



Human Rights Consortium  
SCHOOL of ADVANCED STUDY  
UNIVERSITY OF LONDON

Refugee  
Law  
Initiative

CHATHAM  
HOUSE  
The Royal Institute of  
International Affairs

International Law Programme  
Meeting Summary

# Refuge from Inhumanity? War Refugees at the Intersection of IHL and Refugee Law

**Dr David James Cantor**

Director, Refugee Law Initiative, University of London

**Jean-François Durieux**

Programme Director, International Institute of Humanitarian Law

**Françoise Hampson**

Emeritus Professor, University of Essex

**Chair: Ruma Mandal**

Senior Research Fellow, International Law Programme, Chatham House

25 February 2015

The views expressed in this document are the sole responsibility of the speaker(s) and participants, and do not necessarily reflect the view of Chatham House, its staff, associates or Council. Chatham House is independent and owes no allegiance to any government or to any political body. It does not take institutional positions on policy issues. This document is issued on the understanding that if any extract is used, the author(s)/speaker(s) and Chatham

House should be credited, preferably with the date of the publication or details of the event. Where this document refers to or reports statements made by speakers at an event, every effort has been made to provide a fair representation of their views and opinions. The published text of speeches and presentations may differ from delivery.

## Introduction

How does international humanitarian law (IHL) interact with international refugee law (IRL)? To what extent does IHL contribute to the protection of war refugees? These issues were discussed at a meeting held jointly by the International Law Programme (Chatham House) and the Refugee Law Initiative (University of London).<sup>1</sup> The meeting coincided with the publication of *Refuge from Inhumanity? War Refugees and International Humanitarian Law*.<sup>2</sup> This summary draws together the main points and themes explored:

- The lack of a clear legal framework for the protection of war refugees under international refugee law;
- IHL as a source of protection for those fleeing situations of armed conflict;
- The return of individuals to where they have fought or may be required to fight.

The meeting was not held under the Chatham House Rule.

## The ‘war flaw’ of international refugee law

IRL struggles to respond to the protection claims of persons fleeing situations of armed conflict and indiscriminate violence – the ‘war flaw’ described by Judge Hugo Storey. This stems from a lack of consensus as to whether the refugee definition in the 1951 Convention Relating to the Status of Refugees (‘the Refugee Convention’) covers flight from situations of armed conflict, especially where violence is indiscriminate and the nexus between the harm feared and one of the Convention grounds (e.g. race, religion) is not evident.

This ambiguity is reflected in the inconsistent responses of European states to the protection claims of those fleeing the Syrian conflict.<sup>3</sup> These responses demonstrate resistance against guidance from the UN High Commissioner for Refugees (UNHCR), according to which the majority of Syrian asylum-seekers fall within the Refugee Convention’s refugee definition. It was noted that this reticence can be traced back to the UNHCR Handbook<sup>4</sup> itself, which provides ambiguous guidance about the refugee character of persons fleeing situations of armed conflict. It was emphasized that this reticence by states may be hardening rather than softening.

---

<sup>1</sup> This summary was prepared by Victoria Barlow.

<sup>2</sup> David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill, 2014).

<sup>3</sup> Similar concerns were raised with regard to protection claims of people fleeing the conflicts in Iraq, Afghanistan and Somalia. See UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* (2011).

<sup>4</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011) HCR/1P/4/ENG/REV. 3.

#### **IHL as an interpretative tool for international refugee law**

International protection under IRL encompasses not only refugee status under the Refugee Convention, but also complementary refugee protection under regional systems (the OAU Convention and the Cartagena Declaration<sup>5</sup>) as well as subsidiary protection under EU law. All these instruments employ, to varying degrees, concepts and terms that have IHL connotations. This opens up the possibility of IHL principles and concepts being used as guidance for interpreting elements of refugee and subsidiary protection definitions. Under the EU regional system, Article 15(c) of the EU Qualification Directive is particularly problematic. As this provision recognizes the need for protection from a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict', it manages to combine ambiguous terminology with a lack of a clear framework of reference.<sup>6</sup>

It was observed that 'indiscriminate violence' has different meanings under IHL and IRL. Under IHL, an indiscriminate attack is one that does not respect the principle of distinction between combatants and those not directly participating in hostilities. In contrast, IRL defines 'indiscriminate' as lacking a nexus with any of the recognized grounds for persecution. It was argued that to conflate the two leads to a deficit of protection. It was further remarked that the use of the term 'civilian' in Article 15(c) is ambiguous. Should it be understood in the same sense as under IHL? In international refugee law and policy, the concept of the civilian character of asylum and of refugee camps also exists. Its meaning is, however, hard to trace to precise IHL concepts. It was suggested that though this debate is not closed, a consensus is emerging that favours an 'inclusive approach' to interpretation. Such an approach takes account of multiple factors, or building blocks, some of which – but clearly not all – rely on IHL concepts. It rules out recourse to IHL concepts where the outcome would be to restrict the scope of refugee or subsidiary protection.

#### **IHL as a source of refugee protection**

There is an assumption that IHL is only indirectly relevant to the international protection of refugees. Yet it was repeatedly noted that IHL does in fact contain rules that are important to the protection of refugees from armed conflict, and may serve to fill some of the gaps left by IRL.

Indeed, the 1949 Geneva Conventions (GCs) enjoy universal ratification, as opposed to the 148 state parties to the Refugee Convention and its Protocol. The IHL framework is thus binding on all states, including those not bound by the Refugee Convention. It was also noted that armed forces are assuming an increased role in dealing with refugees and cross-border flows of people in times of armed conflict. IHL, unlike IRL, is directed specifically towards military personnel (as well as others). IHL also has a well-developed

---

<sup>5</sup> See Article I(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969; see also 1984 Cartagena Declaration on Refugees, para. III(3).

<sup>6</sup> That said, it was noted that some steps have been taken to clarify the meaning of 'internal armed conflict' by the European Court of Justice in Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* (30 January 2014).

regime of individual criminal responsibility for violations of its obligations; an aspect not present in IRL.

It was noted that there are three specific areas where the utility of IHL in refugee protection can be seen: prohibitions on forced removals; IHL standards specifically concerned with refugees; and the concept of a broader class of war refugees.

### IHL and forced removals

Article 49 of Geneva Convention IV (GCIV), which is concerned with international armed conflict (IAC), absolutely prohibits the forced transfer of any civilian protected person out of occupied territory. Article 45 absolutely prohibits the forced transfer of any protected person who is an alien in hostile territory to a state where he may have reason to fear persecution for his political opinions or religious beliefs. It was emphasized that IHL is thus important as a distinct source of protection against removal. These provisions also raise questions about the interaction between IHL and IRL. For example, protection against *refoulement* in the Refugee Convention (Article 33(2)) is qualified.

### Specific provisions on refugees in IHL

The protection rationale of the Geneva Conventions is largely predicated on the concept that nationals of a belligerent state require protection when they fall into the hands of the hostile state because of their presumed bond of allegiance with their state of nationality. For refugees, this presumption is reversed as they fear persecution from their state of nationality. IHL recognizes this; Article 44 of GCIV requires the state in which the refugee is present not to treat the refugee as an enemy alien solely on the basis of his or her (ineffective) nationality. Where, as a result of military occupation, a refugee falls into the hands of the state that he or she fled, IHL rules protect the refugee, including from transfer out of the occupied territory (for example, from *refoulement* back to the country of origin).

It was acknowledged that Article 73 of Additional Protocol I to the Geneva Conventions attempts to tie the determination of refugee status in these circumstances back to IRL. However, the provision suffers from the practical shortcoming that it protects only refugees who arrived in the territory before the start of hostilities. Although this deficiency was recognized at the time of drafting, it was felt that IRL might resolve this problem. However, the discussion noted that IRL has not yet done so and that it might therefore be time to strengthen some of the protections available to refugees in IACs.

### IHL protection for a wider class of persons fleeing from armed conflict

It was noted that the focus of IHL is on prevention and punishment, including the prohibition and criminalization of acts that may lead to displacement (e.g. targeting of civilians or starvation of the civilian population). IHL therefore does not appear to impose any duty on states to admit those who flee when IHL rules are breached on the territory of the armed conflict. It was highlighted that IRL has equally been reluctant to acknowledge as refugees this class of persons, drawing the line definitively at 'persecution'.

However, differing views were expressed about whether IHL already provides some form of protection to these persons. It has been argued that a progressive interpretation of

Common Article 1 of the GCs ('to respect and to ensure respect') gives rise to an obligation upon all states not to *refoule* persons to territories where there is a real risk of Common Article 3 violations. Doubts about this interpretation were, however, expressed. It was emphasized that in any case this does not obligate states to admit persons who have not yet left the war zone. Concern was also raised that pushing such a view of Common Article 1 could inadvertently allow states to circumvent their IRL obligations and undermine IRL through displacing the debate.

It was also proposed that, beyond the discrete disciplines of IHL and IRL, there might be underpinning rules in international law that protect a broad class of war refugees. In practice, temporary refuge is often granted outside of IHL and IRL to persons fleeing armed conflict, which may form the basis for state practice creating international custom to protect this class of persons.

### The return of fighters

It was queried whether a state can be prevented, under IHL and IRL, from returning a person to a state where he has fought or where he would be required to fight in various circumstances.

### Imminent armed conflicts

Where an armed conflict is imminent but has not yet commenced, IHL is not applicable. It was suggested that if an individual is called up by his state of nationality but refuses to respond to the call-up while in the territory of another state, this constitutes desertion. If a state seeks to enforce its own criminal law, this is not in itself a basis for a claim of persecution under IRL, unless the reason for refusal is linked to a ground specified in the Refugee Convention, such as political opinion or membership of a particular social group. It was further noted that since human rights law now appears to recognise a right to conscientious objection, this may operate as a basis upon which to prevent *refoulement* where the state of origin does not recognize this right.

### During armed conflict

#### International armed conflicts

In IACs, it was noted that it is first necessary to determine whether the state of refuge is a belligerent, a neutral or a third state.

#### *A belligerent state*

Where an individual is in a belligerent state during an armed conflict between that state and his state of origin, it is virtually inconceivable that the belligerent state would seek to send the individual back to his state of origin, as this would reinforce the enemy army. A more likely scenario would be internment or detention as a prisoner of war (POW) or an enemy civilian. The requirement to return POWs to their state of origin at the end of active hostilities under Article 118 of Geneva Convention III (GCIII) is now outdated. Under customary IHL, an individual has a right to refuse to be returned.

### *A neutral state*

It was suggested that a third state is only neutral where the state has actually invoked neutrality; and once invoked for a particular issue, neutrality status would apply generally. An individual arriving in the territory of a neutral state during an armed conflict could give rise to three different scenarios.

First, the individual may have voluntarily chosen to abandon the side for which he was fighting (i.e. he could be seen as a deserter). It was suggested that a neutral state, in order to maintain its neutrality, is permitted to host deserters in its territory only if deserters from both sides are allowed to stay. Parties to the conflict may disagree on the classification of the individual and so there may be an issue as to what label the neutral state uses to describe the individual.

Second, the individual might still be a fighting member of the armed forces, and thus seeking to return to his home state's armed forces. Under Article 11 of Hague Convention V, the neutral state would be required to intern the individual.

Third, the individual might be captured by the belligerent state as a POW and then escape to neutral territory. Under Article 91 of GCIII, when a POW reaches neutral territory, he has made good his escape and ceases to be a POW. If he does not wish to return to his home state, he would be in the same position as a non-active member of the armed forces and probably a deserter, since members of the armed forces are expected to rejoin their home state's armed forces upon reaching neutral territory.

### *A third state*

It was noted that the most likely situation is that an individual will find himself in a third state that has neither claimed neutral rights nor is a belligerent state. In such circumstances, he may face the risk of criminal proceedings for desertion if sent back to his state of origin. It must be determined whether these are ordinary criminal proceedings, or whether his opposition to fighting actually derives from underlying persecution or from conscientious objection. If the ex-fighter simply does not want to be sent back to a war zone, it was suggested that this situation is more likely to be addressed through discretionary immigration categories such as 'exceptional leave to remain' based on the danger of return to indiscriminate violence.

### **Non-international armed conflicts (NIACs)**

With regard to fighting for the state, the IHL rules in NIACs are the same as in IACs. The state of refuge is, however, not expected to be even-handed, but more supportive of the state party in the NIAC (subject to the exception of the recognition of belligerency).

An ex-fighter or individual refusing to fight, who does not wish to be returned because he would be forced to fight for a non-state armed group, could nevertheless be sent back to a part of the territory that is not under control of that particular non-state party. If the individual fears punishment by the non-state fighters if he refuses to join them, this could be relevant in preventing his *refoulement* even to parts of the state not controlled by them. Where the individual may fear punishment by the state for having previously fought on behalf of the non-state fighters, it must be recognized that the former is entitled to enforce its own criminal law, as these acts constitute engagement in armed violence against the

state. Return could only be prevented if: there were an underlying issue of persecution; there were a newly found conscientious objection; or there would be a flagrant denial of justice under human rights law. It was suggested that, as a policy matter, the state of refuge would probably choose to address this via exceptional leave to remain.

### **How an individual fought**

Where it is alleged that an individual has committed war crimes or crimes against humanity, this may lead to exclusion from refugee status under Article 1F(a) of the Refugee Convention.

It was noted that an atmosphere of increased concern about terrorism has implications for reliance by governments on the exclusion clause. Several developments were put forward as requiring reconsideration of how this provision is interpreted. There have been significant developments in international criminal law through the decisions of domestic and international courts regarding forms of participation in crimes, such as joint criminal enterprise and command responsibility. This may affect the application in practice of Article 1F(a) of the Refugee Convention. Moreover, the question was raised as to whether the increased ability and willingness of states to conduct their own war crimes proceedings lessens the necessity for invoking the exclusion clause. In this regard, it was stated that it is not clear whether the rationale for exclusion is that the individuals concerned are unworthy of refugee status or avoid impunity.

An analogy with the situation of POWs was raised. Under Article 85 of GCIII, a POW who is alleged to have committed a war crime retains POW status, regardless of whether he is tried or convicted of war crimes. Communist states sought to make a reservation to this provision in the 1950s, 1960s and 1970s. Western states objected to this reservation and severed it so that Article 85 would still apply. If Western states are so insistent on the maintenance of POW status where an individual has committed war crimes, exclusion on the basis of involvement in war crimes should no longer be seen as relevant in IRL, particularly where an individual is actually prosecuted for war crimes. It was further argued that developments in international human rights law (in relation to its *non-refoulement* obligations) render exclusion outdated.

The question of what happens after an individual is excluded was also raised. It was suggested that, since returning the individual to his state of origin would merely transfer the danger to that state, the response should be to prosecute. The difficulties of prosecutions for offences committed abroad, for example in relation to evidence, were acknowledged. Yet it was also observed that this problem was not insuperable, as illustrated by a review of Scandinavian responses to alleged war criminals.<sup>7</sup>

Participants raised the issue of whether exclusion was a necessary feature to prevent misuse of national asylum systems. It was noted that the system is continually under strain due to the fact that anyone has the right to claim asylum, whether or not they are a refugee. However, it was suggested that misuse derives from many more sources than just excludable persons. Indeed, in the Rwandan genocide, the misuse may have been the

---

<sup>7</sup> Denis Dzidic and Marina Ferhatovic, 'Refugee War Criminals Pose Dilemma to Scandinavia' (Från BalkanInsight.com) (19 August 2009, Amnesty International).

overly hasty conclusion that all those arriving in neighbouring states were refugees, when many of them were not civilians.

### The 'pro homine' principle

Although the meeting examined the interaction of IHL and IRL specifically, it was acknowledged throughout that international human rights law remained relevant to the discussion. It was suggested that the system is better conceived as a triangulation of the three bodies of law and that the *pro homine* principle prevails – whatever regime offers the greatest protection must be privileged.