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Refuge from inhumanity

Enriching refugee protection standards through recourse to international humanitarian law

Conference report

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Refugee Studies Centre
Oxford Department of International Development
University of Oxford

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List of abbreviations

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| CJEU | Court of Justice of the European Union |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| ICC | International Criminal Court |
| ICL | international criminal law |
| ICRC | International Committee of the Red Cross |
| ICTY | International Criminal Tribunal for Former Yugoslavia |
| IHL | international humanitarian law |
| IHRL | international human rights law |
| IRL | international refugee law |
| NIAC | non-international armed conflict |
| OAU | Organization of African Unity |
| UNHCR | Office of the United Nations High Commissioner for Refugees |

Introduction

This report summarises the proceedings at the international conference ‘Refuge from inhumanity: enriching refugee protection by recourse to international humanitarian law’ held at All Souls College, Oxford, 11-12 February 2013. The conference was jointly organised by the Refugee Studies Centre, University of Oxford, and the Refugee Law Initiative of the School of Advanced Study, University of London.

This expert conference broke new ground in exploring the role of international humanitarian law (IHL) in the protection of refugees and asylum-seekers. Its seven thematic panels went beyond traditional approaches to IHL and refugee law by assessing the prospects for substantive legal interaction between the two fields. The first day of the conference explored the extent to which IHL (and international criminal law) may provide interpretative guidance in the asylum context. The second day was devoted to examining the potential of IHL for preventing *refoulement* to situations of armed conflict.

The conference brought together exciting new contributions from more than twenty leading specialists in the fields of IHL and refugee law to take stock of recent developments in law and practice, and to cultivate new approaches to the topic. There were over 60 participants, including staff from international and national humanitarian organisations, judges, lawyers, academics and students. For a complete list of participants, please see Annex 1. Unless otherwise indicated, all presenters spoke in an individual and not an institutional capacity.

Thematics

Panel I: Theoretical Perspectives

The first (introductory) panel – chaired by **Jean-François Durieux** – served to outline some of the conceptual and institutional responsibility issues involved in protecting people displaced by and/or within the context of armed conflict and other situations of generalised violence. The conference heard the perspectives of the Office of the United Nations High Commissioner for Refugees (UNHCR/Alice Edwards) and the International Committee of the Red Cross (ICRC/Marie-Louise Tougas) on the inter-penetration of the bodies of law of which these organisations are the guardians.

Alice Edwards offered reflections on the fragmentation and specialisation of international law generally, concluding that the objective of harmonisation should not be pursued to the detriment of respect for the object and purpose of each regime or instrument. Building upon the conclusions of two recently held expert meetings organised by UNHCR, she described the existing points of intersection between international refugee law (IRL) and IHL, distinguishing between explicit cross-references (of which there are few) and similar terminology. Over-reliance on the latter, she argued, carries the risk of fuelling restrictive tendencies in applying the refugee definition.

Marie-Louise Tougas identified two questions which IHL, because of its limited scope and purpose, cannot answer fully on its own, namely: what protection must be available to victims of armed conflict outside the conflict area? and what remedies must be made available for IHL violations? She acknowledged that IRL has a potential for supplementing IHL in answering these questions.

Hélène Lambert addressed a broad conceptual and methodological issue, namely causation, which she sees as central to a proper understanding of how IRL can protect people fleeing the indiscriminate effects of generalised violence. In these cases, she argued, conventional causal analysis is insufficient to capture the complexity of contemporary refugee flows. Advocating receptiveness towards the wider social context of civilian flight, Lambert recommended a ‘constitutive causation’ approach that opens up enquiry into the complex character of violence in contemporary conflicts and the experience and perceptions of the displaced. She wondered whether IHL is currently equipped to play any significant role in our understanding of constitutive causation in the refugee context.

The ensuing discussion focused primarily on the issue of causation and its connection with the nexus question in refugee law, with participants debating whether it offered a conceptual advantage compared with more established approaches such as that of risk assessment. A secondary round of questions put on the table the issue of whether violations of IHL could amount to persecution.

Panel II: Laws of War and the 1951 Convention ‘Refugee’ Definition

The second panel – chaired by **Kate Jastram** – introduced the first theme of the conference, namely: the interpretation of IRL concepts and norms in the light of IHL.

Stefanie Haumer and **Ryszard Piotrowicz** argued for an interpretation of ‘protection’ in IRL that is limited to respect for the principle of non-*refoulement*. They considered whether IHL norms could be interpreted as widening the scope, especially including armed conflict itself as a reason for the obligation not to return. They concluded in the negative, and stressed that an interpretation of the notion ‘to ensure respect’ in Common Article 1 of the Geneva Conventions that would include the obligation of non-*refoulement* would be too broad. Protection has to be drawn from IRL – also in situations of armed conflict.

Geoff Gilbert offered a critical assessment of IHL and international criminal law (ICL) terms and standards as potentially transferrable to the law and practice of exclusion from refugee status under IRL. He analysed both the definition of crimes falling within Article 1 F (a), (b) and (c) of the 1951 Convention, and issues of attribution of individual responsibility for such crimes. His thorough review of the International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Court (ICC) statutes and jurisprudence led him to conclude that officials and judges applying IRL’s exclusion clauses should not be tied to the complexities of such jurisprudence, the very intricacy of which suggests that no common understandings currently exist. The different natures of refugee status determination (RSD) and international criminal prosecution should allow for an autonomous, more humanitarian, understanding of Article 1 F.

Vanessa Holzer explored the extent to which, in cases involving persons fleeing situations of non-international armed conflict, IHL can provide interpretative guidance for the meaning and scope of key elements of the 1951 Convention’s refugee definition, namely: persecution and the causal link to an established ground. Noting that interpreting the 1951 Convention refugee definition in light of IHL might restrict its scope by incorporating the ‘minimalistic’ approach of IHL to protection in armed conflict, she argued that the overall guiding principle for interpreting the Convention, namely its humanitarian object and purpose, should serve to ensure that recourse to IHL as interpretative aid enhances, rather than restricts, refugee protection. While violations of the IHL principles of proportionality and distinction suggest the existence of causes unrelated to military necessity, and hence clarify the nexus between persecution and one or more of the 1951 Convention grounds, they cannot provide a conclusive assessment.

In the discussion that followed, participants grappled with the relevance of IHL applicability for the concept of protection in the refugee definition. On the one hand, the presumably lower level of positive obligations to protect on the part of the home state in situations of war suggests that the protection element of Article 1A (2) may be less easily satisfied. On the other, the imposition of obligations on non-state parties to non-international armed conflict (NIAC) might imply that they also carry protection obligations. Other questions concerned the place of IHL and international criminal law in the search for an autonomous meaning in relation to the exclusion clauses.

Panel III: Regional Approaches to Refugee Protection and IHL

The third panel – chaired by **Guy Goodwin-Gill** – introduced the analysis of regional frameworks for the protection of ‘war refugees’ and their relation to IHL that was continued by the fourth panel.

This discussion was introduced by a broader reflection, offered by **Hugo Storey**, on the ‘war flaw’ in IRL i.e. the perceived failure of international protection to analyse claims by persons fleeing armed conflict by reference to the correct international law framework. Finding support in national as well as supranational case law, Storey argued for a primary reliance on IHL and ICL in the analysis of such cases. He acknowledged, however, that IHL can hardly ever be used on its own, and recommended that, wherever IRL needs to be interpreted in the light of other bodies of law, the choice between IHL or international human rights law (IHRL) norms should be guided by whichever ensures more protection.

Discussing the 1969 Organization of African Unity (OAU) Convention’s definition of ‘refugee’, **Tamara Wood** emphasised the importance of the Vienna Convention on the Law of Treaties in the interpretation of treaty-based refugee law norms. Noting that the use of IHL as a ‘relevant rule of international law’ in the interpretation of Africa’s expanded refugee definition is heavily circumscribed by general rules on treaty interpretation, she suggested that IHL instruments and jurisprudence, including on the meaning of armed conflict, could be used as *indicia*. Such *indicia* would be neither exhaustive nor necessary to establish the existence of one of the refugee-producing events mentioned in the African treaty.

Diana Trimiño and **David Cantor** also considered rules of interpretation regarding the expanded refugee definition found in the 1984 Cartagena Declaration on Refugees. This instrument not being a treaty, however, they opined that a ‘conventional’ interpretation of its terms is misguided, and recommended a broader and more contextual interpretation. In outlining this new interpretation, they proposed a simplified understanding of the ‘situation’ elements of the Cartagena definition, and a ‘group’ approach to the ‘threat’ elements. They noted that for one particular class of objective event mentioned in the Declaration, namely internal conflict, the scope of protection offered by the Cartagena definition is influenced by reference to the IHL principle of distinction.

Participants in the following discussion emphasised the importance of also giving due consideration to the role of IHL in interpreting the regional expanded refugee definitions, suggesting that undue emphasis has historically been accorded to interpreting the 1951 Convention. In this connection, questions were also raised about the significance of the term ‘refugee’ in the regional instruments and the application of that concept to those fleeing armed conflict and other situations of indiscriminate violence.

Panel IV: Subsidiary Protection in EU Law

Still on the subject of regional approaches, the fourth panel – chaired by **Jennifer Moore** – zeroed in on the European Union (EU) Qualification Directive, which includes in its Article 15 (c) a subsidiary protection standard for non-Convention refugees whose return to situations of generalised violence would expose them to serious harm.

Lilian Tsourdi examined the impact of Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) jurisprudence on the understanding of subsidiary protection, and asked what gaps remain for the protection of persons fleeing indiscriminate violence. In considering avenues to define the added protection value of Article 15 (c), she cautioned against an interpretation that would undermine the primacy of the 1951 Convention, and argued that the ‘soft’ references of the ECtHR to IHL – notably through risk indicators – may serve to safeguard the relevance of the disputed EU law provision.

Céline Bauloz expressed deep scepticism regarding the potential of IHL concepts and norms to properly influence the application of Article 15 (c). She referred in particular to the Article 15 (c) terms ‘indiscriminate violence’, ‘civilian’, and ‘international or internal armed conflict’, to show how an interpretation of these terms on the basis of IHL would ultimately restrict the protective ambit of subsidiary protection. In her search for viable definitional alternatives, she suggested that the adjective ‘indiscriminate’ be re-conceptualised outside the realm of IHL so as to qualify the *effects* of the violence and not the aim or nature of the attack. With regards to the notion of ‘civilian’, a factual determination should be preferred over fixed legal categories focusing on too rigid statuses. Finally, the term ‘international or internal armed conflict’ should be approached as a factual notion rather than a legal one.

Violeta Moreno-Lax focused on EU law, which has developed into an autonomous system of ‘supranational’ law with a specific regime and hierarchy of sources within which the position of human rights – reconceptualised as ‘fundamental rights’ – is uppermost. She explained how this should guide any interpretation of Article 15 (c), referring to the EU Charter as the main reference point in cases involving fundamental rights disputes. Considering that protection under Article 3 of the European Convention on Human Rights (ECHR) has been extended so as to cover situations of generalised and/or indiscriminate violence, she argued that the only way for Article 15 (c) to preserve its ‘independent substance’ is through a more generous interpretation of its terms.

Questions generated during the ensuing discussions focused on the appropriate starting point for legal analysis in Article 15 (c), i.e. whether it should be treated primarily as a ‘refugee law’ instrument or one based in IHL (or IHRL). A wide range of views were expressed on this topic and on the closely related question of the relationship of this subsidiary protection to the concept of asylum. A second round of questions picked up on the place of public international law (of which IHL forms a part) within the specific context of EU law.

Panel V: The Protection of Refugees as Civilians

Panel 5 – chaired by **Geoff Gilbert** – was devoted to the protection of refugees as ‘civilians’.

Maja Janmyr traced the origins of the principle according to which refugee camps have a civilian and humanitarian character – an application of the peaceful and humanitarian character of asylum. She then asked whether, in the articulation of this principle, ‘civilian’ and ‘humanitarian’ are direct imports, perversions, or vague imitations, of the same concepts in IHL and concluded that the terms do not, and are not intended to, correspond with their IHL meaning. In refugee law, the terms serve an operational and functional, rather than strictly legal, purpose.

Stéphane Jaquemet analysed arguments advanced by some critics to refuse an IHL, or IHL-friendly, reading of refugee law concepts, to suggest that a more robust interface with IHL could have addressed some of the concerns expressed by those same critics, and contributed to filling identified protection gaps. He also noted that UNHCR as an operational agency, as well as the UN Security Council and Secretary-General have developed (not least through the ‘protection of civilians’ language) a more engaged perception of IHL as a natural complement to IRL and IHRL. While acknowledging that, in matters of protection, the ‘central square’ is occupied by human rights, he concluded that in a country at war national protection will necessarily be measured against both human rights law and IHL.

Eric Fripp noted that senior courts have specifically interpreted Article 1A (2) of the 1951 Convention by reference to IHL standards in draft evasion or desertion cases. He also showed how combatants and ex-combatants had been conspicuous among those historically assisted as refugees prior to the advent of the 1951 Convention, and argued that the latter did not exclude members of these categories from its protective ambit. Likewise, he argued, there is no provision in IHL for the cessation of combatant status by renunciation of military activities by the individual concerned. Combatants relying upon combat risk alone might well be outside the Article 1A (2) definition. On the other hand, discriminatory practices regarding enlistment and/or the assignment of dangerous or humiliating duties to targeted ethnic or religious segments of the armed forces may give rise to a well-founded fear of persecution, as does the recruitment of child soldiers in contravention to both IHL and IHRL.

The discussion returned to the question of whether IHL could be used, and if so how, in relation to refugee law and protection. Participants took several different positions on this question and tested the speakers’ claims. Much of the discussion revolved around practical aspects of protecting war victims in refugee camps, especially around the presence of fighters. In this regard, some participants pointed out the need for clearer use of IHL terminology by refugee practitioners, who were apt to introduce an element of confusion through the loose use of IHL concepts.

Panel VI: The IHL Framework on Non-Refoulement

Panel 6 – chaired by **Jean François Durieux** – introduced the second main theme of the conference, namely: the protection obligations of states toward people displaced by conflict.

Françoise Hampson distinguished two levels in the debate on legal coherence. At one level, there is a need to avoid direct normative conflict (this is, however, a rare occurrence in the IRL/IHL/IHRL debate). At another, more complex level, what is required is a coherent approach to a particular issue, in order to avoid violating one area of law by applying another. The ‘first tier’ question, she argued, must be answered according to the object and purpose of the legal regime one seeks to apply e.g. is this person a refugee in the meaning of IRL? The ‘second tier’ question is whether any damage is being done to another area of law, e.g. IHL, in the process. She called upon practitioners to recognise those areas of law with which their decisions are likely to ‘dialogue’, and at a minimum to avoid redefining technical terms that are used in those extraneous areas. She illustrated this approach by identifying a range of scenarios that may arise in international and non-international armed conflicts, in relation to whether fighters may be able to prevent their involuntary transfer to a particular state.

David Cantor discussed the extent to which IHL provisions relating to civilians and the civilian population provided protection against being sent to face potential harm in other countries. He showed that the rules relating to non-international armed conflict do prevent such transfers in certain situations for protected persons. Whilst there is some (but not total) overlap here with the protection provided against *refoulement* in refugee law, the Geneva Conventions have the advantage

of universal ratification. In respect of non-international armed conflict, he then analysed whether the rules in Additional Protocol II governing forced displacement offered some protection against forced return to harm in another state.

Kate Jastram analysed IHL's contribution to the protection of internally displaced persons in non-international armed conflict. She reviewed the impact of IHL on the development of the body of soft law purporting to address the situation of internally displaced persons. She asked, *inter alia*, whether the Guiding Principles on Internal Displacement, and/or customary international law, could be used to expand the scope of the law of armed conflict. She concluded that more robust implementation, rather than more law, is what the international community should concentrate its efforts upon.

The divergent papers generated separate streams of questions and debate. The first paper reopened the earlier discussions around the relationship between refugee law and IHL. The second paper generated discussion about the proximity or otherwise of concepts of *refoulement* in refugee law and transfer/displacement in IHL. The third paper raised the issue of whether a soft law framework for externally displaced war victims, based on the Guiding Principles for IDPs, might be useful.

Panel VII: Perspectives on Protection against Refoulement under IHL

Panel 7 – chaired by **Hélène Lambert** – considered innovative perspectives on protection against *refoulement*, including those inspired by IHL.

Ruvi Ziegler developed a careful step-by-step argument to show how a duty on non-belligerent states to refrain from returning persons to the risks associated with armed conflict could be derived from IHL obligations. This was done by concentrating primarily on developing current thinking on the scope of the obligation to 'ensure respect' in Article 1 Common to the 1949 Geneva Conventions. He acknowledged the novelty of this position but was able to point to a wide variety of persuasive legal interpretations in support of each step of his argument.

Jennifer Moore sought to elaborate a principle of protection from *refoulement* to situations of war by drawing on a wide range of humanitarian sources, including the Responsibility to Protect and the Millennium Development Goals. She argued that although IHL is among these sources, it does not have the exclusive claim to 'humanitarianism'. Instead, a broader underlying principle of 'humanitarian non-*refoulement*' finds much wider support in the broad gamut of instruments – of both hard and soft law – that reveal the humanitarian will of the international community.

Guy Goodwin-Gill also made the argument for the existence of a broader rule of international law that provides for temporary refuge for those persons fleeing war. Drawing on his early work on temporary refuge from the 1980s, he drew attention to the mass of evidence in support of such an international custom. However, he suggested that this concept should be de-linked from that of non-*refoulement* as understood in either the 1951 Convention or IHRL. The customary nature of the rule would suggest that it is binding upon all states regardless of their particular treaty obligations.

A good deal of the ensuing discussion grappled with the issue of the appropriate form of protection for persons fleeing their country as a result of war, whether based on temporary refuge or admission, non-*refoulement* or other concepts such as rescue or non-return. The concept of 'humanitarian' in this context was also thoroughly interrogated.

Annex 1

Convenors

David Cantor, Refugee Law Initiative, University of London
Jean-François Durieux, University of Oxford

Panelists

Céline Bauloz, Geneva Academy of International Humanitarian Law and Human Rights
David Cantor, Refugee Law Initiative, University of London
Vincent Chetail, Graduate Institute of International and Development Studies
Alice Edwards, UNHCR
Eric Fripp, Chambers of Ami Feder Esq
Geoff Gilbert, School of Law, University of Essex
Guy S. Goodwin-Gill, All Souls College, University of Oxford
Françoise Hampson, School of Law, University of Essex
Stefanie Haumer, German Red Cross
Vanessa Holzer, University of Frankfurt
Maja Janmyr, Faculty of Law, University of Bergen
Stéphane Jaquemet, UNHCR
Kate Jastram, Berkeley Law Faculty, University of California
Hélène Lambert, School of Law, Westminster University
Marie Louise Tougas, ICRC
Jennifer Moore, Law Faculty, University of New Mexico
Violeta Moreno Lax, University of Liverpool
Ryszard Piotrowicz, Department of Law and Criminology, Aberystwyth University
Nicolás Rodríguez Serna, Refugee Law Initiative, University of London
Hugo Storey, UK Upper Tribunal - Asylum and Immigration Chamber
Diana Trimiño Mora, Refugee Law Initiative, University of London
Lilian Tsourdi, Faculty of Law, Université Libre de Bruxelles
Tamara Wood, Law Faculty, University of New South Wales
Ruvi Ziegler, University of Reading

Note takers

Georgia Coles, University of Oxford
Angela Pilath, University of Oxford

Participants

Maite Zamacona Aguirre, Swedish Red Cross
Sharelle Aitchison, Immigration and Protection Tribunal - New Zealand
Deborah Baglole, UK Department for International Development (DFID)
Johanna Baillie, British Red Cross
Roland Bank, Refugee Studies Centre, University of Oxford
Peter Billings, University of Queensland
Kevin Brassell
Rachel Brett, Quaker UN Office - Geneva
Rebecca Brubaker, University of Oxford
Jennifer Chacon, Professor of Law, University of California
Dawn Chatty, Refugee Studies Centre, University of Oxford
Meltern Ineli Ciger, University of Bristol
Marjan Claes, Belgian Refugee Council
Meryll Dean, Oxford Brookes University

Jose Francisco Sieber Luz Filho, University of Oxford
Matthew Gibney, Refugee Studies Centre, University of Oxford
Pierre d'Huart, Catholic University of Louvain-la-Neuve
Linda Janku, Faculty of Law, Masaryk University
Jeroen Jansen, Médecins Sans Frontières (MSF)
Robyn Kerrison, World Food Programme
Linda Kirk, Refugee Law Initiative, University of London
Anna Kvittingen, UNRWA
Luc Leboeuf, Université catholique de Louvain
Jadwiga Maczynska, Jagiellonian University Human Rights Centre
Daniel Morris, National University of Ireland, Galway
Patricia Ötvös, Office of the Council of Europe Commissioner for Human Rights
Leana Podeszfa, Mercator Fellowship on International Affairs
Michael Sanderson, School of Law, University of Exeter
Jessica Schultz, University of Bergen
Rebecca Stern, Faculty of Law, Uppsala University
Dallal Stevens, University of Warwick
Amanda Taylor
Ioanna Voudouri, Geneva Academy of International Humanitarian Law and Human Rights
Hesetr Waddams, UK Foreign and Commonwealth Office (FCO)
Joris van Wijk, Faculty of Law, VU University Amsterdam