

Refuge from Inhumanity? War Refugees and International Humanitarian Law

Edited by

David James Cantor and Jean-François Durieux



BRILL
NIJHOFF

LEIDEN | BOSTON

Contents

Acknowledgements	IX
Abbreviations	X
Notes on Contributors	XII

PART 1

Introduction

- 1 **Refuge from Inhumanity? Canvassing the Issues** 3
Jean-François Durieux and David James Cantor

PART 2

Interpretive Guidance from IHL: Cross-Cutting Issues

- 2 **The ‘War Flaw’ and Why It Matters** 39
Hugo Storey
- 3 **Causation in International Protection from Armed Conflict** 57
Hélène Lambert
- 4 **Expanding Refugee Protection through International Humanitarian Law: Driving on a Highway or Walking near the Edge of the Abyss?** 79
Stéphane Jaquemet

PART 3

Interpretive Guidance from IHL: Inclusion and Exclusion under the Refugee Convention

- 5 **Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insights from Customary International Humanitarian Law** 101
Vanessa Holzer
- 6 **Inclusion of Refugees from Armed Conflict: Combatants and Ex-combatants** 128
Eric Fripp

- 7 **Exclusion is Not Just about Saying ‘No’: Taking Exclusion Seriously in Complex Conflicts** 155
Geoff Gilbert

PART 4

Interpretive Guidance from IHL: Regional Definitions and Systems

- 8 **The African War Refugee: Using IHL to Interpret the 1969 African Refugee Convention’s Expanded Refugee Definition** 179
Tamara Wood
- 9 **A Simple Solution to War Refugees? The Latin American Expanded Definition and its relationship to IHL** 204
David James Cantor and Diana Trimiño Mora
- 10 **Revisiting the Civilian and Humanitarian Character of Refugee Camps** 225
Maja Janmyr
- 11 **The (Mis)Use of International Humanitarian Law under Article 15(C) of the EU Qualification Directive** 247
Céline Bauloz
- 12 **What Protection for Persons Fleeing Indiscriminate Violence? The Impact of the European Courts on the EU Subsidiary Protection Regime** 270
Evangelia (Lilian) Tsourdi
- 13 **Of Autonomy, Autarky, Purposiveness and Fragmentation: The Relationship between EU Asylum Law and International Humanitarian Law** 295
Violeta Moreno-Lax

PART 5

IHL Protections for Non-Return to Armed Conflict

- 14 **Laws of Unintended Consequence? Nationality, Allegiance and the Removal of Refugees during Wartime** 345
David James Cantor
- 15 **The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict** 373
Françoise J. Hampson
- 16 ***Non-Refoulement* between ‘Common Article 1’ and ‘Common Article 3’** 386
Reuven (Ruvi) Ziegler

PART 6

Wider Approaches to Protection of War Victims

- 17 **Protection against the Forced Return of War Refugees: An Interdisciplinary Consensus on Humanitarian *Non-refoulement*** 411
Jennifer Moore
- 18 ***Non-refoulement*, Temporary Refuge, and the ‘New’ Asylum Seekers** 433
Guy S. Goodwin-Gill
- Bibliography** 461
- Index** 485

Protection against the Forced Return of War Refugees

An Interdisciplinary Consensus on Humanitarian Non-Refoulement

Jennifer Moore

The close relationship between refugee law and international humanitarian law (IHL) reflects their mutual affirmation of human dignity, whether in the face of political repression or military violence. Refugee law protects individuals who flee in well-founded fear of persecution on ethnic, religious or socio-political grounds. It seeks to shelter displaced persons, especially those who cross international boundaries, from serious human rights abuses and to provide for their basic needs. IHL, for its part, seeks to protect the *hors de combat* (non-combatants) from the outrages of armed conflict. It applies specifically in time of war to shield civilians, wounded combatants and prisoners from military attack and inhuman treatment. Both refugee law and IHL are born of exigent circumstances; both have a humanitarian character, in that they seek to alleviate the suffering of war and persecution; both use the language of protection; and both aim higher than they reach. The two fields have much in common, but their scholars and practitioners spend a fair amount of time marking the legal, theoretical and operational boundaries that separate them. The substantial common ground between refugee law and IHL expands when we adapt a more dynamic definition of both legal fields. For refugee law this involves a meaningful response to the plight of internally displaced persons [IDPs], and the recognition that the protection of IDPs is intrinsically connected to the protection of cross-border refugees. For humanitarian law, this dynamism entails addressing the responsibilities of signatories to the Geneva Conventions¹ to ensure respect for IHL in all times and all places, including in countries of asylum far from the zone of conflict.

The 1951 Refugee Convention establishes the framework for international refugee protection, under the leadership of the UN High Commissioner for Refugees [UNHCR]. The 1949 Geneva Conventions and the International

1 The 'Geneva Conventions' is a general reference to the four Geneva Conventions of 1949, particularly Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (Fourth Geneva Convention).

Committee of the Red Cross [ICRC] are the standard-bearers for international humanitarian law. Yet, despite their distinct constitutional treaties and governing organizations, refugee law and IHL are frequently applied in the same contexts – in refugee camps and IDP settlements,² detention facilities and transit centers, borderlands and more distant countries of asylum.³ Moreover, practitioners of refugee law and IHL are equally accustomed to confronting the wide divide between the State's legal obligation to ensure respect for human rights, on the one hand, and state powerlessness or complicity in the face of the harsh realities of war, persecution and displacement, on the other. Refugee law aspires to durable status in countries of asylum for victims of persecution, but not infrequently presides over the prolonged encampment of displaced persons in marginal circumstances. IHL demands respect for the norms of humanity, distinction, necessity and proportionality, but all too often bears witness to war crimes and crimes against humanity in which non-combatants are brutalised. Given their common contexts, objectives, and challenges, the need for common cause between the two fields is irrefutable.

Despite their sixty-plus years of shared history, UNHCR and ICRC lawyers sometimes become preoccupied by the mandates of their institutions and distracted from the worsening plight of the war refugees whose needs their organizations were created to serve. A disciplined insistence upon clarity regarding the proper application of refugee law and IHL may devolve into distracting

2 'IDP settlements' is a reference to camps established for so-called internally displaced persons (IDPs). Essentially IDPs are forced migrants who have not crossed an international boundary, but who otherwise have similar motivations and needs to those of *refugees* as defined according to the Refugee Convention. While IDPs are not covered by the 1951 Refugee Convention, they are the subject of another treaty, which entered into force in 2012. See 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 22 October 2009 (entered into force 6 December 2012) (Kampala Convention) <<http://www.unhcr.org/refworld/docid/4ae572d82.html>> accessed 1 March 2014; see generally W. Kidane, 'Managing Forced Displacement by Law in Africa: the Role of the New African Union IDPs Convention' (2011) 44 *Vanderbilt J Tran'l L* 1. For a vision of refugee law encompassing protections for 'internal refugees', e.g. IDPs, as well as 'cross-border refugees', see J. Moore, *Humanitarian Law in Action within Africa* (OUP 2012) 159–166 and 171, n 40.

3 While IHL applies in situations of armed conflict, it may nonetheless have indirect application outside the zone of conflict itself. Since the 1980s the Art 1 responsibility of state parties to the Fourth Geneva Convention to 'ensure respect' for the treaty has been utilized to demand that states of would-be asylum not deport asylum seekers to countries in which civilians are the victims of indiscriminate military attack (see J. Moore, 'Simple Justice: Humanitarian Law as a Defense Against Deportation' (1991) 4 *Harvard H Rts LJ* 19; see also D. Perluss and J.F. Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1985–1986) 26 *Virginia J Int'l L* 551).

struggles regarding whose *lex* is more *specialis*.⁴ In such situations war refugees may find themselves caught in a *terra nullius* between the two legal domains, enjoying the benefits of neither while they merit the protection of both. Where two bodies of law offer specific norms relevant to situations characterised by extreme violence, suffering and lawlessness, an exacting search for the *lex specialis* may frustrate as much as facilitate constructive action. To secure better protections for war refugees, concurrent and complementary legal frameworks are essential. Such emergent situations cry out for a '*lex communis*' composed of overarching principles, spanning both refugee law and IHL, to better protect war refugees from further brutalization. In seeking such common principles, we recognise and respect the differences in their precise application under either regime, while trying to avoid getting bogged down in technicalities. In such a spirit, this chapter is a call to collective action on the part of the refugee advocacy and Red Cross movements. It is a challenge to all refugee and humanitarian lawyers that we seek common ground, acknowledging our shared responsibility to make operational the fundamental legal protections for war refugees, which are rooted in both fields.

The purpose of this chapter is not to survey the precise outer limits of refugee law and international humanitarian law, or to argue which normative system takes priority in specific situations. Rather, the analysis acknowledges the bountiful shared terrain between refugee law and IHL, and seeks to build upon this concurrent jurisdiction in creative and constructive terms. One concrete expression of the fundamental synergy between refugee law and IHL is the shared commitment to protecting individuals from forcible transfer to life-threatening circumstances. This chapter focuses on the prohibition against the forced return of individuals displaced by armed conflict, and explores the legal heritage of this so-called 'humanitarian form of *non-refoulement*', rooted in the fertile ground of refugee law, IHL, and related fields of international law and practice.⁵ Humanitarian *non-refoulement* is a fruitful place to start in reclaiming the space of protection for war refugees.

The freedom from fear is integral to the theory and practice of refugee law and IHL, and entails access to safety and decent living conditions without

4 The legal maxim '*lex specialis derogat legi generali*' holds that a more specific rule (i.e., a rule governing a specific situation) should trump more general rules. This maxim is designed to ensure that the most relevant and finely tuned principles are utilized to resolve specific dilemmas that the law is called upon to address.

5 It should be noted at the outset that the conceptual framework underlying this chapter does not insist upon a fine distinction between *non-refoulement* and so-called 'temporary refuge', in contrast to other scholars who posit a clearer separation between the two concepts (see J.F. Durieux, 'Three Asylum Paradigms' (2013) 20 Int'l J Minority and Group Rts 165).

which both the notion of refuge and the principle of humanity have little meaning. Protection against forced return to the danger zone is a clear nexus between the two fields. Humanitarian *non-refoulement* takes the mandatory protection against forced return⁶ enjoyed by individuals who meet the well-founded fear of persecution-based definition of the refugee, and extends it to individuals who flee international or non-international armed conflicts. Humanitarian *non-refoulement* recognises that the State prerogative to exclude individuals seeking safe passage at and inside the border is trumped by the reality of war atrocities just as it is overruled by the likelihood of persecution upon return.

The prohibition against deportation to indiscriminate military attacks, so-called 'humanitarian *non-refoulement*', resonates across various domains of international law. In addition to its importance in the context of refugee law and IHL, humanitarian *non-refoulement* has broader relevance to the promotion of international peace and security, implementation of the Responsibility to Protect (R2P), and progress towards the Millennium Development Goals (MDGs). While frequently misconceived in exclusive terms of military intervention to end systemic and egregious human rights abuses, R2P has a powerful humanitarian dimension that is realised through the provision of emergency relief and safe harbor to individuals displaced by crimes against humanity. For their part, the Millennium Development Goals obligate States, individually and collectively, to address the root causes of armed conflict and repression and to shelter those who flee such violence, no matter where those conflicts exist. Both R2P and the MDGs will be furthered through the promotion of poverty alleviation and human development in regions of conflict, as well as the provision of relief from deportation to war refugees who have sought refuge outside the danger zone.

Through humanitarian *non-refoulement*, victims of war atrocities and persecution may become survivors of violence and agents of conflict resolution and social development in their own right. In this sense, humanitarian *non-refoulement* is an essential factor in the effective implementation of R2P and the MDGs. It is also a reminder to the international community of the responsibilities of States located outside the zone of insecurity. For as long as States outside the conflict zone remain stymied in their capacity or will to help end armed conflict, widespread repression and endemic poverty in other countries, they have a responsibility to shelter and empower those war refugees who have been able to flee violent circumstances, rather than re-victimizing them through forced return.

6 See Art 33(1) Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (Refugee Convention).

The principle of protection is multi-faceted and cannot be claimed as the exclusive province of refugee law or the unique mandate of the law of armed conflict. It encompasses refuge from persecution and war, shelter from genocide, and progress toward socio-economic self-sufficiency. Humanitarian *non-refoulement* creates the opportunity for refugee and humanitarian law practitioners and scholars to embrace a broader conception of humanitarian protection, one which entails engagement in conflict resolution and poverty alleviation as well as the provision of safe harbor, life-saving shelter and sustenance. The three sections to follow explore the roots and branches of humanitarian *non-refoulement* in refugee law and international humanitarian law, the Responsibility to Protect, and the Millennium Development Goals.

1 *Non-Refoulement* as a Convergence of Refugee Law and Humanitarian Law

This section will start with humanitarian *non-refoulement* in its more traditional historical context. *Non-refoulement* springs from the common ground of refugee law and international humanitarian law, whose bedrock is a venerable humanitarian institution of sanctuary predating both the 1951 Refugee Convention and the 19th century Red Cross movement. Various forms of refuge and protection from persecution and violence were recognised during the Greco-Roman and Early Christian periods,⁷ and similar doctrines were formalised in the pre-Islamic and Koranic traditions.⁸ Building upon this historical foundation, 20th century refugee law and the law of armed conflict give us our modern definitions of the refugee and protection from unlawful deportation.

1.1 *Refugee Law*

International law defines the refugee as a person with a well-founded fear of persecution on account of her race, religion, nationality, membership in a particular social group or political opinion, according to the 1951 Refugee

⁷ See I. Bau, *This Ground is Holy: Church Sanctuary and Central American Refugees* (Paulist Press 1985) 124–133, exploring various forms of temple and alter sanctuary in Ancient Greece, Rome and the Early Christian Church.

⁸ See G.M. Arnaut, *Asylum in the Arab-Islamic Tradition* (UNHCR 1987) 14–21, exploring the pre-Islamic Arab tradition of *ijara* and the Koranic concept of *amân*, both linked to notions of asylum from persecution or refuge for the wayfaring stranger.

Convention.⁹ Despite its dedication to the ‘status of refugees’, the treaty does not require sovereign States to grant durable asylum let alone citizenship to refugees.¹⁰ Therefore the norm of *non-refoulement* – the mandatory protection against forcible return to likely persecution – remains the heart of refugee law, perhaps the most important norm that this body of law has to offer.¹¹ The refugee is not assured long-term status, but she must enjoy protection from involuntary return to the dangerous situation in which her life or freedom would be at risk.¹² The centrality of non-return to the very concept of refugee protection cannot be denied, and is evidenced in numerous pronouncements by the

9 Refugee Convention, Art 1(A)(2) defines a refugee as someone with a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’.

10 Refugee Convention Art 34.

11 The non-discretionary character of *non-refoulement* derives from the language of Art 33 of the Refugee Convention: ‘[n]o Contracting State shall expel or return (“refouler”) 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’ (Art 33(1)). The state is only permitted to return a refugee who constitutes a security risk or ‘a danger to the community’ (Art 33(2)). For all refugees who do not threaten the community they seek to enter, the state is prohibited from expelling or returning them to the danger zone. The non-discretionary nature of *non-refoulement* is in contrast to the discretionary nature of asylum. While states may grant durable status to refugees, they are not obligated to do so – as per Art 34: ‘The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees’.

The question of whether *non-refoulement* has attained the status of a *jus cogens*, or peremptory, norm is somewhat controversial, in light of Art 33(2) of the Refugee Convention. The author takes the position that *non-refoulement* is a fundamental entitlement of all refugees who do not threaten the national community in which they seek refuge. See Moore (n 2) 155–157; also J. Moore, ‘Restoring the Humanitarian Character of U.S. Refugee Law: Lessons from the International Community’ (1997) 15 Berk J Intl L 51, 53–58. Other legal scholars argue explicitly for the *jus cogens* status of the norm. See generally J. Allain, ‘The *Jus Cogens* Nature of *Non-Refoulement*’ (2001) 13 IJRL 533; A. Farmer, ‘*Non-Refoulement* and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection’ (2008) 23 Georgetown Imm LJ 1.

12 Durieux (n 5) 167 has a distinct assessment, arguing that ‘the Convention’s focus is on admission as a positive duty’ because ‘the principle of *non-refoulement* is not the foundation of the [Refugee] Convention, but its cornerstone’. While the focus of this chapter is on *non-refoulement* for war refugees, it is vital to recognize that all refugees need and deserve more than minimal relief from forced return to war atrocities and persecution. Refugee protection is multi-dimensional. Fully realized, it entails admission and full membership in a national community.

Executive Committee of UNHCR emphasizing ‘the fundamental importance of the principle of *non-refoulement*’.¹³

Our question is whether international refugee law extends the protection of *non-refoulement* to other fearful individuals who do not meet the 1951 Refugee Convention definition of a ‘refugee’. Certainly the Convention itself does not explicitly refer to ‘war refugees’. Nevertheless, the regional treaty dedicated to the protection of refugees on the African continent has expanded the refugee definition to encompass individuals displaced by armed conflict,¹⁴ and includes such war refugees within the purview of its norm of *non-refoulement*.¹⁵ Moreover, on various occasions since 1959, the UN General Assembly has mandated the UN High Commissioner for Refugees to provide material assistance and legal protection for individuals in ‘refugee-like’ situations, including those displaced by both international and non-international armed conflicts.¹⁶

Thus, while treaty-based international refugee law remains focused on persecution-fleeing refugees, in certain regions of the world, and in the practice of international organizations, refugees from war are also deemed worthy of special legal protection. Because even the Refugee Convention does not ensure the right to durable asylum, the strongest entitlement to legal protection for war refugees, as for refugees who fear persecution, is the guarantee of *non-refoulement*. The claim that war refugees are entitled to freedom from forced return, despite their omission in explicit terms from the provisions of the Refugee Convention, is in accord with the inclusive spirit of its framers when the treaty was opened for signature in 1951:

-
- 13 See Moore, ‘Restoring the Humanitarian Character’ (n 11) 56 and n 32, citing twenty-four separate Conclusions of the UNHCR Executive Committee over a fifteen-year period reminding states of their solemn responsibility to respect the norm of *non-refoulement*.
- 14 Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) (African Refugee Convention) Art I(2) (‘the term “refugee” shall also apply to every person who, owing to...events seriously disturbing public order...is compelled to leave...’) It can easily be argued that an armed conflict is an event ‘seriously disturbing public order’, as in the chapter by Wood in this volume.
- 15 African Refugee Convention Art II(3): ‘(n)o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion...where his life, physical integrity or liberty would be threatened for the reasons set out in Art I(1) and (2)...’
- 16 UNGA Resolution 1388 (XIV) 20 November 1959; UNGA Resolution 1673 (XVI) 18 December 1961; UNGA Resolution 3454 (XXX) 9 December 1975. The 1959 and 1961 resolutions charged UNHCR with providing material assistance to those in ‘refugee-like situations’ who did not meet the Refugee Convention definition. The 1975 resolution went the further step of authorizing UNHCR to extend the legal mantle of protection to such individuals.

THE CONFERENCE,

Expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.¹⁷

As international refugee law expands its zone of protection to encompass the plight of war refugees, international humanitarian law steps in to help define those survivors of war who are in need of protection from forced return. Like refugee law, the *jus in bello* is fundamentally concerned with the dignity and humane treatment of individuals who are vulnerable to the abusive exercise of power. Humanitarian *non-refoulement* thus becomes another means by which IHL may shield non-combatants from the brutality of armed conflict.

1.2 Humanitarian Law

International humanitarian law, the *jus in bello*, governs the conduct of armed conflict, and protects persons *hors de combat*, including wounded soldiers and sailors, prisoners of war and civilians. Just as 20th century refugee law had its precursors in the ancient traditions of sanctuary from persecution, 20th century humanitarian law built upon principles of humanity in war dating from the time of Grotius.¹⁸ The modern rules of IHL, known as ‘the law of Geneva’, are codified in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.¹⁹ While there is no explicit reference to *non-refoulement* of

17 Refugee Convention, Annex I, Excerpt from the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 137 (Refugee Convention Annex I).

18 Moore (n 2) 45–46 and n 9.

19 Alongside the Fourth Geneva Convention (n 1) see: Geneva Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (No. II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (No. III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Protocol II).

war refugees in the Geneva Conventions, the prohibition against the forced return of individuals displaced by both international and non-international armed conflicts can be derived from certain treaty provisions, and more importantly from the customary principles of international humanitarian law, which underlie the treaties themselves.²⁰

Starting with the Fourth Geneva Convention, which concerns the protection of civilians in wartime, Article 147 of that treaty defines ‘unlawful deportation or transfer’ of a ‘protected person’ as a ‘grave breach’ of the Convention.²¹ The reference to ‘unlawful deportation’ may be a thin reed on which to hang the norm of humanitarian *non-refoulement*, however. First of all, the Fourth Geneva Convention, like its three sister treaties, applies mainly to international armed conflict, whereas humanitarian *non-refoulement* protects individuals displaced by all sorts of armed conflict, including internal or ‘civil’ wars. Second, ‘protected persons’ are defined in Article 4 of the treaty to comprise individuals ‘in the hands of a Party to the conflict or Occupying Power’ rather than individuals seeking refuge in a country outside the zone of conflict.²² Nevertheless, the Article 147 reference to unlawful deportation must be read in the spirit of the Convention as a whole. In this regard, the opening provisions of all four Geneva Conventions set the tone for an expansive interpretation of signatory obligations, and one that would prohibit both direct and indirect violations of the treaty by a State party.

In particular, Article 1 of the Fourth Geneva Convention, common to all four Geneva Conventions, provides that the ‘High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’²³ The Article 1 obligation to ‘respect and ensure respect for’ the Fourth Geneva Convention encompasses two sets of duties. First, a party to the Fourth Geneva Convention must ‘respect’ the treaty by honoring its provisions and refraining from any direct violations. Second, that party must ‘ensure respect for’ the treaty by positively influencing conduct by other actors in accord with its provisions. Thus, under its primary duties a State cannot commit atrocities against civilians, and under its secondary duties the State cannot take actions that facilitate or tolerate the commission of atrocities by other actors.²⁴ The forced

20 See generally Moore (n 3) 11–46.

21 Geneva Convention No. IV Art 147. See the chapter by Cantor in this volume for commentary.

22 Ibid, Art 4.

23 Ibid, Art 1.

24 In fact, the ‘ensure respect’ language of the Art 1 of the Fourth Geneva Convention could also imply an affirmative duty on the part of State signatories to *stop* wartime atrocities by other actors. Thus a lesser duty to refrain from actions that would *facilitate* future war

return of civilians, by a signatory, to a war in which civilians are the intentional or indiscriminate targets of military attack, would facilitate the commission of future atrocities. Thus humanitarian *non-refoulement*, which protects civilians from forced return to a situation of widespread war crimes, is required by the spirit of Article 1 of the Fourth Geneva Convention, an argument further developed by Ruvy Ziegler in his chapter on Common Article 1 of the Geneva Conventions.²⁵

While the signatory State's obligation to 'ensure respect' for the Geneva Conventions is an important basis for limiting its prerogative to deport individuals from its territory, Article 1 of the Geneva Conventions does not operate in a normative vacuum. Rather, the customary principles that gave rise to the law of Geneva are an equally vital source from which to derive and define the norm of humanitarian *non-refoulement*. In his influential study of customary international humanitarian law, Jean Pictet identified several tiers of principles underlying the Geneva Conventions, which 'are rooted in the custom of peoples, from which none may depart'.²⁶ As he explained, many of these principles 'existed, potentially, before the conclusion of the agreement, as an expression of international custom. The principles can therefore be said to have come before the law, and to govern it after codification'.²⁷

Pictet's distillation of the age-old norms of customary humanitarian law is painstaking and precise. First he identifies 'fundamental principles', which include the basic 'principle of the law of Geneva: persons placed *hors de combat* and those not directly participating in hostilities shall be respected, protected and treated humanely'.²⁸ From there he proceeds to 'common principles', which encompass the 'principle of security, in accordance with which every individual has a right to personal safety'.²⁹ This principle comprises the prohibition against deportations, specifically when undertaken as a means of reprisal.³⁰ Finally, Pictet identifies 'principles specifically applicable to war victims', and among these he concludes with the 'principle...of protection: the State

crimes by third parties is a relatively conservative interpretation of the 'ensure respect' obligation.

25 In his contribution to this volume, Ziegler explores the 'ensure respect' language of Art 1 as a basis for claiming a duty on the part of non-belligerent states to refrain from returning refugees to the risks associated with armed conflict.

26 J.S. Pictet, *Humanitarian Law and the Protection of War Victims* (Henry Dunant Institute 1975) 28.

27 *Ibid.*, 27.

28 *Ibid.*, 28, 33.

29 *Ibid.*, 34, 42.

30 *Ibid.*, 42.

must ensure the national and international protection of persons who have fallen into its power'.³¹

Collectively, Pictet's principles of humanity, safety and state protection establish a broad and deep foundation for the customary norm of humanitarian *non-refoulement*. Protection from forced return helps prevent future violations of the *jus in bello*, guarding against the inhumane treatment of civilians. It likewise creates some measure of security and safety not available in the zone of conflict. But most importantly, humanitarian *non-refoulement* is an expression of the State's obligation to protect individuals within its power from prospective violations of humanitarian law. Even if Pictet was envisioning state protection primarily in terms of those states party to the conflict, there is nothing in his conception that limits the customary IHL principle of protection to States engaged in armed conflict, or occupying foreign territory. A broader understanding of protection would extend to all States that exercise jurisdiction over war-affected individuals.

Humanitarian *non-refoulement* is also demonstrated in state practice, including the immigration policy of the United States. In 1990, the US Immigration and Nationality Act was amended to give the Attorney General (now the Secretary of Homeland Security) the discretion to accord members of certain national groups 'temporary protected status' (TPS) and relief from deportation based on conditions of unrest in the country of origin.³² One basis for the extension of TPS is the finding that 'there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety'.³³ In 2013, nationals of eight different countries enjoy TPS in the United States, namely El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria.³⁴ The US provision of temporary protected status and relief from deportation to individuals who have fled to its shores to escape war-related violence and danger illustrates the norm of humanitarian *non-refoulement* at work.

International refugee law and IHL dovetail in the norm of protecting war refugees from forced return to armed conflicts characterised by indiscriminate

31 Ibid, 44, 47.

32 8 USC 1254a.

33 8 USC 1254a(b)(1)(A).

34 U.S. Citizenship and Immigration Services, 'Temporary Protected Status' fact sheet <www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> accessed 1 March 2014. In addition to armed conflict, TPS can be extended on the basis of natural disaster, health epidemic, or other extraordinary and temporary circumstances (see 8 USC 1254a(b)(1)(B)).

attacks on the civilian population.³⁵ At the same time, the concept of humanitarian *non-refoulement* is grounded in two additional and very important foundational principles of the UN Charter itself: the prevention of genocide and the elimination of crushing global poverty. Today, these two principles are addressed in two interrelated global campaigns: the Responsibility to Protect and the Millennium Development Goals, which are the subjects, respectively, of the two remaining sections of this chapter.

2 Humanitarian *Non-Refoulement* as a Component of the Responsibility to Protect

The Responsibility to Protect (R2P) is a call to state action to defend human dignity in the face of war crimes, crimes against humanity and genocide. In one sense, R2P is a modern iteration of the older norm of humanitarian intervention,³⁶ but one which emphasises prevention and non-militarised

35 This chapter does not focus on the precise definitions of international and non-international armed conflict, or even the difficulties in identifying and distinguishing between the various forms of armed conflict. Nevertheless, as food for thought and further scholarly exploration, it is important to suggest the potential applications of humanitarian *non-refoulement* to situations of widespread violence, insecurity and displacement that not all observers would identify as 'armed conflict'. Examples might be the forced relocation of populations by security forces (to facilitate mineral extraction by private firms, for example) or the terror and displacement provoked by a militarized response to the narcotics trade (such as the 'narco wars' in Mexico). Interestingly, while humanitarian *non-refoulement* classically applies in civil war situations, it need not be so limited. In fact, the OAU Refugee Convention, the one refugee treaty that explicitly extends the protection of *non-refoulement* to non-1951 Convention refugees, recognizes that refugees also include those displaced by 'events seriously disturbing public order'. For a fuller discussion of the nature of armed conflict, and the outer reaches of the typology of armed conflict, see generally Moore (n 2).

36 While disputed by strict constructionists of the UN Charter's general prohibition against the use of force, a purported customary norm of 'humanitarian intervention' has been cited from time to time, particularly to justify a State's armed intervention in a neighboring country on the basis of a claimed intention to stop crimes against humanity. The historical record reveals two cases of alleged humanitarian intervention in 1978: Vietnam's invasion of Cambodia to stop Khmer Rouge atrocities against civilians; and Tanzania's invasion of Uganda to stop the brutal policies of Idi Amin. See Moore (n 2) 50; compare Charter of the United Nations, 26 June 1945, 1 UNTS xvi (entered into force 24 October 1945) (UN Charter) Art 2(4): 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

responses to widespread attacks on communities. It flows from the UN Charter's pledge 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...'³⁷ The contemporary usage of the term 'Responsibility to Protect' emerged from a publication by that name presented by the International Commission on Intervention and State Sovereignty, whose authors called for standards to govern 'intervention on human protection grounds'.³⁸ Former UN Secretary General Kofi Annan promoted the concept of R2P to the General Assembly in his 2005 report 'In Larger Freedom', and 150 members of the UNGA endorsed it that same year.³⁹ R2P has not yet been enshrined in a UN Security Council resolution nor has it been codified by regional or international treaty. Whether R2P attains the status of customary law will depend on the extent to which States act in accordance with it, out of a sense of legal obligation.

R2P is a controversial idea, in part because it is sometimes misperceived as a state prerogative or obligation to use force to stop massive human rights violations. Focusing exclusively on military intervention, however, is an impoverishment of the vision of R2P. As articulated by Edward Luck, UN Secretary General Ban Ki-Moon's special advisor on R2P, the concept starts by affirming the State's responsibility to protect the human dignity of people on its territory; secondly, it encourages the State to seek help from other countries in meeting its human rights obligations; from there, R2P requires other nations to step in to provide life-saving assistance when the State cannot do so on its own; and only as a last resort does R2P contemplate military action.⁴⁰

The Responsibility to Protect entails both preventive as well as reactive measures, and contemplates state interventions that are socio-economic as much as military in nature. In fact, the most ambitious aspect of R2P may be its socio-economic imperative: countries outside the zone of conflict are called upon to feed, shelter and provide medical care to victims of crimes against

independence of any state or in any other manner inconsistent with the Purposes of the United Nations'.

37 UN Charter, Preamble.

38 See International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (December 2001) <http://www.responsibilitytoprotect.org/index.php/about-rtop/core-rtop-documents> accessed 29 April 2014.

39 K. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All* (2005) para 125 <http://www.un.org/en/events/pastevents/inlargerfreedom.shtml> accessed 29 April 2014; see also UNGA Resolution 60/1 (24 October 2005) A/RES/60/1; Moore (n 2) 51–52.

40 See 'An idea whose time has come – and gone?' (23 July 2009) *The Economist* <<http://www.economist.com/node/14087788>> accessed 1 March 2014.

humanity. In the end, the greater challenge in implementing R2P is the economic burden it asks industrialised states to assume, rather than the military liberties it allows them to take.

Certainly R2P conjures the notion of state intervention in another country, with or without its invitation. But less appreciated is the obligation of the 'protecting State' to respond to the needs of displaced people within that State's own borders. The Responsibility to Protect is not inherently a challenge to the territorial sovereignty of the State embroiled in conflict: its focus is on the individuals in need of protection and not the geographical locus of protection. In this sense the obligation to provide life-saving assistance covers victims of widespread violence who have fled the zone of conflict just as it concerns those still caught in the danger zone. In fact, R2P's preference for non-invasive action is demonstrated in its spectrum of protective alternatives, which begins with state self-help and state-invited outside assistance and only exceptionally proceeds to uninvited or imposed actions. Given this continuum, the provision of life-saving shelter and relief from deportation in a country of potential asylum should precede the contemplation of military and other forms of direct intervention on the territory of the conflicted State itself.⁴¹

Humanitarian *non-refoulement*, or relief from deportation to indiscriminate military violence, is a modest way for States outside the immediate region of conflict to begin implementing their 'responsibility to protect'. The State provides protection, within its own domestic legal system, to those individuals who have made it to its shores, alongside any resources it expends to transport tents and foodstuffs, medicine and other material assistance to larger numbers of war-affected people still on the ground in the conflicted region. The sheltering State joins forces with those who have by their own agency left the conflict zone, helping them by the simple virtue of not expelling or forcing them to return to the very danger they fled.

41 Barbour and Gorlick, in their 2008 article on the challenge of implementing the Responsibility to Protect, confront the 'mischaracterization of R2P as nothing more than military intervention'. They argue that 'the grant of asylum and other protection measures are a good starting point to enacting R2P as they are devoid of the controversy surrounding military intervention' (B. Barbour and B. Gorlick, 'Embracing the "Responsibility to Protect": A Repertoire of Measures Including Asylum for Potential Victims' (2008) 20 *IJRL* 533, 536). Barbour and Gorlick cite P. Bertrand, former Director of the UNHCR New York Office, who queried in 2007, 'Would it not be logical to propose that, at a very minimum, the R2P agenda be construed as encompassing states responsibility to provide asylum to victims and/or potential victims of genocide and mass atrocities?' (*ibid.*, 564 and n 143). Humanitarian *non-refoulement*, like asylum, falls within a class of victim-centered, preventive approaches to implementing the Responsibility to Protect.

Relief from removal or deportation is often conceived as an act of grace or discretion by a State, when in fact it is a matter of state obligation in multiple situations. *Non-refoulement* is imperative when the individual has a well-founded fear of persecution, under international refugee law; and when the individual flees widespread violations of the laws of war, under international humanitarian law. Arguably, under the mandate of R2P, *non-refoulement* is also imperative when individuals flee crimes against humanity and massive human rights abuses. In addition to these three contexts, humanitarian *non-refoulement* has yet another protective dimension, which springs from state responsibility to address the root causes of armed conflict throughout the world, including entrenched poverty, socio-economic inequality and underdevelopment.

3 Humanitarian *Non-Refoulement* and the Millennium Development Goals

Humanitarian *non-refoulement* is not customarily discussed in the context of the Millennium Development Goals (MDGs). *Non-refoulement* is an emergency measure, undertaken in the face of violence and repression, whereas the MDGs are protracted responses to global socio-economic problems long in the making and longer in their resolution. Nevertheless, humanitarian *non-refoulement* is precisely the kind of pragmatic response to human suffering that the MDGs will require for their successful implementation. The roots of war, oppression and poverty are deeply entwined, and protecting and assisting victims of war is an essential pathway towards enhanced social wellbeing and meaningful conflict prevention around the globe. Before evaluating humanitarian *non-refoulement* as a component of the MDGs, however, it is important to address the reality of socio-economic misery throughout the world, and to explore the linkages between underdevelopment and war. This discussion starts with an exploration of the term 'development' itself.

3.1 *The Human Development Gap and Armed Conflict*

The United Nations has attempted to quantify the concept of development through various specific indices of human security. As of 2010, the UN Development Programme (UNDP) designated 86 of the 194 members of the United Nations as 'developing countries' and, within that subset, identified 49 as the 'least developed countries' (LDCs).⁴² In the LDCs over 50% of the

42 UN Development Programme, UNDP Human Development Report for 2010 (2010) 227 <http://hdr.undp.org/en/content/human-development-report-2010> accessed 29 April 2014.

population lives in extreme poverty, meaning they subsist on \$1.25 per day or less.⁴³ Generally, LDCs are characterised by a very modest per capita share of national income, a low level of adult literacy, and a high level of hunger and food insecurity.⁴⁴ They are also notable for high levels of military violence.⁴⁵

In addressing socio-economic conditions around the world, UNDP seeks to rank particular nations in terms of their overall levels of 'human development'. Human development is defined in terms of several factors, the most significant being life expectancy, years of schooling and gross national income (GNI) per capita. Worldwide, the mean life expectancy is 69.3 years, average years in school are 7.4 and GNI per capita is \$10,631.⁴⁶ The corresponding figures for the least developed countries are 57.7 years life expectancy, 3.7 years in school, and \$1393 GNI per capita.⁴⁷ The gap in human security between the Global South and the world as a whole is stark from this statistical perspective: over 10 years less in life expectancy, half the years of primary education, and only 15% of the gross national income per capita.

Socio-economic inequality is even greater if we compare human security indicators in the Global South to those prevailing among the world's richest countries. In the industrialised North, life expectancy is 80 years, years of education average at 11 years, and the mean GNI per capita is nearly \$40,000.⁴⁸ Considering these statistics, the human security divide is breathtaking: on average people in the least developed countries live 20 years less, they stay in school for one third of the time, and their GNI per capita is 97% lower than their counterparts in the Global North.

In addition to their daunting prospects in terms of life expectancy, access to education and share of national income, people living in the least developing countries are much more likely to experience the violence of war than their peers in the Global North. UN statistics graphically demonstrate the correlation between war and poverty: the likelihood of armed conflict in industrialised countries for the period between 1997 and 2006 was 1.6 percent, whereas

43 United Nations Conference on Trade and Development, 'Poverty Reduction and Progress Towards MDGs in the LDCs: Encouraging Signs But Much Remains to Be Done', Least Developed Country Series, No. 20/E, May 2011 <http://unctad.org/en/docs/presspb20118_en.pdf> accessed 1 March 2014. In 2007, 52.8% of the population of the world's least developed countries was living at or below the \$1.25 extreme poverty line.

44 Moore (n 2) 78.

45 See footnote 47 below and related text.

46 UNDP Development Report (2010) 146.

47 Ibid.

48 Ibid, 227.

it was 38.7 percent among the least developed countries.⁴⁹ These numbers suggest that narrowing the development gap will promote conflict resolution, just as assisting victims of war will enhance socio-economic development.

3.2 *Combating Global Poverty, Hunger and War through Global Partnership*

A call for action to address the gaping wealth divide between the industrialised world and the Global South is rooted in the UN Charter itself, whose Preamble calls on member States 'to employ international machinery for the promotion of the economic and social advancement of all peoples'. In 2000, fifty-five years after the entry into force of the UN Charter, the UN General Assembly promulgated the Millennium Development Goals (MDGs), which established benchmarks and timelines for achieving eight specific objectives of the United Nations in the area of socio-economic justice.⁵⁰ Alongside (1) poverty and hunger alleviation, (2) public education promotion, reductions in (3) infant mortality and (4) maternal mortality, (5) increased gender equity, (6) lessening of AIDS infection rates, and (7) progress towards environmental sustainability, the Millennium Development Declaration called upon the member States of the United Nations to establish (8) 'a global partnership for development'.⁵¹

As set by the Millennium Declaration, the first Millennium Development Goal is a pledge to reduce the global rates of extreme poverty and food insecurity to half of their 1990 levels by 2015.⁵² People living in extreme poverty are defined by the Millennium Declaration as those who strive to meet their basic needs with \$1 per day or less (the extreme poverty line has since been set at \$1.25 per day). The global poverty rate has been cut substantially, from 47% in 1990, to 24% in 2008, and, if current trends continue, will be at just below 16%

49 J. Siebert, 'Addressing Armed Violence in Development Programming', (2008) 29 *Ploughshares Monitor* 1 <<http://www.ploughshares.ca/libraries/monitor/monmo8e.pdf>> accessed 1 March 2014.

50 See United Nations Millennium Declaration, UNGA Resolution 55/2 (A/55/L.2) September 8, 2000, para 19 <www.un.org/millennium/declaration/ares552e.pdf> accessed 29 April 2014.

51 In more specific terms, the Millennium Declaration sets eight specific benchmarks to reach by 2015: (1) a one-half reduction in extreme poverty and hunger; (2) universal primary education; (3) the promotion of gender equity; (4) a two-thirds reduction in infant mortality; (5) a three-quarter reduction in maternal mortality; (6) progress in combating HIV/AIDS; (7) greater environmental sustainability; and (8) the establishment of a global partnership for development (*ibid.*).

52 *Ibid.*, para 19.

by 2015.⁵³ Based on these statistics, the goal of slashing extreme poverty by 50% will soon be met. Nevertheless, progress in poverty alleviation has been uneven across the various regions of the world, and poverty rates in the Global South have not fallen as fast as global rates. In Africa, for example, where the regional poverty rate was 25% higher than the global rate in 1990, the regional rate is projected to be twice the global rate by 2015.⁵⁴

Food insecurity is defined in terms of the percentage of people who are 'undernourished', or who have difficulty meeting their nutritional needs on a daily basis. While food security has improved since 1990, the data reveal that there has been significantly faster progress in the war on poverty than in the war on hunger. For example, while extreme global poverty was 47% in 1990 and is headed for 15% in 2015, parallel progress has not been achieved in the area of hunger alleviation. Food insecurity, at 20% in 1990, hovered at 16% from 2000 to 2007, was still as high as 15.5% in 2011, and is not predicted to hit its MDG target of 10% by 2015. The lack of corresponding improvements in the global poverty and hunger rates signifies that rising income rates simply do not guarantee improved access to food.⁵⁵

The 'disconnect' between rising incomes and commensurate improvements in nutrition is of particular concern in times of global financial instability characterised by extreme volatility in the price of staple grains. In parts of the developing world, the average family spends 40% or more of its daily household income on food.⁵⁶ In the current global financial climate, it is not unusual for

53 See Millennium Development Goals Report 2012 (United Nations, New York, 2012) (2012 MDG Report) 4, 7 <<http://www.un.org/en/development/desa/publications/mdg-report-2012.html>> accessed 1 March 2014. Each yearly MDG Report includes complete analysis of progress to date on each of the eight MDGs.

54 See Millennium Development Goals Report 2011 (United Nations, New York, 2011) (2011 MDG Report) 6, 7 <http://www.un.org/millenniumgoals/reports.shtml> accessed 29 April 2014. The 2011 MDG Goals Report includes a particular focus on regional disparities in progress towards poverty alleviation.

55 See 2011 MDG Report (n 54) 11. The 2011 Report discusses the slower progress in hunger alleviation as compared to poverty alleviation in the period from 1990 to 2010. See also 2012 MDG Report (n 53) 11, 12: 'The disparity between falling poverty rates and steady levels of undernourishment calls for improved understanding of the dimensions and causes of hunger and the implementation of appropriate policies and measures'.

56 In the United States, 7% of the average household income went to food in 2011. In contrast, the average Indonesian spent 43% of her income on food in 2011 (N. Jones, 'Mapping Global Food Spending' (2011) *Civil Eats* (a daily news source on topics relating to sustainable agriculture) <<http://civileats.com/2011/03/29/mapping-global-food-spending-info-graphic/>> accessed 1 March 2014).

the price of rice or other staple foodstuff to increase by 50% to 100% in the space of several months.⁵⁷ When grain prices fluctuate this radically, people living in extreme poverty (those subsisting on \$1.25 or less per day) who are already spending nearly half their modest income on food may not be able to absorb the higher price of food staples and still meet other essential needs for shelter, transportation and medicine. Instead, poor families may reduce their caloric intake substantially, or be forced to skip meals or eat only once in a two-day period.

The challenge of promoting food security and implementing the other Millennium Development Goals is particularly daunting in countries embroiled in or emerging from armed conflicts, but all the more vital. In addition to the connection between underdevelopment and armed conflict, research on the relationship between hunger and war also reveals a strong correlation between unrest and food insecurity.⁵⁸ Evidence that armed conflict is rooted in inequitable socio-economic conditions of life suggests that efforts to fight poverty and alleviate hunger are powerful tools of conflict resolution. Thus the MDGs have heightened relevance in countries embroiled in armed conflict, where confronting the interconnected web of poverty and violence is an essential pathway to durable peace.

3.3 *Humanitarian Non-Refoulement and the Millennium Development Goals in the Context of Civil Strife*

The Millennium Development Goals have important applications in war situations, as illustrated by specific provisions addressing the security needs of war refugees. In addition to demanding measurable improvements in the indices of poverty and social misery throughout the world, the Millennium Declaration shines its light on catastrophic humanitarian emergencies, and calls on States to provide short-term and life-saving assistance to the victims and survivors of war crimes and crimes against humanity. In a section devoted to 'Protecting the vulnerable', the Declaration specifically addresses the reality of genocide and armed conflict. Paragraph 26 of the Declaration encompasses the situation of refugees and displaced persons in countries outside the zone of violence, as well as those still living within it:

57 Between June 2010 and January 2011, the global price of wheat more than doubled (The World Bank, 'Food Price Watch' (2011) <http://www.worldbank.org/foodcrisis/food_price_watch_report_feb2011.html> accessed 1 March 2014).

58 See generally, P. Pinstrip-Andersen and S. Shimokawa, 'Do Poverty and Poor Health and Nutrition Increase the Risk of Armed Conflict Onset?' (2008) 33 *Food Policy* 513. The authors conclude that government policies that improve access to food and health care enhance stability.

We will spare no effort to ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible.

We resolve therefore:

- To expand and strengthen the protection of civilians in complex emergencies, in conformity with international humanitarian law.
- To strengthen international cooperation, including *burden sharing in*, and the coordination of humanitarian assistance to, *countries hosting refugees* and to help all refugees and displaced persons to return voluntarily to their homes, in safety and dignity and to be smoothly reintegrated into their societies.⁵⁹

Thus the Millennium Declaration, like the principle of R2P, commits States outside the zone of conflict, and requires the protection of war refugees and victims of crimes against humanity who have sought asylum in other countries. Humanitarian *non-refoulement* is one way that UN member States can contribute toward the Millennium Development Goals within their own borders, by providing temporary protection and basic material assistance to war refugees until such time that they may freely choose to return to their homes in 'safety and dignity'.

The principle of *non-refoulement* for war refugees also helps ensure that the burden of assisting individuals displaced by humanitarian emergencies is not borne exclusively by developing States in the region of conflict, but also by industrialised States in the Global North, in the spirit of the MDGs and the global partnership for development.

4 Conclusion

This chapter has argued for a scholarly and practitioner consensus in support of the norm of protection against forced return for war refugees. Humanitarian *non-refoulement* extends to all individuals displaced by armed conflict characterised by widespread attacks on the civilian population, regardless of whether they meet the persecution-based definition of a refugee set forth in the 1951 Refugee Convention. Both refugee law and international humanitarian law are essential in defining the scope and application of the norm. Refugee law

⁵⁹ Millennium Declaration para 26, emphasis added.

clarifies the principle that while States have the right to grant durable asylum on a discretionary basis, they are absolutely prohibited from returning individuals to situations in which their basic human rights are at risk. IHL helps us identify those situations in which the occurrence of war atrocities requires the provision of humanitarian *non-refoulement*, especially when attempts to stop those atrocities have proven ineffective.

When the principles of humanity, distinction, proportionality and necessity are violated, practitioners of IHL and refugee law focus much of their considerable operational skills on meeting the basic survival needs of individuals displaced by wartime atrocities. Protection from forced return to the zone of conflict is an important mechanism to ensure the safety and well-being of war survivors. Humanitarian *non-refoulement* is also an expression of the Responsibility to Protect. It is a powerful and non-violent measure to prevent war refugees from falling victim to further war crimes and crimes against humanity. Ensuring safe passage and shelter for war refugees shields them from violence without resort to violence. Finally, humanitarian *non-refoulement* is a facet of the global partnership for development contemplated by the Millennium Development Goals. By virtue of humanitarian *non-refoulement*, countries of asylum may contribute to improvements in human security at home as well as abroad, by ensuring the welfare of those individuals who have escaped from armed conflict and sought refuge within their borders.

The three conceptions of humanitarian *non-refoulement* explored in this chapter are simultaneously three manifestations of a vibrant understanding of humanitarian protection, all joining to forbid the forced return of war refugees. First, from the twin wellsprings of refugee law and international humanitarian law, we derive an integrated conception of protection in terms of sheltering individuals from gross violations of human rights abuses and the brutalities of armed conflict. Humanitarian *non-refoulement* requires that we shelter victims of war as well as victims of persecution. Second, from the 21st century articulation of a 'Responsibility to Protect' we derive a protective response to massive atrocities threatening entire societies and regions. Humanitarian *non-refoulement* is a concrete means of implementing R2P, and a non-military and preventive interpretation of 'humanitarian intervention' in the face of genocide and crimes against humanity. And, finally, the Millennium Development Goals confront the reality of extreme poverty as a way of life for billions of human beings throughout the world, and envision protection in terms of human security and socio-economic wellbeing. Humanitarian *non-refoulement* is an important domestic mechanism by which States may contribute to international burden-sharing within the MDG framework. A melding together of *non-refoulement* and socio-economic security

demands that we define humanitarianism in structural and transformative terms, while inviting us to implement human development policy through individual acts of shelter and rescue.

The case for humanitarian *non-refoulement* is particularly strong in wealthier states outside the zone of conflict, which have enhanced resources to defuse armed conflicts by addressing their root causes, and to assist those war-affected individuals who have made the journey from the developing to the industrialised world. Humanitarian *non-refoulement* provides a modest mechanism by which higher-income States can alleviate the socio-economic inequities between the Global North and South, conditions which themselves inflame conditions of unrest and armed conflict. In confronting the complex web of poverty, political repression and military violence, humanitarian *non-refoulement* enables the 'protecting powers'⁶⁰ to respond, one war refugee at a time.

60 'Protecting powers' has a broader meaning here than its classic usage under IHL. In the spirit of the principle of protection, the term is not limited to parties to a conflict, or occupying States, but applies more broadly to all States in a position to assist victims of war, especially those States in which individuals seek relief from forced return to indiscriminate military violence.