chapter is derived from the detailed description of how and in what order different norms and bodies of law should be considered in the determination of asylum cases in the EU, and from its systemic approach. Countering this, it is unfortunate that the complexity of the interpretive methodology she suggests may place it beyond easy operationalization by many decision-makers.

While the chapters focusing on the EU make a significant contribution towards understanding aspects of EU law and how IHL may be used in asylum cases, they are also the source of one of the books' major weaknesses. The EU neither produces nor receives a majority of refugees in terms of global numbers.<sup>4</sup> Reconciling this fact with the preoccupation with European law and jurisprudence that permeates the book has proven difficult. This is reflected in the fact that three of the six chapters from the section focusing on regional definitions focus on Europe, and also that the overwhelming majority of cases quoted throughout the book are European in origin.

It is true that a complex legal system and weighty body of jurisprudence make for interesting analysis, making the EU an understandable focal point. However, if the purpose of the book is to potentially expand the parameters for the protection of refugees fleeing conflict, a more direct approach would have been one grounded in legal responses in countries who are host to mass influxes of people fleeing conflict. A significant proportion of countries which host very

3 *Refuge from Inhumanity?*, p. 340.

4 See UNHCR, "Facts and Figures about Refugees", available at: [www.unhcr.org/uk/about-us/key-facts-and-figures.html](http://www.unhcr.org/uk/about-us/key-facts-and-figures.html) (accessed on 4 January 2015).

large numbers of people fleeing conflict are not signatories to the Refugee Convention – for example, Pakistan or Lebanon – but the idea that this would make them irrelevant is hard to swallow. In any case, there are signatories to the Refugee Convention who do host large numbers of war refugees, such as Kenya and Turkey, which also remain out of view in the book. Additionally, the assessment of the potential utility of IHL in furthering the protection of war refugees would have been particularly prescient in some of these cases, with reasonable cause to argue that some major host countries could themselves be classified as engaged in a NIAC while hosting groups from another country also engaged in a conflict; Kenya and Pakistan both spring to mind here. Tamara Wood’s chapter and David Cantor and Diana Trimino Mora’s chapter are both notable exceptions in that their focus is not overly centred on Europe.

The effect of the heavy weighting towards Europe is that the book comes across as being somewhat detached from the lived experiences of those fleeing war, and this is compounded by the very limited discussion of the relationship between legal possibilities and operational realities. For example, Françoise Hampson’s chapter on the obligation not to return combatants or ex-combatants provides a clear, cogent argument, but does so using a series of abstract scenarios through which the gravity and complexity of these types of situations are lost. A second point relating to the ill explored relationship between the legal and operational is the very limited cognisance of the political dimensions of the legal decision-making around those fleeing war. Reading Bauloz’s chapter, it would have been easy to believe that the interpretation and application of the law takes place in a vacuum, free of subjectivity or external influences. This is not to say that her recommendations are not clear, but simply to draw attention to a possible naivety in the idea that decision-making depends only on a “correct” interpretation of certain terminology. After all, the imprecise and contradictory nature of Article 15(c) of the EU Qualification Directive with which she grapples is itself the outcome of a political negotiation. The apolitical approach to analysis, not just in this chapter but more broadly throughout the book, appears particularly peculiar given the focus on the EU and that the issue of asylum seekers has become intensely politicized in this context. Given this, Jennifer Moore’s chapter, which demonstrates a consensus around “humanitarian *non-refoulement*”, is refreshing in its acknowledgment that legal provisions around protection are only part of a bigger and more complex assemblage of forces which influence the protection of war refugees, and a desire to use this for the better.

The above weaknesses will no doubt be frustrating to the reader; nonetheless, the authors collectively do make a number of valid arguments and lay some important groundwork in the use of IHL to support IRL, to potentially expand the protection available for war refugees. As part of a broader conversation, the conclusions reached in the book provide a source of optimism for the advancement of legal protection for war refugees. However, the book opens up almost as many lines of enquiry as it resolves. An obvious starting point for further research would be a greater regional focus, especially on how the application of IRL is playing out in contemporary situations of mass influx,

including assessment of the role or potential role of IHL on a country or regional level. This could enable identification of specific individuals or groups at increased risk of falling through a protection gap, and help pull analysis from the abstract to reality. Improving the collective understanding of the political dimensions of EU decision-making may expose some uncomfortable truths, but could perhaps lay the ground for more consistent and transparent decision-making. Finally, one chapter which stands out as suggesting a solution that could benefit large groups of people is David Cantor and Diana Trimino Mora's, on the Cartegna Declaration. The interesting point is around affording groups fleeing conflict protection based on the geographic area that they come from, rather than on who they are; this appears to have the potential to overcome a number of evidential issues while being suitable for mass influx situations. It would be very interesting to explore this idea in greater depth and especially its potential for application outside Latin America, where provisions equivalent to the Cartegna Declaration do not exist.

Overall, the book clearly makes a timely and significant contribution to an important area of legal enquiry. It is encouraging that certain sections may genuinely extend protection to those who may not otherwise be seen as entitled to it. For example, if used, Eric Fripp's analysis could potentially extend protection to certain combatants or ex-combatants, and David Cantor's may do the same for those classified as refugees before the outbreak of a conflict. These concessions, and those put forward collectively throughout the book, appear somewhat piecemeal when faced with the current reality that the number of individuals fleeing conflict is unprecedented in recent times. The intention of the book is to broaden the parameters of the debate, and certainly it has succeeded in doing this, but only marginally. This is perhaps representative of the complexity of the area in focus: the absence of any "magic bullet" solution. It may also demonstrate a sense of realism and an acceptance of only incremental progress. However, enhancing protection for those fleeing war is among the most pressing contemporary issues, given the continuing and intensifying instability across the Middle East and parts of Africa. This demands a level of ambition and imagination beyond what is offered in *Refuge from Inhumanity? War Refugees and International Humanitarian Law*.