PROTECTION OF REFUGEES IN POST-ARMED CONFLICT SITUATIONS

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Abstract

This article charts the interlinking of the regime governing the international protection of refugees in post-armed conflict situations through the spectrum principles of humanitarian law and human rights law. Armed conflicts often have an economic and social impact, it may also result in unprecedented movement and displacement of civilian population. A war zones and conflict areas generate a large number of refugees by forcing them to flee to other countries for the safety of life and liberty. Development of refugee law in armed conflict reflects the cross fertilization of international law, as the whole problem of refugees are dispersed in the normative framework of international humanitarian law, refugee law, and human rights law. This fragmentation rather than facilitating the process have led to complexity in implementation of the legal norms. This paper ventures into cross fertilization of international humanitarian law and refugee law through the lens of international human rights law. The paper explores the collective security and approaches to cross fertilization of international law in a post-pandemic world.

I. Introduction

Wars, violence or persecution forced 11 million people to flee their homes throughout the year,[1] mostly from low- or middle-income countries, creating a total displaced global population of almost 80 million.[2] The unprecedented current "refugee crisis", with millions of uprooted people, who are forcibly displaces, demands a new protection orientation and framework for refugees and other forced migrants that are focused on the "root causes" of refugeehood, non-international protracted armed conflict or civil war.[3] The first calls for broadening the definition of who is a refugee to include "war refugees" was found in the 1984 Cartagena Declaration and the 1969 Organization of African Unity (OAU) Convention.

Armed conflicts often have economic and social impact, it may also result in unprecedented movement and displacement of civilian population.[4] War has always been one of the main reasons people pull up and leave, the cause of the most massive displacements of population, of those that take place in the most tragic circumstances. As Ruud Lubbers, United Nations High Commissioner for Refugees, wrote in 2001,

[1] Johnny Wood, This is how many people are forcibly displaced worldwide, *World Economic Forum*, https://www.weforum.org/agenda/2020/06/displacement-numbers-world-refugee-day/

[2] UN refugee chief laments nearly 80 million people forcibly displaced, *UN News*, https://news.un.org/en/story/2020/06/1066492

[3] K.J. Partsch, 'The Protection of Refugees in Armed Conflicts and Internal Disturbances by Red Cross Organs', 2234 *Revue de droit pénal militaire et de droit de la guerre* (1983) 419–38. See also A. Edwards, 'Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the "International Protection" of Refugees', in R. Arnold and N. Quenivet (eds), *International Humanitarian Law and International Human Rights Law: Towards a New Merger in International Law* (Leiden and Boston: Martinus Nijhoff, 2008). For more specific case-studies focusing on the refugee definition or a particular country.

[4] Y. Dinstein, 'Refugees and the Law of Armed Conflict', 12 Israel Yearbook on Human Rights (1982) 94

> "Refugees continue to flee persecution in countries at peace, but armed conflict is undeniably the greatest cause of refugee flows today. The nature of conflict has also changed, with the proliferation of internal ethnically or religiously based struggles in which displacement has become an objective, rather than merely a consequence of war."[5]

While international humanitarian law is mainly concerned with the protection of enemy nationals in the hands of a party to an armed conflict, international refugee law seeks to protect individuals who have sought refuge from persecution on the territory of a third country. However, the two bodies of law do not operate in isolation from each other and are, in fact, closely interconnected. International humanitarian law and international refugee law may indeed apply successively, when violations of the laws of war force individuals to flee and seek refuge in a neighbouring or third country. Nevertheless, forced displacement still occurs on a massive scale, often as a consequence of human rights and humanitarian law violations carried out by the belligerents during an armed conflict.[6]

The fact that war is the primary cause of people being uprooted raises several questions on the protection the law of armed conflict affords refugees and displaced persons. The paper attempts to answer the following research questions.

i. How does humanitarian law protect groups of civilians from being forced to flee?
ii. What protection does it offer those who have nevertheless been uprooted, and how does that protection interrelate with refugee law?
iii. How can the Red Cross and Red Crescent organizations, in particular the International Committee of the Red Cross, come to the aid of refugees and displaced persons?
iv. How does International Humanitarian Law interlink with Refugee Law?
v. How does fragmentation of laws lead to cross fertilization of International Law?

II. REFUGEE PROTECTION UNDER INTERNATIONAL HUMANITARIAN LAW

Refugees are people who have crossed an international frontier and are at risk, or have been victims, of persecution in their country of origin. Refugees are protected by refugee law mainly the Convention Relating to the Status of Refugees and human rights law, and particularly by the principle of non-refoulement.[7]

Article 1 of the Convention Relating to the Status of Refugees, as modified by the 1967 Protocol, defines a 'refugee' as;

> "….[a]ny person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and the Cartagena Declaration (1984) on refugees have adopted a broader definition that includes people fleeing events that seriously disrupt public order, such as armed conflicts and other situations of violence.[8] Refugees are also

[5] François Bugnion, Humanitarian Law and the Protection of Refugees, 24(4) Refugee Survey Quarterly (2005) at 1

[6] R. Brett and E. Lester, 'Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead. A Non-Governmental Organization's View', 83(843) International Review of the Red Cross (2001) 713–26; W. Kälin, 'Flight in Times of War', 83(843) International Review of the Red Cross (2001) 629–50; S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', 83(843) International Review of the Red Cross (2001) 651–74; J. Patrnogic, 'Thoughts on the Relationship Between International Humanitarian Law and Refugee Law, their Promotion and Dissemination', 28(265) International Review of the Red Cross (1988) 367–78.

[7] See Krill, Franҫhise, "ICRC's action in aid of refugees", IRRC, No. 265, July-August 1988, pp. 328–350;Lavoyer, Jean-Philippe, "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.

[8] Grahl-Madsen, Atle, Commentary on the Refugee Convention 1952, UNHCR, Geneva,1997, p. 42

protected by IHL when they are in a State involved in an armed conflict. While most people fleeing violence choose or are forced to remain within their own country in refugee-like conditions, others will seek refuge across international borders.[9] In some cases, their host country will in turn become engulfed in an armed conflict and refugees will once again become victims of war.[10]

When assessing persecutory harm in situations of armed conflict, reference should be made to the relevant norms of international humanitarian law, particularly the rules governing the conduct of hostilities and the principle of civilian immunity. Thus, in the context of a civil war, violations of Common Article 3 or Protocol II or threats thereof will constitute persecution if it can be demonstrated that they were motivated by the race, religion, nationality, social group or political opinion of the victims. Similarly, military operations directed at a particular group of civilians, in violation of the fundamental principle of distinction, will be regarded as persecution if their target is a group of persons hors de combat who share certain racial, religious or political characteristics.[11]

Refugees receive, besides the general protection afforded to civilians by IHL, special protection under the Fourth Geneva Convention and Additional Protocol I. Article 44 of the Fourth Geneva Convention specifies that Detaining Powers should not treat as enemy aliens refugees who do not, in fact, enjoy the protection of any government.[12] Article 73 of Additional Protocol I adds that refugees must be regarded as protected persons in all circumstances and without any adverse distinction. International humanitarian law and international refugee law will also apply concurrently, when refugees find themselves in the hands of a party to an armed conflict.

As civilian refugees in a situation of armed conflict, they may claim protection under both branches of international law. Indeed, as refugees, they benefit from the continuing protection of international refugee law, which applies at all times, even in time of armed conflict.[13] Furthermore, as the legal regime specifically applicable within the context of an armed conflict, international humanitarian law will extend its protection to refugees who find themselves on the territory of a party to an armed conflict, namely refugees who fled conflict or persecution in their home country and settled on the territory of a state subsequently embroiled in an armed conflict whether an international armed conflict against their home country or another state altogether, or a civil war or refugees who fled war in their country to find refuge, albeit temporary and precarious, in a country also engaged in an armed conflict.[14]

III. THE REFUGEE IN A NON-INTERNATIONAL ARMED CONFLICT

International humanitarian law distinguishes between different categories of armed conflict. First of all, international armed conflicts are defined in common Article 2 of the Geneva Conventions of 1949 and include all cases of declared war or any other armed conflict which may arise between two or more parties, even if the state of war is not recognized by one of them. They also include all cases of partial or total occupation of the territory of a party, even if it meets with no armed resistance. Article 1 of Protocol I additional to the Geneva Conventions relating to the victims of international armed Conflicts adds to the category of international armed

[9] 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

[10] Shields-Delessert, Christiane, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, (Schulthess Verlag, Zurich, 1977), p. 170; Kourula, Pirkko, *Broadening the Edges:Refugee Protection and International Protection Revisited*, (Martinus Nijhoff Publishers, The Hague, 1997), p. 110

[11] M. Sassòli, 'Le droit international humanitaire, une lex specialis par rapport aux droits humains?', in A. Auer, A. Flückiger, and M. Hottelier (eds), *Les droits de l'homme et la constitution: études en l'honneur du Professeur Gorgio Malinverni* (Geneva: Schulthess, 2007), 375–95 at 383.

[12] S. Jaquemet, Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker? (Geneva: UNHCR Legal and Protection Policy Research Series, Department of International Protection, PPLA/2004/01, 2004), 21.

[13] M. Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.682 (2006), 57, § 105. Among many other instances, see also H. Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', 11 Journal of Conflict and Security Law (2006) 265–91 at 273

[14] For a critical account of the ICRC study with regard to forced displacement, see R. Piotrowicz, 'Displacement and Displaced Persons', in E. Wilmshurst and S.C. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge and New York: Cambridge University Press, 2007), 337–53.

conflicts, those in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination

Secondly, international humanitarian law defines non-international armed conflicts. They are covered by common Article 3 of the Geneva Conventions as well as by Additional Protocol II. Common Article 3, referred to by many as a mini-convention, provides minimum standards for protecting persons not taking active part in the hostilities "in the case of armed conflict not of an international character." As for Additional Protocol II, it provides in its Article 1 that, without modifying the existing conditions of application of common Article 3, the Protocol shall apply to all armed conflicts not covered by Article 1 of the Additional Protocol I and which take place in the territory of a party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

There is an indisputable correlation between armed conflict and displacement. Armed conflict and internal strife are widely considered to be major causes of population movement, within and outside borders.[15] As observed in the 2005 Human Security Report:

> "For four decades the number of refugees around the world has tracked the number of armed conflicts – growing inexorably, though unevenly, from the 1960s to the early 1990s, then falling commensurably as the numbers of wars declined in the 1990s."[16]

The reasons for internal, rather than external, displacement is numerous. People generally prefer to stay within or close to, their own community and their homes, hoping for a speedy return, as soon as the hostilities end.[17] In certain situations, geographical and topographical considerations may stand in the way of external flight.[18] Military operations on the border may also constitute an obstacle. Recently, the obstacles have tended to be political, with governments growing progressively more reluctant to accept large numbers of refugees within their frontiers. Persons displaced by armed conflicts have thus faced closed borders, stringent travel restrictions and check points, forcing them to remain in camps at the frontier.[19] Consequently, while they may be able to escape the fighting, internally displaced persons never escape the conflict, which eventually catches up with them, particularly during civil wars.

Refugees are protected whether or not diplomatic representation exists between two countries. The fact that they have been recognized as refugees outweighs any consideration based on their nationality or their country of origin.[20] However, in order to benefit from the protection afforded to protected persons under Parts I and III of the Civilians Convention, two criteria must be fulfilled.

1. They must have been considered as refugees 'under the relevant international instruments' or 'under the national legislation of the State of refuge or State of residence'.

2. The 'relevant international instruments' include in particular the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as regional instruments, such as the OAU Convention and the Cartagena Declaration, and any other instrument containing a definition of refugees.

[15] R. Da Costa, Maintaining the Civilian and Humanitarian Character of Asylum (Geneva: UNHCR Legal and Policy Research Series, Department of Protection, PPLA/2004/02, 2004); C. Beyani, 'International Legal Criteria for the Separation of Members of Armed Forces, Armed Bands and Militia from Refugees in the Territories of Host States', 12 International Journal of Refugee Law (2000) 251–71; M. Othman-Chande, 'International Law and Armed Attacks in Refugee Camps', 59(2)–(3) Nordic Journal of International Law (1990) 153–77.

[16] Andrew Mack, Human Security Report 2005: War and Peace in the 21st Century, Vol. 80, No. 1/2, Schwerpunktthema: Friedenskonsolidierung in Nachkriegsgesellschaften (2005), pp. 177-191

[17] Phuong, *International Protection of Internally Displaced Persons*, (2004), p. 3

[18] UNHCR, State of the World's Refugees, 1997, ch. 3.

[19] Lischer, Dangerous Sanctuaries, 2005, p. 2.

[20] K. Obradovic, 'La protection des réfugiés dans les conflits armés internationaux', in *The Refugee Problem on Universal, Regional and National Level, Thesaurus Acroasium*, vol 13 (Thessaloniki: Institute of International Public Law and International Relations of Thessaloniki, 1987), 147–61 at 150.

Whether in an international or internal conflict, the provisions of international humanitarian law apply essentially on the territory of the parties in conflict.[21] As a rule, they do not apply to refugees who have sought refuge on the territory of a State that is not involved in the conflict. Insofar as they have reached the territory of a neutral or non-belligerent State, refugees are protected by the national law of the host country, by human rights law and by the 1951 Refugee Convention, if they are refugees as defined in the latter. Refugees who flee to neutral States may nonetheless enjoy the benefit of certain provisions of international humanitarian law.[22] Because they are basically civilian, refugee camps may not be the object of attack, unless they are used as bases for military operations directed against the State from which the refugees fled.

The Office of the United Nations High Commissioner for Refugees and the International Committee of the Red Cross have long shared a close relationship based on a determination to uphold standards of protection and operational principles. The connection between the two institutions is firmly anchored in historical, legal and operational aspirations.[23] In late 2003 and early 2004, for example, fighting in Darfur forced over one million of the province's six million inhabitants to move. The ICRC was able to launch a major relief operation, thanks to an agreement reached during its President's mission to Sudan in March 2004. The operation provided basic household items to 380,000 displaced persons, and tents and emergency shelters to 80,000 people in the camps. The ICRC also distributed food on a regular basis to about 110,000 people and drinking water to over 200,000 people.[24]

In the preamble to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the Heads of States and governments recognized the need for an essentially humanitarian approach towards solving the problems of refugees.[25] Article II (2) of the OAU Convention confirms that the grant of asylum to refugees is a peaceful and humanitarian act, and shall not be regarded as an unfriendly act by any member State. Article III contains specific regulations on the prohibition of subversive activities. Paragraph 1 of this article contains the same general obligation as Article 2 of the 1951 Convention, but adds the important proviso that refugees shall also abstain from any subversive activities against any member State of the OAU. Paragraph 2 further declares that signatory States undertake to prohibit refugees residing in their respective territories from attacking any member State of the OAU, by any means likely to cause tension between member States, and in particular by use of arms, through the press and radio.

In this regard, it is worth recalling that on one occasion, the International Court of Justice has recognized that obligations of States could be based on so called "elementary considerations of humanity"[26] and that on another it held that "certain obligations were owed by a State towards the international community as a whole".[27] Such obligations, for example, "could derive in contemporary international law from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[28]

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[21] See C. Bauloz, 'L'apport du droit international pénal au droit international des réfugiés: l'article 1F(a) de la Convention de 1951', in V. Chetail and C. Laly-Chevalier (eds), *Asile et extradition: théorie et pratique des clauses d'exclusion au statut de réfugié* (Brussels: Bruylant, 2014)

[22] A. Grahl-Madsen, Commentary on the Refugee Convention 1951 (Geneva: UNHCR, 1963), 25–6. See also U. Davy, 'Article 8', in A. Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford: Oxford University Press, 2011), 774.

[23] J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 273; N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, 1953), 76.

[24] Violence in Sudan's Darfur forces thousands to flee, *UNHCR*, https://www.unhcr.org/news/briefing/2020/1/5e2ff3bd4/violence-sudans-darfur-forces-thousands-flee.

[25] See A. Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention', 13 Melbourne Journal of International Law (2012) 623–4.

[26] Corfu Channel, United Kingdom v Albania, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949), 9th April 1949, United Nations [UN]; International Court of Justice [ICJ]

[27] Barcelona Traction, Light and Power Company, Limited, Belgium v Spain, Removal From the List, Judgment, [1961] ICJ Rep 9, ICGJ 163 (ICJ 1961), 10th April 1961, United Nations [UN]; International Court of Justice [ICJ]

[28] Background Note presented by the Office of the United Nations High Commissioner for Refugees at the 14th Round Table on Current Problems of International Humanitarian Law at the International Institute of Humanitarian Law on 12 September 1989. UN High Commissioner for Refugees (UNHCR), Protection of Refugees in Non-International Armed Conflicts, 12 August 1989, available at: https://www.refworld.org/docid/438c8bf54.html

These basic rights, which are enjoyed by all persons including refugees, may not be suspended even in exceptional circumstances. These non-derogatory rights include the right to protection against arbitrary deprivation of life, and against torture or cruel and inhuman treatment and punishment, the right not to be subjected to slavery and servitude or to retroactive penalties, the right to recognition as a person before the law and to freedom of thought, conscience and religion as well as the right to protection against discrimination.[29] Refugees in non-international armed conflicts have a right to humane treatment which includes benefiting from basic human rights, including protection from refoulement.

More specific standards of treatment seem, however, to be required. Thus, for example, the civilian status of refugees must be respected and they should not be subjected to recruitment in armed groups. Similarly, the civilian and humanitarian nature of their camps and settlements must be respected and relief supplies should not be deviated for use by combatants. This is all the more important in order to permit UNHCR to continue its activities on behalf of refugees in a humanitarian, non-political and neutral manner. The protection of refugees in non-international armed conflicts having references of humanitarian law are:

i. refugees are civilians and non-combatants and benefit therefore from the protection of civilians provided for under both common Article 3 and Additional Protocol II;
ii. these instruments, as well as general principles of international law, including elementary considerations of humanity, prescribe humane treatment;
iii. although not explicitly provided for, such humane treatment should include continuing to provide at least temporary refuge as well as respect for the principle of non-refoulement and fundamental human rights;
iv. refugees should also be protected from recruitment into armed groups and the civilian and humanitarian nature of their camps and settlements located in areas of non-international armed conflicts should always be respected;
v. the foregoing basic standards of treatment should apply not only to the protection of refugees in situations of non-international armed conflicts but also to those who find themselves in areas of internal disturbances and tensions;
vi. the request for asylum in a second country of refugees whose physical security or freedom are threatened by non-international armed conflicts and who as a result seek protection in a neighbouring country should be given favourable consideration by that country; and
vii. these persons, as well as those fleeing non-international armed conflicts because of a threat to their physical security or freedom, should also benefit from humane treatment.[30]

It can be seen that international humanitarian and refugee law are not a panacea in terms of protection, and that it is international human rights law that fulfils the central function of filling the gaps in protection left by humanitarian and refugee law.[31]

IV. THE FUNDAMENTAL PRINCIPLE OF NON-REFOULEMENT

International refugee law is as indifferent to armed conflict as international humanitarian law is to refugees. This comes as no surprise as it reflects the segmented approach which prevailed at the end of World War II when the first universal treaties for the protection of individuals were adopted. As a result of such compartmentalization, refugees are approached by humanitarian law within the interstices of its particular norms, whereas refugee law refers to armed conflicts in a transversal and occasional manner.[32]

[29] J.-F. Durieux and J. McAdam, 'Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies', 16(4) International Journal of Refugee Law (2004) 5–24.
[30] Executive Committee (ExCom) Conclusions Nos 15 XXX (1979), [f]; 22 XXXII (1981), [A.1, 2]; 79 (XLVII) (1996), (i); 100 LV (2004), [i]; 103 LVI (2005), [l]; see K. Long, *No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx* (Geneva: UNHCR Policy Development and Evaluation Service, 2010).
[31] S. Sivakumaran, 'International Humanitarian Law', in D. Moeckli, S. Shah, and S. Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010), 538.
[32] E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 119–21; M. Barutciski, 'Le militantisme juridique et le néo-naturalisme face au droit international positif: les flux massifs de réfugiés et la sécurité nationale', 14(1) Revue québécoise de droit international (2002) 37–54.

To face the unforeseen situations such as civil wars, military takeovers, wars between states, natural disasters, gross human rights violations, economic dislocations and so on, many scholars and international organisations tried to introduce new ideas. The principle of non-refoulement is one of such ideas and used to address the gap in existing law.[33]

According to this principle, no person can be transferred to a country where he or she would be in danger of being subjected to torture or other form of ill-treatment, arbitrary deprivation of life or persecution on account of his or her race, religion, nationality, political opinion or membership in a particular social group.[34]

The principle of non-refoulement is expressed, with some variation in scope, in a number of international legal instruments, including in IHL, refugee law and international human rights law. It is also, in its core, a principle of customary international law. It may preclude the Detaining Power from repatriating a prisoner of war or transferring a civilian provided for in own territories: Fourth Geneva Convention, Art. 45(4).

In occupied territory, any transfer of protected persons is prohibited (Fourth Geneva Convention, Art. 49). Common Article 3 is largely considered as incorporating the principle of non-refoulement. Article 45(4) of the Fourth Geneva Convention provides that: "In no circumstance shall a protected person be transferred to a country where he or she have reason to fear persecution for his or her political opinion or religious beliefs."[35]

This provision establishes, in international humanitarian law, the fundamental principle of non-refoulement, according to which "no refugee shall be returned to any country where he or she is likely to face persecution, other ill-treatment or torture".[36] This cornerstone principle of international refugee law is enshrined in Article 33(1) of the 1951 Refugee Convention, which declares that:

> "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

It has been interpreted that Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', contains an implied prohibition on refoulement. The application of the principle of non-refoulement is not dependent upon any formal determination of refugee status by a state or an international organisation.[37] A state may be considered in violation of its duty of non-refoulement without even considering who is at fault, if it is the officials that omitted to act or have acted erroneously, or if it is the legal and administrative systems that failed to offer a remedy to the refugee, a guarantee of which is necessitated by an applicable international standard.[38]

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[33] See W. Kälin, M. Caroni, and L. Heim, 'Article 33, para. 1', in A. Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford: Oxford University Press, 2011), 1327–96 at 1377–80; J.-Y. Carlier, 'Droit d'asile et des réfugiés: de la protection aux droits', 332 Recueil des cours de l'Académie de droit international (2008) 93–101; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, Oxford: Oxford University Press, 2007), 242–3; Hathaway, 355–63; J.-F. Durieux and A. Hurwitz, 'How Many is Too Many? African and European Legal Responses to Mass Influxes of Refugees', 47 German Yearbook of International Law (2004) 105–59.

[34] A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff, 2002), 168–72; V. Chetail, 'Le principe de non refoulement et le statut de réfugié en droit international', in V. Chetail and J.-F. Flauss (eds), La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés—50 ans après: bilan et perspectives (Brussels: Bruylant, 2001), 55–61.

[35] Article 45(4) of the Fourth Geneva Convention

[36] See also Concluding Observations on Dominican Republic, UN Doc CERD/C/DOM/CO/12 (2008), § 13; General Recommendation 30: Discrimination Against Non-Citizens, UN Doc HRI/GEN/1/Rev.7/Add.1 at 2 (2005), § 26.

[37] See I.C. Jackson, *The Refugee Concept in Group Situations* (The Hague: Martinus Nijhoff, 1999); J. Fitzpatrick, 'The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict', in D.A. Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinus Nijhoff, 1988), 87–101; D. Perluss and J.F. Hartman, 'Temporary Refuge: Emergence of Customary Norm', 26 Virginia Journal of International Law (1986) 558–75.

[38] G.J.L. Coles, 'Temporary Refuge and the Large Scale Influx of Refugees', 8 Australian Yearbook of International Law (1978–80) 190–212. At the regional level, temporary protection has been in the EU with the Temporary Protection Directive 2001/55/EC, OJ L 212/12 (2001).

V. CROSS-FERTILIZATION OF INTERNATIONAL LAW

Refugees caught in armed conflicts represent an archetypal case for testing the potential of the complementarity approach. The overlapping between international humanitarian law, refugee law, and human rights law is not disputable in this particular situation and their cumulative application reveals some unexpected conclusions. Although international humanitarian law is supposed to be the main branch of international law applicable in times of armed conflict, closer scrutiny of its specific norms proves rather frustrating. Indeed, international humanitarian law has little to provide for protecting the specific needs of refugees caught up in armed conflicts. The simultaneous application of refugee law and human rights law accordingly proves to be a crucial source of protection.[39] Because of the limited protection offered by humanitarian law, refugee law and human rights law are bound to play essential roles. This is not only the case in non-international armed conflicts but also in international armed conflicts, where refugees are not protected persons under international humanitarian law or, even when they are, because of the relative lack of a tailored and specific protection granted by this last branch of international law.[40]

The concurrent application of refugee law and human rights law highlights the crucial importance of the complementarity approach for ensuring effective protection in armed conflicts.[41] The reach and degree of protection offered by the two branches of law are nevertheless quite different from one another. Thus, with humanitarian law, the most specific norms enshrined in refugee law are not necessarily the most protective ones when compared to human rights law.[42]

The continuing applicability of human rights law in times of armed conflict is beyond any doubt. In fact, 'the question is no longer whether international human rights law applies in armed conflict but how it applies'. Similarly, to the Refugee Convention, the answer mainly depends on whether the derogation clause applies or not. Compared to its refugee law counterpart, derogation clauses under human rights law contain five substantive conditions. First, there must be an emergency threatening the life of the nation. Secondly, the derogation must be limited to, and go no further than that 'strictly required by the exigencies of the situation' in due respect with the principle of proportionality. Third that the derogating measures must not be inconsistent with the state's other obligations under international law, thus including international humanitarian law and refugee law. Lastly, derogating measures must not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.[43]

International humanitarian law is based on the premise that despite the existence of armed conflict, persons not 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.[44] Respect for international

[39] See Y. Arai-Takahashi, *The Law of Occupation. Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (Leiden: Martinus Nijhoff, 2009), 332–45; J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1995), 143–78.

[40] Y. Dinstein, 'The Israel Supreme Court and the Law of Belligerent Occupation: Deportations', 23 Israel Yearbook on Human Rights (1993) 1–26; R. Lapidoth, 'The Expulsion of Civilians from Areas which Came under Israeli Control in 1967: Some Legal Issues', 2 European Journal of International Law (1990) 97–109.

[41] See ECtHR, Andric v Sweden, ECHR (1999), App No 45917/99, § 1; General Comment No 15 (n 82), § 10; CERD, General Recommendation 30 (n 83), § 26; IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc 5 rev 1 corr (2002), § 404

[42] V. Chetail, 'Voluntary Repatriation in Public International Law: Concepts and Contents', 23 Refugee Survey Quarterly (2004) 1–32; M. Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (The Hague/Boston/London: Martinus Nijhoff, 1997); S. Takahashi, 'The UNHCR Handbook on Voluntary Repatriation: The Emphasis of Return over Protection', 9(4) International Journal of Refugee Law (1997) 593–612.

[43] See V. Holzer, *Protection of People Fleeing Situations of Armed Conflict and Other Situations of Violence and the 1951 Refugee Convention* (Geneva: UNHCR Legal and Protection Policy Research Series, 2012); J.-F. Durieux, 'Of War, Flows, Laws and Flaws: A Reply to Hugo Storey', 31(3) Refugee Survey Quarterly (2012) 161–76 at 163–4; C.M. Bailliet, 'Assessing Jus Ad Bellum and Jus in Bello within the Refugee Status Determination Process: Contemplations on Conscientious Objectors Seeking Asylum', 20(1) Georgetown Immigration Law Journal (2005) 337–84.

[44] Von Sternberg (n 2), 5; M. Kagan and W.P. Johnson, 'Persecution in the Fog of War: The House of Lords' Decision in Adan', 23 Michigan Journal of International Law (2002) 247–64; H. Storey and R. Wallace, 'War and Peace in Refugee Law Jurisprudence', 95 American Journal of International Law (2001) 349–66 at 353; W. Kälin, 'Refugees and Civil Wars: Only a Matter of Interpretation?', 3 International Journal of Refugee Law

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 and refugee protection.[45]

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.[46] Secondly, both refugee law and humanitarian law aim at granting international protection for the "unprotected", often in different situations but sometimes concurrently.[47] 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".[48]

VI. CONCLUSION

The unprecedented current "refugee crisis", with its 80 million plus uprooted people, who are forcibly displaces, demands a new protection orientation and framework for refugees and other forced migrants that are focused on the "root causes" of refugeehood, non-international protracted armed conflict or civil war. That's the most since World War II, according to the U.N. Refugee Agency (UNHCR).[49] The first calls for broadening the definition of who is a refugee to include "war refugees" as found in the 1984 Cartagena Declaration and the 1969 Organization of African Unity (OAU) Convention. Syrians has more than 6.7 million refugees and asylum seekers because of the Syrian civil war remain in the Middle East. About 1.1 million people who identify as members of the Rohingya ethnic group have fled their homes in western Myanmar's Rakhine state. The protracted conflict in South Sudan has resulted in 2.3 million refugees.[50]

While international humanitarian law, refugee law, and human rights law are clearly the three pillars of the refugee protection regime, their multifaceted interactions constitute a fertile ground for apprehending forced

(1991) 435–51; S. Bodart, 'Les réfugiés apolitiques: guerre civile et persécution de groupe au regard de la Convention de Genève', 7(1) International Journal of Refugee Law (1995) 39–59; P. Butcher, 'Assessing Fear of Persecution in a War Zone', 5(1) Georgetown Immigration Law Journal (1991) 435–74.

[45] P. Tiedemann, 'Subsidiary Protection and the Function of Article 15(c) of the Qualification Directive', 31(1) Refugee Survey Quarterly (2012) 123–38; R. Errera, 'The CJEU and Subsidiary Protection: Reflections on Elgafaji and After', 23(1) International Journal of Refugee Law (2011) 93–110; V. Chetail and C. Bauloz, The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis? (San Dimenico di Fiesole: European University Institute, Robert Schuman Centre for Advanced Studies, EU-US Immigration Systems 2011/07, 2011), 17; H. Lambert and T. Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence', 22(2) International Journal of Refugee Law (2010) 237–73; J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', 17 International Journal of Refugee Law (2005) 461–516; R. Piotrowicz and C. Van Eck, 'Subsidiary Protection and Primary Rights', 53 International and Comparative Law Quarterly (2004) 107–38.

[46] see G. Okoth-Obbo, 'Thirty Years On: A legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa', 20(1) Refugee Survey Quarterly (2001) 79–138; E. Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism', 3 International Journal of Refugee Law (1991) 185–207; P. Nobel, 'Refugee, Law, and Development in Africa', 3 Michigan Yearbook of International Legal Studies (1982) 255–88.

[47] See H. Battjes, 'Subsidiary Protection and Other Alternative Forms of Protection', in V. Chetail and C. Bauloz (eds), *Research Handbook on Migration and International Law* (Cheltenham: Edward Elgar Publishing, 2014); S.S. Juss, 'Problematizing the Protection of "War Refugees": A Rejoinder to Hugo Storey and Jean-François Durieux', 32(1) Refugee Survey Quarterly (2013) 122–47.

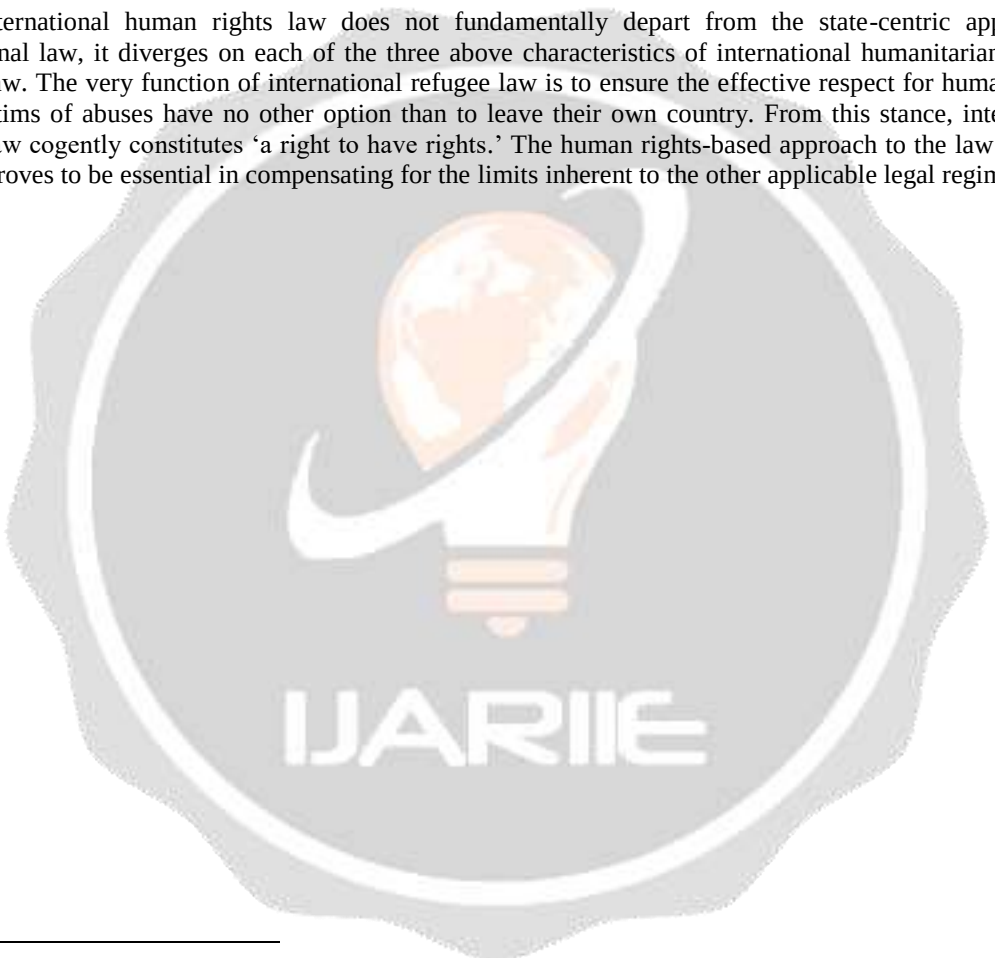
[48] P. Butcher, 'Assessing Fear of Persecution in a War Zone', 5(1) Georgetown Immigration Law Journal (1991) 435–74.

[49] See also C. Bauloz, 'The (Mis)Use of International Humanitarian Law under Article 15(c) of the EU Qualification Directive', in J.-F. Durieux and D. Cantor (eds), *Refuge from Inhumanity: Enriching Refugee Protection Standards Through Recourse to International Humanitarian Law* (The Hague: Martinus Nijhoff, 2014).

[50] Rohingya Refugee Crisis, *OCHA*, https://www.unocha.org/rohingya-refugee-crisis.com

migration through a holistic and systemic approach. From a comparative perspective, international refugee law has more in common with international humanitarian law than it has with international human rights law. The reasons for this are both historical and structural.[51] The four Geneva Conventions of 1949 and their refugee sister adopted two years later are children of their times. Though both refugee law and humanitarian law have been amended in the 1960s and 1970s, they have still retained some common distinctive features which arguably reflect their stage of development. The normative structure of international humanitarian law and refugee law converges on three major components.[52] First, the two legal regimes are primarily framed as obligations of states, instead of individual rights. Secondly, under each branch of international law, the traditional distinction between nationals and non-nationals remains a foundation stone for identifying and framing the applicable norms. Thirdly, both international humanitarian law and refugee law rely on a decentralized scheme of implementation without a proper supervisory mechanism. Though the ICRC and the UNCHR are the key humanitarian actors in their respective field, they are not monitoring bodies in charge of supervising states' conduct. Overall, the basic principle underlying the three common attributes of international humanitarian law and refugee law is the tribute paid to the sacrosanct sovereignty of states.[53]

While international human rights law does not fundamentally depart from the state-centric approach to international law, it diverges on each of the three above characteristics of international humanitarian law and refugee law. The very function of international refugee law is to ensure the effective respect for human dignity when victims of abuses have no other option than to leave their own country. From this stance, international refugee law cogently constitutes 'a right to have rights.' The human rights-based approach to the law of armed conflict proves to be essential in compensating for the limits inherent to the other applicable legal regimes.



[51] See J.P. Charmatz and H.M. Wit, 'Repatriation of Prisoners of War and the 1949 Geneva Convention', 62 The Yale Law Journal (1952–53) 391–415 at 406–8 who already contemplated the potential of international human rights law for repatriation to be conducted on a voluntary basis. See also C. Shields Dellessert, Release and Repatriation of Prisoners of War at the End of Active Hostilities, vol 5 (Zürich: Société Suisse de droit international, Schulthess, 1977), 194–9.

[52] B.S. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation', 5(3) International Journal of Refugee Law (1993) 442–60; G.S. Goodwin-Gill, 'Voluntary Repatriation: Legal and Policy Issues', in G. Loescher and L. Monahan (eds), *Refugees and International Relations* (Oxford: Oxford University Press, 1989), 255–85; R. Hofmann, 'Voluntary Repatriation and UNHCR', Zeitschrift für ausländisches und öffentliches Recht (1984) 327–35.

[53] For instance, about 15,000 Iraqi prisoners of war refused their repatriation to Iraq after the second Gulf War. H. Fischer, 'Protection of Prisoners of War', in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), 321–67 at 366. See also J. Quigley, 'Iran and Iraq and the Obligations to Release and Repatriate Prisoners of War after the Close of Hostilities', American University Journal of International Law and Policy (1989) 82.