Humanitarian Law, Human Rights and Refugee Law – Three Pillars

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International humanitarian law, refugee law and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons.They form a complex network of complementary protections and it is essential that we understand how they interact. Statement at the International Association of Refugee Law Judges world conference, Stockholm, 21-23 April 2005, by Emanuela-Chiara Gillard, ICRC Legal Adviser.

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I. The International Committee of the Red Cross and International Humanitarian Law

How does the ICRC carry out the mandate given to it by states to assist and protect persons affected by armed conflict?

Pre-emptively, by disseminating international humanitarian law to armed forces in time of peace.

In the heat of conflict by:

obtaining access to persons in need;

making interventions to parties to the conflict (states and organised armed groups) with a view to putting an end to violations;

dealing with the consequences of such violations, by the provision of emergency assistance: including water, shelter, food and medical care;

re-establishing family links;

visiting persons detained in relation to the conflict.

A. What is international humanitarian law?

In addition to this very operational side of its work, the ICRC is also the promoter and guardian of international humanitarian law, the body of rules applicable in armed conflict which

protect those not or no longer taking active part in hostilities

regulate permissible means and methods of warfare.

The principal sources of international humanitarian law today are

the four Geneva Conventions of 1949;

the two Additional Protocols thereto of 1977;

a number of treaties prohibiting or restricting the use of specific weapons, eg the 1980 Convention on Certain Conventional Weapons and its protocols;

the 1954 Convention on the Protection of Cultural Property in the Event of War;

instruments establishing international mechanisms for the enforcement of international humanitarian law such as the 1998 Statute of the International Criminal Court;

an important body of customary law.

B. When does international humanitarian law apply?

As I stated earlier, international humanitarian law applies in times of armed conflict. This begs the deceptively simple question of “what constitutes an armed conflict”?

While in 1974 General Assembly adopted a definition of aggression, nowhere - neither in international humanitarian law instruments nor in any other body of international law – do we find a definition of armed conflict.

If we look to international humanitarian law treaties for guidance, while we do not find a definition, we do have provisions indicating when relevant conventions are applicable. International humanitarian law recognises two types of conflict: international armed conflicts a nd non-international armed conflicts. Different criteria determine the existence of these types of conflict, which are regulated by different rules.

1. International conflicts

These are conflicts opposing two or more states. The word “international” is used to describe the parties fighting each other (ie inter-states) and not in a geographic sense.

It is clear from provisions common to the four Geneva Conventions of 1949, the Commentary thereto as well as recent decisions of the International Criminal Tribunal for the former Yugoslavia ( " ICTY " ) such a conflict exists whenever there is any difference arising between two States … leading to the intervention of armed forces … even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. [J. PICTET (ed.), Commentary to the IV Geneva Convention, (1958) 20.] The ICTY Appeals Chamber in the Tadic decision seems to have taken a similarly expansive approach, holding that an international armed conflict exists and, consequently that international humanitarian law applies, " whenever there is resort to armed force between states " . [Tadic, IT-94, ICTY Appeals Chamber, 2 October 1995, § 70.]

Any use of force by states is thus regulated by international humanitarian law – even if they do not label it as war.

2. Non-international armed conflicts

The position is not so simple with regard to non-international arm ed conflicts. These are conflicts opposing a state and an organised armed group or two or more such groups. Again, " non-international " is not used as a geographic term. Although these tend to be internal conflicts, they can easily have a cross-border dimension.

Time prevents me from going into the details of the two slightly different legal regimes that regulate such conflicts, one based on Article 3 common to the 1949 Geneva Conventions and one based on the 1977 Additional Protocol II thereto. Instead, I will focus on the key constituent elements of non-international conflicts.

Additional Protocol II applies to:

conflicts … between [a state’s ] armed forces and dissident armed forces or other organised 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. [Article 1(1) Additional Protocol II. Common Article 3 of the Geneva Conventions applies simply to "armed conflict not of an international character".] “Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are expressly excluded from the scope of the Protocol. [Article 1(2) Additional Protocol II.] In the Tadic case the Appeals Chamber of the ICTY held that international humanitarian law was applicable in situations of non-international armed conflict in cases of " protracted violence between governmental authorities and organised armed groups or between such groups within a State " . [Tadic, supra.]

Although there is no precise formula or checklist for determining the existence of a non-international armed conflict the following elements are relevant:

parties: a state fighting an organised armed group or two or more such groups fighting among themselves;

control of territory by the organised armed group is required for Additional Protocol II to apply. This is not necessary under common Article 3 of the Geneva Conventions. In any event it is a significant indicator of the level of organisation of an armed group;

a certain level of violence and intensity of fighting;

resort to military means;

protracted violence.

It is by no means straightforward factually to determine if a situation is “unrest” or isolated or sporadic acts of violence or a conflict. Moreover, the determination and acceptance of the existence of a non-international conflict is an extremely sensitive political issue.

C. Who determines the existence of a conflict?

Finally, who makes the determination of existence of an armed conflict? Different entities for different purposes and with different consequences.

For example, the Security Council is authorized by the UN Charter to make a determination of the existence of a threat to the peace, breach of the peace or act of aggression. Such a finding brings into play the Chapter VII enforcement mechanisms of the Charter. The resolution making such a finding is binding on all UN Member States.

A Security Council determination of the existence of a threat to the peace, breach of the peace or act of aggression is not the same as a finding of the exi stence of an armed conflict. However, it may be an indirect evidence of the existence of such a situation, for example if the resolution calls upon the parties to the conflict to respect the Geneva Conventions – whose application, of course, presupposes the existence of an armed conflict.

Secondly, international and/or national courts may be required to make a determination of the existence of a conflict. This can occur ex post facto when they try individuals for alleged violations of international humanitarian law – for war crimes to be committed it is necessary to have a war. The international criminal tribunals for the former Yugoslavia and for Rwanda have therefore developed important jurisprudence on the notion of armed conflict that provide useful guidelines when analysing other situations. Of course, it is not only in relation to criminal matters that courts may have to determine whether a particular situation amounts to an armed conflict. The question may also arise in civil claims, for example to determine whether a war exemption clause in an insurance contract is applicable.

Thirdly, the parties to the conflict themselves also make a determination of the situation in which they find themselves. This might be required constitutionally. For example parliamentary authorisation may be required for going to war. Or it may take the form of a more discrete determination, for example, by the provision of " armed conflict " as opposed to " law enforcement " rules of engagement to the armed forces.

Finally, the ICRC also and constantly makes a determination of whether a particular situation amounts to an armed conflict. This “qualification” of a situation, as we call it, is necessary both to determine whether international humanitarian law is applicable and for the ICRC to commence its traditional activities.

This is not a public finding. It is an essential part of an o n-going confidential dialogue with the parties concerned and, of course, it is not binding. The ICRC qualifies every situation of violence in the world. Once it determines that a situation amounts to an armed conflict it sends a memorandum to the parties concerned setting out their obligations under international humanitarian law and it offers its services.

For obvious reasons this is an extremely sensitive issue, particularly in non-international armed conflict, where there is a tendency by states to deny the application of international humanitarian law, often claim the violence is terrorism and not armed conflict, or as has recently been the case in Colombia, that it is narco-trafficking and not armed conflict.

II. The interplay between the “three pillars”

A. Interface between international humanitarian law and human rights law

While international humanitarian law only applies in times of armed conflict, human rights law applies at all times; in times of peace and in times of armed conflict. The concurrent application of these two bodies of law has been expressly recognised by various international tribunals, including the International Court of Justice, the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights and, of course, numerous national courts.

This being said, some human rights treaties permit states to derogate from certain rights in times of public emergency. Certain key rights may never be suspended, including the right to life and the prohibition of torture or cruel, inhuman or degrading treatment or punishment. Moreover, unless and until they have issued derogations in accor dance with the relevant procedures states are bound by the entirety of their conventional obligations even in times of armed conflict.

The scope of application of the two bodies of law is slightly different. international humanitarian law binds all actors in armed conflicts: states, organised armed grounds and individuals. Human rights law, on the other hand, lays down rules that regulate states in their relations with individuals. While there is a growing body of opinion according to which organised armed groups – particularly if they exercise government-like functions – must also respect human rights the issue remains unsettled. Although individuals do not have specific obligations under human rights law, the most serious violations of human rights, such as genocide, crimes against humanity and torture, are criminalised by international law and are often crimes under national criminal law.

The essence of some of the rules of international humanitarian law and human rights law is similar. For example, both bodies of law aim to protect human life. prohibit torture or cruel treatment, prescribe basic rights for persons facing criminal proceedings and prohibit discrimination. However, care must be taken to ensure the proper articulation of the relationship between the two sets of rules.

As stated by the International Court of Justice in its advisory opinion on Nuclear Weapons, in situations of armed conflict, international humanitarian law is lex specialis. What does this mean? The precise interplay depends on the rules in question.

There may be certain matters for which international humanitarian law lays down a “self-contained” set of rules. In these cases the provisions of international humanitarian law apply to the exclusion of human rights. A case in point are the rules relating to prisoners of war found in the Third Geneva Convention which, with regard to most matters, is a self-c ontained system. For example, this means that prisoners of war can be deprived of their liberty until the end of hostilities and a right to challenge the deprivation of liberty cannot be inferred from human rights law. [Article 5 of Third Geneva Convention does give captured combatants a right to have their entitlement to prisoner of war status determined by a competent tribunal.]

On the other hand, international humanitarian law can be vague or silent on particular questions, in which case it is proper to turn to human rights law for guidance to interpret the rules in question. This is most notable in relation to fair trial provisions, where international humanitarian law only contains general provisions, like a reference to entitlement to “judicial guarantees recognised as indispensable by civilised peoples”. The precise contents of such guarantees can be inferred from human rights law. Human rights law is also an important source of rules and protection in non-international armed conflicts, where the international humanitarian law treaty rules are few.

Finally, there may be issues addressed by both bodies of law. As international humanitarian law is lex specialis, the human rights norm must be interpreted through the prism of international humanitarian law. What do I mean by this? The right to life can serve as an example. What constitutes an “unlawful killing” in situations of armed conflict must be assessed on the basis of the relevant rules of international humanitarian law, including the fact that combatants or other persons taking a direct part in hostilities may be attacked - even with lethal force; and that killing of civilians in certain circumstances may not be prohibited. They may be permissible “collateral damage”. The lawfulness of such deaths must be assessed pursuant to international humanitarian law’s principle of proportionality which requires a balancing of the inciden tal loss of civilian life or injury to civilians with the concrete and direct military advantage expected from a particular attack.

In recent years we have been seeing the emergence of extremely interesting and important case law from human rights and national courts as they grapple with this complex relationship. The analysis is not rendered any easier by the question of the extent of extra-territorial application of human rights.

B. Interface between international humanitarian law and refugee law

The relationship between international humanitarian law and refugee law is also a two-way cross fertilisation.

1. International humanitarian law in refugee law and protection

Armed conflict and international humanitarian law are of relevance to refugee law and refugee protection in a number of ways.

First, to determine who is a refugee. Many asylum seekers are persons fleeing armed conflict and often violations of international humanitarian law. Does this make them refugees? Not every person fleeing an armed conflict automatically falls within the definition of the 1951 Refugee Convention, which lays down a limited list of grounds for persecution. While there may be situations, notably in conflicts with an ethnic dimension, where persons are fleeing because of a fear of persecution based on their “race, religion, nationality or membership of a particular social group”, this is not always the case.

Recognising that the majority of persons forced to leave their state of nationality today are fleeing the indiscriminat e effect of hostilities and the accompanying disorder, including the destruction of homes, foodstocks and means of subsistence – all violations of international humanitarian law – but with no specific element of persecution, subsequent regional refugee instruments, such as the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees have expanded their definitions to include persons fleeing armed conflict.

Moreover, states that are not party to these regional instruments have developed a variety of legislative and administrative measures, such as the notion of “temporary protection” for example, to extend protection to persons fleeing armed conflict.

A second point of interface between international humanitarian law and refugee law is in relation to issues of exclusion. Violations of certain provisions of international humanitarian law are war crimes and their commission may exclude a particular individual from entitlement to protection as a refugee.

2. Protection of refugees under international humanitarian law

International humanitarian law offers refugees who find themselves in a state experiencing armed conflict a two–tiered protection. First, provided that they are not taking a direct part in hostilities, as civilians refugees are entitled to protection from the effects of hostilities. Secondly, in addition to this general protection, international humanitarian law grants refugees additional rights and protections in view of their situation as aliens in the territory of a party to a conflict and their consequent specific vulnerabilities.

A. GENERAL PROTECTION

If respected, international humanitarian law operates so as to prevent displacement of civilians an d to ensure their protection during displacement, should they nevertheless have moved.

i. The express prohibition of displacement

Parties to a conflict are expressly prohibited from displacing civilians. This is a manifestation of the principle that the civilian population must be spared as much as possible from the effects of hostilities.

During occupation, the Fourth Geneva Convention prohibits individual or mass forcible transfers, both within the occupied territory and beyond its borders, either into the territory of the occupying power or, as is more often the case in practice, into third states.

There is a limited exception to this rule, which permits an occupying power to “evacuate” the inhabitants of a particular area if this is necessary for the security of the civilian population or for imperative military reasons. Even in such cases the evacuations should not involve the displacement of civilians outside the occupied territory unless this is impossible for material reasons. Moreover, displaced persons must be transferred back to their homes as soon as the hostilities in the area in question have ceased.

The prohibition on displacing the civilian population for reasons related to the conflict unless the security of the civilians or imperative military reasons so demand also applies in non-international armed conflicts.

ii. Protection from the effects of hostilities in order to prevent displacement

In addition to these express prohibitions, the rules of international humanitarian law which shield civilians from the effects of hostilities also play on important role in the prevention of displacement, as it is often violations of these rules which are at the root of displacements in situations of armed conflict.

Of particular relevance are:

the prohibition to attack civilians and civilian property and of indiscriminate attacks;

the duty to take precautions in attack to spare the civilian population;

the prohibition of starvation of the civilian population as a method of warfare and of the destruction of objects indispensable to its survival; and

and the prohibition on reprisals against the civilian population and its property.

Also of relevance are the prohibition on collective punishments which, in practice have often taken form of destruction of homes, leading to displacement; and the rules requiring parties to a conflict, as well as all other states, to allow the unhindered passage of relief supplies and assistance necessary for the survival of the civilian population.

iii. Protection during displacement

Although prohibited by international humanitarian law, displacement of civilians frequently occurs in practice. Once displaced or evacuated civilians are entitled to various protections and rights. Thus we find rules regulating the manner in which evacuations must be effected: transfers must be carried out are in satisfactory conditions of hygiene, health, safety and nutrition; during displacement persons must be provided with appropriate accommodation and members of the same family must not be separated.

Although these provisions relate to conditions to be ensured on situations of evacuation – i.e. “lawful” displacements for the safety of the persons involved security or for imperative military necessity - these conditions should be applicable a fortiori in situations of unlawful displacement.

In addition to these special provisions relating specifically to persons who have been displaced, such persons are civilians and, as such, entitled, even during displacement, to the whole range of protection appertaining to civilians.

B. SPECIFIC PROTECTION OF REFUGEES

In addition to this general protection, international humanitarian law affords refugees further specific protection. In international armed conflicts refugees are covered by the rules applicable to aliens in the territory of a party to a conflict generally as well as by the safeguards relating specifically to refugees.

i. Protection as aliens in the territory of a party to a conflict

Refugees benefit from the protections afforded by the Fourth Geneva Convention to aliens in the territory of a party to a conflict, including:

the entitlement to leave the territory in which they find themselves unless their departure would be contrary to the national interests of the state of asylum;

the continued entitlement to basic protections and rights to which aliens had been entitled before the outbreak of hostilities;

guarantees with regards to mean of existence, if the measures of control applied to the aliens by the party to the conflict means that they are unable to support themselves.

While recognising that the party to the conflict in whose control the aliens find themselves may, if its security makes this absolutely necessary, intern the aliens or place them in assigned residence, the Convention provides that these are the strictest meas ures of control to which aliens may be subjected.

Finally, the Fourth Convention also lays down limitations on the power of a belligerent to transfer aliens. Of particular relevance is the rule providing that a protected person may in no circumstances be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs; a very early expression of the principle of non refoulement.

ii. Additional protections for refugees

In addition to the aforementioned rules for the benefit of all aliens in the territory of a party to a conflict, the Fourth Geneva Convention contains two further provisions expressly for the benefit of refugees. The first provides that refugees should not be treated as enemy aliens – and thus susceptible to the measures of control - solely on the basis of their nationality. This recognises the fact refugees no longer have a link of allegiance with that state and are thus not automatically a potential threat to their host state.

The second specific provision deals with the precarious position in which refugees may find themselves if the state which they have fled occupies their state of asylum. In such circumstances, the refugees may only be arrested, prosecuted, convicted or deported from the occupied territory by the occupying power for offences committed after the outbreak of hostilities, or for offences unrelated to the conflict committed before the outbreak of hostilities which, according to the law of the now occupied state of asylum, would have justified extradition in time of peace. The objective of this provision is to ensure that refugees are not punished for acts - such as political offences - which may have been the cause of their departure from their state of nationality, or for the mere fact of having sought asylum.

All of this being said, who is a refugee for the purposes of international humanitarian law? Although the Fourth Geneva Convention expressly refers to refugees, it does not define this term. Instead, it focuses on their de facto lack of protection from any government.

The matter was developed in Additional Protocol I. This provides that persons who, before the beginning of hostilities, were considered refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or of residence are to be considered “protected persons” within the meaning of the Fourth Convention in all circumstances and without any adverse distinction.

D. ICRC’s interaction with UNHCR and human rights agencies

So far I have focused on the law. I would now like to say a few words about the ICRC’s interaction with UNHCR and international human rights bodies.

As I said at the outset, the ICRC is an operational agency. Extremely so! Currently it has a presence in 80 situations of armed conflict with more than 12,000 employees. Many of its activities in the field provide protection and assistance to refugees and internally displaced persons. It is natural for us to have a close interaction with UNHCR which is often working in the same context.

This interaction can be on legal matters. For example, in recent years we have worked together to determine the legal framework regulating the separation and internment of combatants who cross borders with refugees in situations of mass influx and the development of guidelines for its implementation. We also regularly train one another's staff in international humanitarian and refugee law.

Obviously, there is also close interaction in operational terms to ensure a coherent and comprehensive response on the ground. Such interaction can be quite formal and at “high level” such as, for example, the Memorandum of Understanding concluded in March 2003 to allocate responsibilities and tasks for possible population flows from Iraq.

Interaction also takes place on a day to day basis in the field. Just to give one example, in Iraq today, where UNHCR currently does not have an expatriate presence, we are liaising to try to find practical ways of dealing with third country nationals in hands of multinational forces who cannot be released in Iraq and who have indicated their fear fo being repatriated.

The ICRC’s interaction with human rights agencies on the other hand is not so close. This could be due to the fact that the Office of the High Commissioner for Human Rights has a very limited field presence. Moreover, as human rights bodies are often by their very nature outspoken in their establishment and condemnation of violations, a close relationship would be hard to reconcile with ICRC’s confidential modus operandi. This naturally gives rise to a relationship more at arm’s length.

The Office of the High Commissioner, monitoring bodies and the Commission on Human Rights, where the ICRC has observer status, are increasingly addressing international humanitarian law in both country and thematic work and, where appropriate, the ICRC provides informal expert advice on international humanitarian law. To give but one example, earlier this week the Commission on Human Rights adopted the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law. The ICRC participated in the expert meetings leading to the adoption of this instrument and provided legal input on the international huma nitarian law dimension.

III. Challenges

To end I would like mention some current challenges to international humanitarian law, refugee law and human rights law.

A. Terrorism and the response to it

Terrorism negates the most basic principles of humanity which underlie the three bodies of law. At the same time, the efforts to prevent further acts of terrorism and to bring suspects to justice have put existing legal framework of protection under strain.

I do not propose to go into the details of this question now. It was the subject of an expert workshop hosted by the Institute of International Humanitarian Law in San Remo in 2002. Suffice it to say that numerous international bodies have reaffirmed the need for states to respect international law while fighting terrorism.

B. Non-refoulement

I would like to spend my final moments to present a practical challenge that the ICRC has faced in recent years: how to ensure respect of principle of non-refoulement.

Non-refoulement is the keystone of refugee law and also forms part of international humanitarian law and human rights law, notably as part of the prohibition of torture: no one must be transferred to a place where s/he risks torture or other forms of ill-treatment. While the precise contours of the principle may differ slightly in the different bodies of law, the essence of the principle is uncontroversial.

The ICRC has to address problems related to non-refoulement in a variety of situati ons. I will only focus on those arising when we visits persons deprived of their liberty, including just before a release and repatriation and they express to us their concern at returning home. We communicate this concern to the detaining authorities and remind them of their obligations under the principle of non-refoulement.

A first challenge sometimes arises when we “unpack” these obligations. What are they in practice? At a minimum they include a requirement to

suspend any repatriation or transfer;

carry out a review of the well-foundedness of the fear expressed by the detainee by a competent tribunal;

grant the individual access to refugee status determination procedures.

What problems are we sometimes faced with?

- issues of extraterritoriality. Although they are not relevant to non-refoulement as a principle of international humanitarian law, as what matters is the existence of a conflict, the international humanitarian law prohibition only expressly applies to aliens in the power of party to an international conflict and not in occupation or non-international conflict, in which cases we are implicitly invoking the prohibition as a principle of refugee law and human rights and issues of extra-territoriality may be more pertinent;

the state concerned could disagree with our analysis of what the principle of non-refoulement means in practice;

a competent tribunal might not exist

access to refugee status determination procedures may be denied;

UNHCR may not be present to assist, or even if it is, the persons concerned may fall into the exclusion clauses.

On this last point, when talking of non-refoulement it is often said that for persons who are not granted protection as refugees, non-refoulement as a rule of human rights acts as a safety net. However, as a matter of practical reality all too often there is no-one to hold this safety net …

human rights agencies are not “operational” ie in the field and in places of detention, so can only rarely act swiftly and preventively in particular cases;

the ICRC cannot provide them with information on individual cases that we are encountering during our confidential work;

the ICRC’s authority to invoke the principle as matter of human rights law may be challenged by states on the ground that the ICRC should only address questions of international humanitarian law.

The final element of complexity is the increasing resort by states to diplomatic assurances to side-side step their obligations under the principle of non-refoulement. The extent, if at all, these are compatible with non-refoulement is far from clear.

Moreover, the ICRC faces the risk of becoming part of the diplomatic assurances “deal” and thus giving it an element of legitimacy, when the sending state – without the ICRC's consent – requires the receiving state to the ICRC's monitoring the detention of any returned persons.

Why do I tell you all of this? Because of the pivotal role of national courts in upholding the principle of non-refoulement. We look to you to authoritatively

set the limits and scope of the principle;

identify its constitutive elements;

determine the interplay between international humanitarian law, refugee law and human rights law, as well as any issues of criminal responsibility;

determine the role and limits of diplomatic assurances.