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LEGAL AND PROTECTION POLICY RESEARCH SERIES

Under What Circumstances Can a Person Who Has Taken an Active Part in the Hostilities of an International or a Non-International Armed Conflict Become an Asylum Seeker?

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EXECUTIVE SUMMARY

This paper is an attempt to respond, from a purely international law perspective (international humanitarian law, international refugee law and the United Nations Charter) to one of the recurrent problems facing the international community, that of armed elements seeking sanctuary in neighbouring countries. As stated by the Secretary General of the United Nations:

> Conflict often leads to mixed movements of populations, comprising not only refugees, internally displaced persons and other civilians, but also armed elements seeking sanctuary in neighbouring countries.[1]

What is the status in international law of "armed elements seeking sanctuary in neighbouring countries"? Is it possible to consider them as genuinely seeking asylum or does their presence in the host country abide by some other logic? This paper makes a first, fundamental, distinction between such "armed elements" fleeing an international armed conflict and those fleeing a non-international armed conflict. The second fundamental distinction, mainly relevant in the context of non- international armed conflicts, is between those who cross an international border with a military agenda and those who have genuinely, sincerely and durably laid down their arms.

A person who is a combatant in the context of an international armed conflict and is captured by the enemy State has the status of prisoner of war. Unless he or she is seriously sick or injured, he or she must be interned and given the protective status of prisoner of war provided for by the 3rd Geneva Convention of 1949[2] until the cessation of active hostilities. He or she then must be released and be given the option to either be repatriated or apply for asylum. He or she must be recognized as a refugee if he or she passes the "double refugee test of inclusion and non-inclusion."[3]

If instead of being captured by the enemy State, the same person finds himself or herself on the territory of a neutral State, the latter has a similar obligation to intern him or her. In strict legal terms, the status is not prisoner of war but the person must be treated at a minimum in the same way as prisoners of war. Generally, the internment lasts until the cessation of hostilities, at which time the person concerned must be given the option to apply for asylum. Internment may end before the end of the hostilities in the case of persons who have been assessed as deserters or have genuinely and permanently renounced military activities.

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[1] United Nations Security Council, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, S/2002/1300 (26 November 2002), para. 31.

[2] Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS (1949) 135, (hereinafter 3rd Geneva Convention).

[3] Refugee status determination requires a determination of whether the applicant is both first includable and then not excludable (what is sometimes called the "double refugee test of inclusion and non-exclusion").

Drawing upon international humanitarian law, international refugee law and the United Nations Charter, persons who have taken a direct part in hostilities[4] in the context of a non-international armed conflict and have not genuinely, sincerely and durably laid down their arms, must be disarmed, separated from asylum seekers and interned. Those who have been armed elements in such non-international armed conflict and have been disarmed and demobilized should be separated from asylum seekers, interned, and given an opportunity to establish that they have genuinely and permanently renounced military activities; if they have, they can then apply for asylum and be recognized as refugees if they pass the "double refugee test of inclusion and exclusion."

The obligation of the neutral state in an international armed conflict to disarm and restrict the movement of combatants has become a customary norm of international law and applies *mutatis mutandis*[5] to non-international armed conflicts. The decision to intern such persons in non-international conflicts is based on the convergent application of Article 11 of the 5th Hague Convention,[6] Article 9 of the 1951 relating to the Status of Refugees (hereinafter 1951 Refugee Convention), and Article 2, paragraph 4 of the UN Charter. Direct proof of involvement in military activities is not necessary and the decision can be taken on the basis of suspicion. The suspicion must nevertheless be supported by some objective elements, such as the profile of the individuals to be interned, the characteristics of the conflict in the neighbouring country as well as of the populations entering the host country.

Internment is not an end in itself. It serves five main purposes. First, it is meant to address legitimate internal and international security concerns; in particular, it helps prevent individuals from using the territory of the host State to wage attacks against their country of origin. Second, it significantly contributes to the maintenance of the civilian character of refugee settlements and to the protection of genuine refugees and local populations against human rights abuses and military attacks. Third, internment has a clear and undisputed humanitarian character, as internees shall at all times be treated humanely and cannot be *refouled*. Fourth, it allows for the opportunity for those who have been interned to genuinely and permanently given up their military activities. Fifth, it allows those internees who have genuinely and permanently given up their military activities to be evaluated as refugees; if they both meet the refugee definition and are not excludable, then they are refugees. Such individuals shall be released.[7]

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[4] "Persons taking a direct part in hostilities" is the language used by Article 4 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter Additional Protocol I). A slightly different - but of same meaning – language can be found in Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (1949) (hereinafter 4th Geneva Convention), i.e. "persons taking active part in the hostilities." For the sake of convenience, we will call such persons "armed elements" whenever we make reference to a situation of non-international armed conflict.

[5] The law of neutrality does not formally apply during non-international armed conflicts, but States bordering a country in the middle of a civil war have a similar obligation of "non-involvement" in that conflict. *See* Section IV (A)(3), *infra*.

[6] The formal title is "Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land," adopted in the Hague on 18 October 1907 (hereinafter 5th Hague Convention).

[7] The internees should be released unless internment is "essential to the national security." Article 9 of the Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (1951) (hereinafter 1951 Refugee Convention).

UNDER WHAT CIRCUMSTANCES CAN A PERSON WHO HAS TAKEN AN ACTIVE PART IN THE HOSTILITIES OF AN INTERNATIONAL OR A NON-INTERNATIONAL ARMED CONFLICT BECOME AN ASYLUM SEEKER?

I. INTRODUCTION*

The international community, collectively, and States bordering countries at war, individually, are confronted with a recurrent problem: armed elements or combatants who, after crossing an international frontier, present themselves as seeking protection and apply for asylum. In some cases, they may have genuinely laid down their arms and be in need of international refugee protection. In other cases, they may have given up their armed struggle but there may be serious reasons for considering that they have committed a war crime, a crime against humanity or a serious non-political crime, as defined in Article 1F (a) and (b) of the 1951 Refugee Convention.[8] Finally, in a number of cases, they will continue their military activities, using the territory of the host country to undergo military training, forcibly recruit refugees, invade or infiltrate their country of origin. In the most extreme situations, armed elements may even take control of refugee camps, militarize them and use them as a cover for their military activities.[9] The refugee population will then often be used as "human shields" in the hope to render such places immune from military operations. As the Secretary-General of the United Nations highlighted in his November 2002 Report to the Security Council on the Protection of Civilians in Armed Conflict:

> Conflict often leads to mixed movements of populations, comprising not only refugees, internally displaced persons and other civilians, but also armed elements seeking sanctuary in neighbouring countries. The continued presence of combatants undermines the transition towards peace. Moreover, the presence of armed elements in refugee camps and internally displaced person settlements has very specific and serious humanitarian consequences. Women and children are particularly vulnerable to serious human rights violations, such as trafficking, forced recruitment, rape and other forms of physical and sexual abuse…
>
> There are two distinct issues of concern: one relates to the intermingling of combatants and civilians in a range of situations and the other concerns, specifically, the movement of

* The views expressed are the personal views of the author, and not necessarily shared by by the UN or UNHCR. The author is greatly indebted to Paula Galowitz and Angelica Jongco for their assistance in editing and producing the final text.

[8] Article 1F of the 1951 Refugee Convention provides that a person is excluded from refugee status if there are serious reasons for considering that that person has committed a crime against peace, a war crime or a crime against humanity, a serious non-political crime outside the country where a refugee and prior to admission to that country, or has been guilty of acts that are contrary to the purposes and principles of the United Nations.

[9] Unfortunately, this has happened in many situations. *See* Gil Loescher, *Refugee Movements and International Security*, Adelphi Papers 268 at 50-51 (1992).

> combatants into refugee and internally displaced person camps and settlements.[10]

From the outset, it is important to clarify that this paper is focusing on the legal response[11] to be given to such situations of intermingling, where civilians and combatants or armed elements live almost in symbiotic way in the host country or where the combatants or armed elements want to take advantage of the international protection offered to the civilians. Our aim is to try to answer, *inter alia,* the following questions:

- Do combatants or armed elements in the host State qualify for or are eligible for refugee status / protection? In other words, can such persons be considered as genuinely seeking asylum?
- If the answer to the previous question is no, what is the status in international law of such persons? What are the duties of the host State towards such persons?
- What about persons who no longer have a military agenda, but were previously actively engaged in military activities in the context of a conflict? Shall these persons be considered as genuine civilians in need of international refugee protection?
- How to define, in international law, settlements which host mixed populations, including refugees and foreign armed elements?

Different, and not covered by this paper, are two other issues, which normally arise at a later stage. The first one is whether a person meets the refugee definition. This question is at the core of refugee status determination. It requires a determination of whether the applicant is both first includable and then not excludable. The second issue which is not covered by this paper concerns persons who, after being formally recognised as refugees, get involved in military activities against their country of origin. Such a later involvement, which is undoubtedly in breach of international law, deserves a paper of its own, as it has a number of consequences from a refugee law viewpoint.

Our main objective with this paper is to draw a line between those persons who are considered as seeking asylum in good faith and those whose presence on the territory of the third State abide by another logic or other motivations.

There is a need in this paper to make a distinction between persons who were combatants in an international armed conflict and persons who were armed elements in the context of a non-international armed conflict. The case of ex-combatants who, after taking direct part in an international armed conflict, have found themselves outside their country of origin and have applied for asylum is a fairly straightforward one. The answer can be found first in international humanitarian law and secondly in refugee law; there is an overlap and a continuum from one branch of law to the other. Practice has shown these two areas of law to be basically complementary and that any apparent discrepancies between both branches of law can be easily reconciled.

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[10] United Nations, Security Council, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, S/2002/1300 (26 November 2002), para. 31 and 33.

[11] The author acknowledges that legal analysis is only the first step. The operational aspects, such as how to disarm and separate armed elements, as well as examples of such operations, are not covered in this paper. In the context of combatants or armed elements being present in refugee settlements, a clear understanding of the law is not sufficient. Principles have to be translated into action, and the latter calls for resources, political courage and support from the international community.

In contrast, the issue of former armed elements, especially those on the non-government side, in a non-international armed conflict who have crossed an international border is extremely complex. They are often indistinguishable from genuine civilians. They are often part of a mass influx crossing the border, which in and of itself can exhaust the capacity response of the host country. Given the emergency nature of such arrivals and the overriding assistance needs of the populations concerned, the screening and identification of military elements from the civilian population may not be seen as a priority. In addition, such a screening is very difficult.[12] From a legal viewpoint, the analysis is also more complex as it necessitates an understanding of the interaction between international humanitarian law, refugee law and the UN Charter.[13] The importance of the legal analysis for non-international conflicts has become more significant as the character of war has changed over the years from primarily international to non-international.[14]

[12] Weapons and uniforms, if any, can easily be shed. Armed elements can claim that they have not been involved in the hostilities and can present themselves as teachers, nurses, etc. Their questionable statements may even be supported by genuine refugees because of family or ethnic ties, or because genuine refugees may be afraid of retaliation by armed elements

[13] Human rights law does not play a central role in defining the status of people who have taken an active part in the hostilities of an international or a non-international armed conflict and have crossed an international border. Therefore, it cannot become the fourth side of a quadrilateral and we have to use a triangle composed of international humanitarian law, refugee law and the UN Charter. However, human rights law does play a significant role in terms of restrictions (such as on liberty and movement), on the conditions of internment and protection against *refoulement*. Human rights law has also played a significant role in the way it has reshaped and reinforced both refugee law (in particular the principle of *non-refoulement* and the fundamental rights of refugees) and international humanitarian law (in particular, in the drafting of both Additional Protocols of 1977). Human rights law is also an essential yardstick regarding the status and treatment of so called “child soldiers.”

[14] Theodor Meron, *The Humanization of Humanitarian Law*, 94 American Journal of International Law 239 at 247 (April 2000). Moreover, most internal wars do “receive some kind of outside support.” I. Detter, The Law of War 40 (2002), quoted in James G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, ICRC, Vol. 85, No. 850, 313 at 316 n. 18 (June 2003) .

II. COMBATANTS IN AN INTERNATIONAL ARMED CONFLICT WHO HAVE CROSSED AN INTERNATIONAL BORDER AND FIND THEMSELVES IN THE HANDS OF A THIRD COUNTRY

A. Defining "International Armed Conflict" and "Combatant"

Under Article 2 common to the four 1949 Geneva Conventions,[15] an international armed conflict is an armed contest between two or more sovereign states. A formal declaration of war, warning, ultimatum or recognition is not necessary. *De facto* hostilities are sufficient. According to the International Committee of the Red Cross (ICRC) Commentary of the Geneva Conventions, "any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2…It makes no difference how long the conflict lasts, or how much slaughter takes place."[16] The law on international armed conflicts[17] encompasses the occupation of one sovereign state by another[18] as well as armed conflicts in which people are fighting "against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination."[19]

Other armed conflicts which are *prima facie* internal may be regarded as international when one or more foreign States come to the aid of one of the parties to a civil war. However, it is not clear how much aid is sufficient to transform a conflict from internal to international in nature. In its 1999 judgement, Prosecutor v. Dusko Tadic, the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) applied the test of "overall control." In deciding whether the involvement of

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[15] The four Geneva Conventions are Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August, 1949, 75 UNTS 31 (1949); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August, 1949, 75 UNTS 85 (1949); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August, 1949, 75 UNTS 135 (1949), (hereinafter 3rd Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (1949), (hereinafter 4th Geneva Convention). The two Additional Protocols of 1977 are the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).
The four Geneva Conventions and the Additional Protocol I of 1977 apply to international armed conflicts. Only Article 3, which is common to the four Geneva Conventions, and the Additional Protocol II of 1977 apply to non-international armed conflicts.

[16] International Committee of the Red Cross (ICRC), *Commentary, IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 20 (1958) (hereinafter ICRC, Commentary 4th Geneva Convention).

[17] These expressions "law on international armed conflicts" and "law on non-international armed conflicts" follow the ones used by Hans-Peter Gasser in "International Humanitarian Law. An Introduction," Separate Print from Hans Haug, Humanity for All: the International Red Cross and Red Crescent Movement, 66 (1993).

[18] The law on international armed conflicts "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Common Article 2, paragraph 2 to the Geneva Conventions, see *supra* note 15.

[19] Article 1 paragraph 4 of the Additional Protocol I, *supra* note 15.

the Federal Republic of Yugoslavia in the conflict in Bosnia-Herzegovina was sufficient to change the nature of the conflict from internal to international, the ICTY ruled:

> In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law [italics in original].[20]

In the words of the ICTY, "…the legal consequences of the characterization of the conflict as either internal or international are extremely important."[21] In addition to offering broader protection to those affected by the conflict, the law on international armed conflicts, unlike the law on non-international armed conflicts, confers the protected status of "combatant" on those who take up arms.

A combatant is: 1) a member of the armed forces of a Party to the conflict (who then has the obligation to distinguish himself/herself from the civilian population); or 2) a member of another armed group (militias, organized resistance movements,…) belonging to a Party to the conflict, provided that such group fulfills the following conditions:

a. that of being commanded by a person responsible for his subordinates;
b. that of having a fixed distinctive sign recognizable at a distance;
c. that of carrying arms openly;
d. that of conducting their operations in accordance with the laws and customs of war.[22]

The status of combatant has significant legal implications. Combatants have the right to directly participate in the hostilities.[23] In addition, and very significantly, combatants who fall into the power of their enemy have the status of "prisoners of war" and may not be punished for having directly participated in the hostilities. If combatants instead find themselves in the hand of a neutral State, the latter has the obligation to intern them.
Additional Protocol I further expanded the notion of combatant by adapting it to the reality of modern warfare, and in particular to wars of national liberation.[24] In recognition of situations in which it was not always possible for combatants to distinguish themselves from the civilian population, and in particular to wear uniforms, Article 44 provided that the status of combatant will be retained if the person carries his arms openly "during each military engagement, and … during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in he is to participate."[25] Combatants may be operating either within or outside their territory. The

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[20] Judgment, Appeals Chamber, *Prosecutor v. Dusko Tadic*, IT-94-1 (15 July 1999), para. 145. The Judgement can be found on www.un.org/icty/tadic/appeal/judgement/index.htm.
[21] *Id*. para. 97.
[22] Article 4(A) of the 3rd Geneva Convention, *supra* note 15.
[23] There is the proviso that the combatants must respect international humanitarian law.
[24] Armed conflicts include ones "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination…." Article 1, paragraph 4 of Additional Protocol I, *supra* note 15.
[25] Article 44 (3) of Additional Protocol I, *Id*.

crossing of an international border does not change their status in international law as long as they are involved in military activities. Their status will only change the day they are captured by the enemy State(s) or find themselves in the power of a neutral State.

B. Combatants Captured by the Enemy State

1. Status, internment and renunciation of rights

Combatants captured by the enemy State receive prisoner of war status under the rather detailed provisions of the 3rd Geneva Convention.[26] Prisoners of war are normally interned,[27] not so much as a form of punishment, but as a way of preventing them from resuming their military activities. Internment also has a clear and undisputed protection dimension for the prisoners of war themselves. The protection provided by the 3rd Geneva Convention

> constitutes a compromise between the interest of the detaining power, the interest of the power on which the prisoner depends, and the prisoner's own interests. Under the influence of developing human rights standards, the importance of the latter factor is growing, but International Humanitarian Law continues to see the prisoner of war as a soldier of his country. Due to this inter-State aspect and in his own interest, he can not renounce his rights and his status.[28]

Under Article 7 of the 3rd Geneva Convention, "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention…"[29] This principle of non-renunciation of rights is fundamental to international humanitarian law. As long as prisoners of war are interned, they are under the protection of the detaining power and cannot renounce their status under international humanitarian law.

2. Repatriation

When hostilities cease, prisoners of war shall be repatriated. The duty to repatriate is premised on the fact that repatriation is a return to a normal situation and that it is assumed that in most situations the prisoner of war would want to be repatriated after the cessation of the hostilities.[30] Those who refuse to be repatriated can apply for asylum in the detaining State, as described in Section III (B)(4), *infra.*[31]

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[26] Article 4 *et seq.* of the 3rd Geneva Convention, *supra* note 15.
[27] *See* Article 21 *et seq.* of the 3rd Geneva Convention, *Id.*
[28] Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?*, Geneva, ICRC, 125 (1999).
[29] It is interesting to note that the Diplomatic Conference which adopted the four Geneva Conventions adopted wording that was even more categorical than the draft submitted by the ICRC "thus intimating to the States party to the Conventions that they could not be released from their obligations towards prisoners of war, even if the latter of their own free will expressed a desire to that effect…. In the end,…the Diplomatic Conference unanimously adopted the absolute prohibition mainly because it is difficult, if not impossible, to prove the existence of duress or pressure." ICRC, *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War*, Geneva, 89 (1960) (hereinafter ICRC, Commentary 3rd Geneva Convention).
[30] *Id.* at 547.
[31] These provide some of the most interesting examples of the interface between international humanitarian law and international refugee law.

3. Application of international humanitarian law

For those prisoners of war who are seriously sick or injured, Article 109 of the 3rd Geneva Convention governs. In the first paragraph, it provides that the parties to the conflict are bound to send back the seriously sick or injured prisoner of wars to their own country; it also provides that during the hostilities, those prisoners of war should be accommodated in neutral countries.[32] In its third paragraph, Article 109 states that "[n]o sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article, may be repatriated against his will during hostilities." This prohibition considers the will of the prisoner of war and constitutes an almost absolute legal guarantee against *refoulement*[33] (a refugee law concept), as a person fearing persecution in his or her country of origin will oppose, and be entitled to oppose, repatriation.

Unfortunately, Article 109 of the 3rd Geneva Convention applies to rather exceptional situations since most prisoners of war are neither seriously sick or injured nor released and repatriated during hostilities. The release and repatriation of able-bodied prisoners of war (including those who are less than seriously sick or injured) takes place at the end of hostilities and is governed instead by Article 118 of the 3rd Geneva Convention. Article 118 is a more ambiguous provision than Article 109, and does not consider the will of the prisoners of war. Paragraph 1 of Article 118 states rather definitively that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."[34]

Isolated from a broader context and interpreted literally, this provision might well be seen as incompatible with the *principle of non-refoulement*. The wording seems to indicate that release and repatriation must take place together, regardless of the wishes of the prisoner of war. During the 1949 Geneva Conference, a proposal by Austria to grant prisoners of war the option of not returning was rejected due to a fear that such a provision would be used by a detaining country to retain prisoners under the pretext that they did not want repatriation.[35] The apprehension of States was primarily due to the experience following World War II, when some States held onto their prisoners of war for long periods of time.[36] Thus, the proposal was rejected by some as a measure to protect the prisoners of war.[37] However, the repatriation has to take place in a manner and in a time that is "consistent with humanitarian rules and the requirements of the Convention…."[38]

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[32] Article 109 of the 3rd Geneva Convention, *supra* note 15.

[33] The French word *refoulement*, which has become part of the refugee law jargon, is mentioned in Article 33 of the 1951 Refugee Convention. It means the removal of a person to a territory where he or she would be at risk of being persecuted, or of being moved to another territory where he or she would face persecution. *Refoulement* constitutes a violation of the principle of *non-refoulement*, and is therefore a breach of refugee law and customary international law.

[34] Article 118 of the 3rd Geneva Convention, *supra* note 15.

[35] Yoram Dinstein, *Refugees and the Law of Armed Conflict*, 12 Israel Yearbook on Human Rights 101 (1982).

[36] ICRC, Commentary 3rd Geneva Convention at 543, *supra* note 29.

[37] The Austrian proposal was also opposed due to fear that prisoners of war would not be freely able to express their wishes under pressure from the Detaining Power. This was a concern of the delegations of both the Soviet and United States. The proposal was eventually rejected by a large majority. *See* Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Schweizer Studien Zum Internationalen Recht Band 5 177 (1977).

[38] ICRC, Commentary 3rd Geneva Convention at 550, *supra* note 29.

4. Application of international refugee law

Those benefiting from the protective status of prisoners of war are, in principle, not entitled to the international protection granted to refugees. However, prisoners of war who refuse to be repatriated at the end of the hostilities can apply for asylum in the detaining State. From a refugee law perspective, a former combatant who has been disarmed and detained by the detaining State can be a refugee. The conditions for being a refugee are that the applicant must meet the conditions in Article 1A(2) of the 1951 Refugee Convention; he or she must, in particular, have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. In addition, there must be no serious reasons for considering that he or she has committed a war crime, a crime against humanity or a serious non-political crime during the time he or she was involved in military activities.[39] A third condition, which should normally be applied to all persons who have taken up arms, is that ex-combatants must have genuinely laid down their arms and given up participation in the hostilities.[40]

This third condition should, in principle, not be relevant in the context of an international armed conflict since at the time of the refugee status determination, the hostilities have generally ceased. Refugee status determination for prisoners of war normally occurs at the time of release and just prior to repatriation, i.e. at a time when applicants are no longer able to fight, either because they are seriously sick or seriously injured (Article 109 of the 3rd Convention) or because the conflict has come to an end (Article 118 of the 3rd Convention). Thus, in the context of an international armed conflict, the question whether ex-combatants who are prisoners of war have genuinely laid down their arms and given up participation in the hostilities is normally irrelevant.[41]

In a number of situations of international armed conflict, prisoners of war released at the end of the hostilities have been met with an ambiguous reception by the country of origin.[42] Released prisoners of war may alternately be seen as heroes who have suffered for their country, traitors or cowards who have been captured instead of accepting a courageous death. They may also be seen as collaborators who have assisted the enemy.[43] Thus, the prisoner of war repatriated to his/her country of origin may have a "well-founded fear of persecution" based on one of the five grounds spelled out in Article 1A of the 1951 Refugee Convention.

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[39] *UNHCR,* Guidelines on International Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05 (4 September 2003). The issue of exclusion "lies squarely at the intersection of a number of areas of law including international refugee law, international humanitarian law, international human rights law and international criminal law." Lawyers Committee for Human Rights,* Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective*, 12 International Journal of Refugee Law 317, 318 (Supp. 1, July 2000).*

[40] The third condition is the very subject of this paper.

[41] In the context of international armed conflict, the enemy State has an interest not to release prisoners of war before the end of hostilities; otherwise, they might go back to the theatre of war. Under the law of neutrality, neutral States have an obligation as part of their duty of prevention to make sure that interned soldiers do not go back to fighting. *See* Section III (C) (1), *infra*.

[42] Article 118, paragraph 4 of the 3rd Geneva Convention, *supra* note 15.

[43] It would be a clear violation of the 3rd Geneva Convention for a Detaining Power to use a prolonged internment to obtain intelligence from their prisoners of war.

Some claims may be based on "membership of a particular social group," as released prisoners of war may be perceived as a category of persons who are disloyal to their country or threatening to the authorities in place. Such an interpretation would be in line with the authoritative recommendation of the UNHCR Handbook, which states:

> membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook…of its members, or the very social group as such, is held to be an obstacle to the Government's policies.[44]

Claims may also be grounded on "race," "religion," "nationality," or "political opinion" (not necessarily expressed but rightly or wrongly attributed to the applicant by the authorities of his/her country of origin).

From a refugee law perspective, the repatriation of individuals with a credible asylum claim would amount to a violation of the *principle of non-refoulement*, unless it has been established as part of individualized refugee status determination that the individual comes within the scope of Article 1F of the 1951 Refugee Convention and is therefore excluded from international refugee protection. Even if the individual was not eligible for refugee status, the principle of *non-refoulement* from international humanitarian law (and from other international instruments) would prevent the repatriation of individuals who are at risk of ill-treatment.[45]

5. Interaction of international humanitarian law and international refugee law

The intersection of Articles 109 and 118 of the 3rd Geneva Convention with the principle of *non-refoulement* is crucial to refugee protection. Not long after the adoption of the 1949 Geneva Conventions and almost coincidental with the adoption of the 1951 Refugee Convention, the issue of whether prisoners of war can be forcibly repatriated to their country of origin became a major concern in the negotiations leading to an armistice in the Korean War. Thousands of prisoners of war, when interviewed by the United Nations Command, said that they would resist forcible repatriation because if they were returned, "[t]hey would be executed or imprisoned or treated brutally in same way."[46] In short, they applied for asylum.

Though none of the parties to the Korean conflict had ratified the Geneva Conventions, all of them had given assurances at the beginning of the hostilities that they would apply them *de facto*. The issue of repatriation was then examined in light of Article 118 of the 3rd Geneva Convention and interpreted differently by each party to the conflict. Negotiations were painful and lengthy but ended with all parties signing a special "Agreement on Prisoners of War," which was concluded in July 1953. The Armistice itself was signed some days later on 27 July 1953. Earlier, on 3 December 1952, the General Assembly of

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[44] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 78 (re-edited January 1992) (hereinafter UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status).

[45] For example, the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, 23 ILM 1027 (1984), prohibits the return of an individual to a country where there is a risk that the individual will be subjected to torture.

[46] Shield Delessert, *supra* note 37, at 158.

the United Nations had adopted a resolution pertaining to the Korean situation in which it affirmed that "force shall not be used against prisoners of war to prevent or affect their return to their homelands and no violence to their persons or affront to their dignity or self-respect shall be permitted in any manner or for any purpose whatsoever…"[47]

Both the Agreement on Prisoners of War and the Armistice incorporated this principle, which asserted that the will of the prisoner of war had to be respected. In the case of the Korean War, the prisoners of war who refused to be repatriated were eventually granted refugee status. Today, such an interpretation is in line with the spirit of the Geneva Conventions and should be treated as authoritative. Furthermore, it harmonizes international humanitarian law and refugee law by giving precedence to the principle of *non-refoulement.*[48]

The Commentary of the ICRC proposes an interpretation of Article 118 that fully conforms to refugee law principles and standards:

> 1. Prisoners of war have an inalienable right to be repatriated once active hostilities have ceased. In parallel,…it is the duty of the Detaining Power to carry out repatriation and to provide the necessary means for it to take place…
>
> 2. No exceptions may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be the subject of unjust measures affecting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually.[49]

In most international armed conflicts, the ICRC has assumed invaluable humanitarian and protection functions vis-à-vis prisoners of war, serving as an almost systematic substitute for the Protecting Powers. The ICRC has constantly and consistently held the view that prisoners of war at risk of persecution in their country of origin must not be repatriated.[50] In the context of the 1990-1991 Gulf War, ICRC delegates interviewed all Iraqi prisoners of war who had expressed their unwillingness to be repatriated and considered that they should be treated as asylum seekers.[51]

The interpretation of Article 118 of the 3rd Geneva Convention during successive international armed conflicts illustrates the complementary character of international humanitarian law and refugee law. More than being seen as an "interface," it should be seen as a legal/protection and institutional continuum. As long as no obligation to release them exists, prisoners of war are protected by the 3rd Geneva Convention, retaining the formal

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[47] A/RES/610[VII].

[48] *See* Dinstein, *supra* note 35, at 102. "The point of departure here is that every prisoner of war must be afforded free choice whether or not to return to his country. But this right must be exercised in such objective conditions (out of the control of the Detaining Power) that there cannot be any doubt as to the free exercise of that choice. The option of repatriation is bestowed on the prisoner of war personally, and not on the two States concerned (the country of origin or the Detaining Power)." *Id*.

[49] ICRC, Commentary 3rd Geneva Convention at 546-547, *supra* note 29.

[50] *Id*.

[51] Peter Rowe (ed.), *The Gulf War in International and English Law*, 203 (1993).

status of prisoner of war under the responsibility of the Detaining Power.[52] As soon as an obligation to release the prisoners of war exists, those prisoners who would be at risk of persecution in their country of origin have the right to apply for refugee status in that same State. That State is no longer the Detaining Power but instead takes on new responsibilities deriving from refugee instruments and principles including, but not limited to, the principle of *non-refoulement.*

The roles of ICRC and UNHCR are also complementary.[53] Institutionally, the mandate of ICRC should terminate the day UNHCR takes over although, in practice, some overlap will be necessary to avoid a protection gap. Released prisoners of war who refuse to be repatriated become "classical" asylum seekers, whose case should be examined in light of all relevant refugee law provisions and principles. If the applicants are considered to have a well-founded fear of persecution based on one of the five Convention grounds, they will then be granted refugee status, unless it has been established as part of the individualized refugee status determination that the applicants comes within the scope of Article 1(F) of the 1951 Refugee Convention and is therefore excluded from international refugee protection.[54]

C. Combatants in the Territory of a Country Which is Not a Party to the Conflict

Instead of being captured by an enemy State (i.e. a party to the international armed conflict),[55] combatants may find themselves in the territory of a country which is not a party to the conflict. In such a situation, there are rights and duties of that State and issues about the status of the combatants. There are also implications for international humanitarian law and refugee law.

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[52] The responsibility of the State detaining the prisoner of war is clearly stated in Article 12 paragraph 1 of the 3rd Geneva Convention, which reads as follows: “Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.” Prisoners of war must at all times be treated humanely and are entitled in all circumstances to respect for their persons and their honour. *See* Articles 13 and 14 of the 3rd Geneva Convention, *supra* note 15.

[53] The International Committee of the Red Cross (ICRC) is a Swiss humanitarian organization, mandated by the international community to be the guardian of international humanitarian law and to protect and assist, on a strictly neutral and impartial basis, people affected by armed conflicts and internal disturbances. Established in 1863, it is the founding body of the International Red Cross and Red Crescent Movement

The United Nations High Commissioner for Refugees (UNHCR) is a subsidiary organ of the UN General Assembly under Article 22 of the UN Charter. It was established in December 1949 and started to operate on 1 January 1951. The mandate of UNHCR under its Statute is to pursue protection and solutions for refugees. The work of UNHCR is of an entirely non-political nature. Under Article 35 of the 1951 Refugee Convention, UNHCR is given supervisory responsibilities as regards the application of the Convention. In States which are not party to the refugee instruments, UNHCR often conducts refugee status determination under its mandate and seeks resettlement opportunities for those found to be refugees.

[54] Even if the person is not eligible for international refugee protection, there may be other applicable international protections. *See* n. 45, *supra*.

[55] Such a state is also called a belligerent or a co-belligerent State.

1. Rights and duties of a neutral State

In international law, a State which chooses not to take part in an international armed conflict is called a "neutral State" or a "neutral Power." Rights and duties of a neutral State are governed by a number of treaties, in particular by the 5th Hague Convention. Most of the rules concerning the rights and obligations or duties of neutral States were codified many years ago and are now considered in practice as being part of customary international law. Though the law of neutrality and the concept of "strict neutrality" may have since 1945 "largely lost its former significance in the system of international law,"[56] it still has some relevance. This is particularly so in light of Article 2 paragraph 4 of the UN Charter, which has abolished the right of States to resort to war and requires all Member States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. It is only in exceptional circumstances, all of them envisaged and clearly delineated by the UN Charter,[57] that Member States may be allowed or required to lend support to one of the belligerents.

In normal circumstances, third States[58] are required to adopt an attitude which should lead to a de-escalation of the conflict, hence the continuing relevance of remaining "neutral" in an international armed conflict. States which choose not to take part in the conflict have both rights and duties.[59] The main right is described in Article 1 of the 5th Hague Convention which states that "the territory of neutral Powers is inviolable." As to the main obligations, they are traditionally categorized under three different headings: 1) abstention, 2) prevention and 3) impartiality.

The duty of *abstention* provides that the neutral State may neither take part in the conflict nor provide military assistance to the belligerents. Military assistance includes troops, equipment, intelligence and financing, but not classical trade (non-military goods and services) which remains permitted. The duty of *prevention* means that the neutral State is under an obligation to prevent the belligerents from using its territory for war-related purposes. Finally, the duty of *impartiality* means that both sides in the conflict must be treated equally and that measures adopted vis-à-vis one of the belligerents must also be applied to the other(s).

The principle of impartiality has been partly challenged by the UN Charter in cases of collective self-defense and enforcement measures adopted by the Security Council. Impartiality may also be problematic in wars of national liberation when the right to self-determination has been recognized by the international community. However, both the duties of abstention and prevention have remained unchanged and undisputed. They may even have gained a new momentum with the adoption of the UN Charter and in particular with Article 2 paragraph 4 of the Charter. A concrete translation of the duty of prevention can be found in Article 11 of the Hague Convention V:

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[56] Dietrich Schindler, Transformations in the Law of Neutrality since 1945, in Astrid J. M. Delissed and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead*, 368 (1991).
[57] There are only two exceptions in the UN Charter, i.e. the enforcement measures adopted by the Security Council on the basis of Chapter VII and the right of collective self-defence (Article 51 of the UN Charter).
[58] Third States are ones which are not party to the conflict.
[59] It is often not only a choice but also an obligation in international law (Article 2, paragraph 4 of the UN Charter).

> 1. A neutral Power which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.
> 2. It may keep them in camps and even confine them in fortresses or in places set apart for this purpose….

A neutral third State has the obligation to disarm and restrict the movement of combatants in an international armed conflict. Though Article 11 of the 5th Hague Convention only mentions the obligation to intern "troops" belonging to the belligerent armies (in other words groups of soldiers entering the host country at the same time), Oppenheim/Lauterpacht[60] are of the opinion that a neutral Power has a similar obligation vis-à-vis single soldiers : "…his duty of impartiality obliges him to disarm them, and to take such measures as are necessary to prevent them from rejoining their forces ."[61] Therefore, there should be no difference in the treatment of individual, single soldiers on one hand and troops on the other.[62] Oppenheim/Lauterpacht also acknowledge that there are a number of practical obstacles to the internment of single soldiers:

> But it is in practice impossible for a neutral to be so watchful as to detect every single fugitive who enters his territory. It will always happen that such fugitives steal into neutral territory and leave it again later on to rejoin their forces without the neutral being responsible. Moreover, before he can incur responsibility for not doing so, a neutral must actually be in position to detain such fugitives.[63]

In short, the neutral Power has a duty of diligence vis-à-vis single soldiers, i.e. it must take all possible measures, normally internment when the latter is feasible. But a neutral Power is not expected to chase every single soldier belonging to one of the belligerents.

2. Status of military internees

While the situation of military internees in neutral countries was governed only by two provisions of the 5th Hague Convention (Articles 11 and 12), the 3rd Geneva Convention added a useful complement in 1949. Article 4(B)(2) of the Geneva Convention clarified that military internees in neutral countries shall be treated in the same way as prisoners of war under the 3rd Geneva Convention. Therefore, combatants who are interned in a neutral country must receive at a minimum the same treatment as prisoners of war (but they do not have the formal status of prisoner of war.) The 3rd Geneva Convention also added that they should enjoy all the advantages of the Convention but that the interning Power might give them a "more favourable treatment."[64] The "more favourable treatment" clause is justified by the fact that neutral countries "were not adversaries as far as the internees were concerned."[65]

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[60] Oppenheim/ Lauterpacht refers to the author and editor of the multi-volume "International Law; A Treatise." *See* note 61, *infra*.
[61] L. Oppenheim, International Law: A Treatise, 7th edition (H. Lauterpacht, ed.), Vol. II, "Disputes, War and Neutrality," 721 (1952/1955).
[62] The 3rd Geneva Convention, *supra* note 15, mentions that it applies to "persons" and not "troops." *See*, *e.g.*, Article 4 ("[p]risoners of war, in the sense of the present Convention, are persons…"). The protection has an individualized character even when a full regiment is interned. Single soldiers in international conflicts, when captured by the enemy State, will have the status of prisoner of war.
[63] Oppenheim/ Lauterpacht, *supra* note 61, at 721.
[64] Article 4(B)(2) of the 3rd Geneva Convention, *supra* note 15.
[65] ICRC, Commentary 3rd Geneva Convention at 70, *supra* note 29.

3. Internment and repatriation

Although the detaining Power can give a more favourable treatment as far as the conditions of internment are concerned, it cannot escape its obligation under international law to intern "troops belonging to the belligerent armies."[66] Internment applies as soon as the troops find themselves under the control of the neutral Power. Host States have to separate combatants and intern them. The obligatory character of internment has been well encapsulated by Oppenheim/Lauterpacht: "The duty of impartiality incumbent upon a neutral obliges him, therefore, to disarm them at once, and to guarantee them so as to ensure that they do not again perform military acts against the enemy during the war."[67]

Though emphasis is put on "neutralising" combatants to prevent them from resuming their military activities, internment also has a clear and undisputed humanitarian character. As protected persons under international law, internees are in the hands of the Detaining Power (Article 12, paragraph 1, 3rd Geneva Convention) and must be treated humanely at all times (Article 13, 3rd Geneva Convention). Unlawful acts or omissions against internees trigger both State and individual responsibility. In addition, internees are protected against forced return to their country of origin (concurrent application of Article 12, paragraph 2 and Article 109 of the 3rd Geneva Convention, as well as Article 11 of the 5th Hague Convention) during the entire period of internment.

Although the combatants do not technically have prisoner of war status since they have not been captured by an enemy state and are instead in a neutral State, they are entitled to, at a minimum, the protections given to prisoners of war and have to be repatriated at the end of hostilities.[68] Correspondingly, those interned by a neutral power must also be given the option of applying for asylum instead of being repatriated against their will.

Finally, the protective and humanitarian character of internment by a neutral Power is reflected in the fact that it is called in "classical" public international law "asylum":

> [if combatant forces penetrate a neutral jurisdiction], they are beyond the reach of their enemy; they have entered what is to them an asylum.[69]

Oppenheim/Lauterpacht likewise speak of soldiers "taking refuge" and neutral Powers "granting asylum" to internee soldiers.[70] Using expressions such as "asylum" or "refuge" is not sufficient to turn internees into refugees under the 1951 Refugee Convention, for the 1951 Refugee Convention does not apply while the combatants are interned.[71]

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[66] The obligatory character of this internment can be easily inferred from the wording of both Article 11 of the 5th Hague Convention ("shall intern") and Article 4(B)(2) of the 3rd Geneva Convention ("are required to intern under international law").

[67] Oppenheim/ Lauterpacht, *supra* note 61, at 722.

[68] *Id*. According to Article 4(B)(2) of the 3rd Geneva Convention, certain categories of persons who have been received by neutral or non-belligerent powers on their territory have to be treated as prisoners of war under the Convention, *supra* note 15.

[69] Howard S. Lewie, *The Code of International Armed Conflict*, Vol. II, 800 (1986).

[70] Oppenheim / Lauterpacht, *supra* note 61 at 721 and 723.

[71] For a discussion of the impact of the refugee law, *see* Section III (B)(5).

4. *Treatment of deserters*

The international law response to individuals who are clearly deserters rather than fugitive soldiers differs, in part. Such individuals need not be interned.[72] Likewise for individuals who belong to troops interned under the 5th Hague Convention, desertion, once correctly assessed, can provide reason for ending internment. Such a decision cannot be taken too lightly as the neutral Power remains under a constant obligation under the law of neutrality to ensure that soldiers belonging to one of the belligerents do not again participate in military activities against the enemy. The duties of impartiality and prevention are of such cardinal importance that desertion shall never be presumed but only assessed on the merits of each individual case. In addition, deserters have the right to apply for asylum.[73]

5. *Application of international refugee law*

The 1951 Refugee Convention is not applicable to ex-combatants during their period of internment but they have a protective status under international law which bears some – but only some - similarities with refugee status, in particular the application of the principles of *non-refoulement* and humane treatment, as well as the fact that internees are aliens in the custody of the host country. Another similarity is that an international humanitarian agency – in this case the International Committee of the Red Cross – has been mandated to provide protection and assistance to the internees held on the territory of a neutral Power.[74]

As with combatants captured by the enemy State, combatants in the territory of a country which is not a party to the conflict can apply for asylum in the neutral State.[75] From a refugee law perspective, a former combatant in a neutral State who has been disarmed and interned can be a refugee. The conditions for a being a refugee are meeting the conditions of Article 1(A)(2) of the 1951 Refugee Convention and not being excludable under Article 1F of that Convention. That would generally occur at the end of the hostilities. However, internment may end before the end of hostilities in the case of persons who have been assessed as deserters or have unequivocally and durably laid down their arms.[76]

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72 Oppenheim / Lauterpacht, *supra* note 61, at 722.

73 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, *supra* note 44, paras 167-174.

74 ICRC, Commentary 3rd Geneva Convention at 72, *supra* note 29.

75 *See* Section III (B)(4), *supra*.

76 It is posited that release from internment prior to the end of the hostilities for someone whom the neutral State has determined to have genuinely and permanently renounced their military activities would not violate the neutral State's obligation of neutrality. Moreover, if someone has genuinely and permanently renounced their military activities, there may be human rights concerns with continued internment.

III. ARMED ELEMENTS IN A NON-INTERNATIONAL ARMED CONFLICT WHO HAVE CROSSED AN INTERNATIONAL BORDER AND FIND THEMSELVES IN THE HANDS OF A THIRD COUNTRY

A. Complexity of the Issues

Determining the status and treatment of armed elements fleeing non-international armed conflict is much more complex and intricate from both factual and legal viewpoints than for those in an international armed conflict. The problem is complicated by a variety of factors including the blurring of legal distinction between armed element and civilian; the lack of protected status for former armed elements; the non-applicability of the law of neutrality; and the practical difficulties of distinguishing armed elements from civilian populations.

1. Blurring of legal distinction between armed element and civilian

The traditional dichotomy between combatant and civilian belongs to the law on international armed conflicts and has not been reproduced as such in the much less detailed law on non-international armed conflicts. The law on international armed conflicts grants protection not only to civilians[77] but also to military that are no longer able or willing to fight.[78]

Both the notions of "combatant" and "prisoner of war" are foreign to the law on non-international armed conflicts. The main reason for this difference lies in some States' fear that if the status of "combatant" and "prisoner of war" were granted to insurgents, it could imply that a government no longer has the right to punish those who have participated in a rebellion, thus handicapping the State's ability to suppress insurgency.[79] Both notions have therefore been replaced by other concepts[80] which, to some extent, blur the distinction between civilians and combatants.

As discussed in Section 1I, the term "combatant" is not used in the context of non-international armed conflict. Instead, under Common Article 3 of the Geneva Conventions and Additional Protocol II (which apply to non-international armed conflict), persons who are protected during non-international armed conflicts are those "taking no active part in the

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[77] *See* 4th Geneva Convention, *supra* note 15.

[78] The 1st and 2nd Geneva Conventions are applicable if the soldiers are wounded or sick; the 3rd Geneva Convention is applicable if the soldiers have been captured. In fact, for more than eighty years (from its inception to the adoption of the 4th Geneva Convention in 1949), the Geneva Law was only interested in the latter category and offered no direct protection to civilians. The raison d'être of the classical Law of War or Law of Armed Conflicts (as international humanitarian law was named before the 1970's) was precisely the protection of army personnel who were "unfit for war" by granting them a protective status in international law.

[79] The concern of States is highlighted, in particular, in Article 3 of Additional Protocol II, *supra* note 15.

[80] In the context of non-international armed conflicts, those who have directly participated in the conflict (in particular, those who are "rebels" fighting against the government) and are caught by that government will not be treated as prisoners of war but as citizens who have violated the law of the country and, as such, can be prosecuted. If captured, these people are only entitled to the broad "human rights" protection offered to them by Articles 5 – 7 of Protocol II. Those not taking part in the hostilities are entitled to the fundamental guarantees highlighted in Article 4 of Protocol II, *supra* note 15.

hostilities"[81] or those "who do not take a direct part or have ceased to take part in hostilities…."[82] Thus, active armed elements are not protected by Additional Protocol II but members of armed elements who have laid down their arms as well as those placed *hors de* combat by sickness, wounds, detention or any other cause, enjoy the same protection and are covered by the same rules as civilians who have never been involved in the fighting.

2. Shift from status-based protection

There is, to some extent, a difference of logic between the protection offered by the law on international armed conflicts and the law on non-international armed conflicts. As discussed in Section III (B)(4), ex-combatants in an international armed conflict have first a status as prisoners of war under international humanitarian law and then, on the condition they are both includable and not excludable, a status as refugees under international refugee law. Both statuses are recognized in the receiving country, after the crossing of an international border. The result is a continuum of protection between these two branches of law that constitutes a kind of ideal "hand over." [83]

While the law on international armed conflicts creates rather clear categories to which the status of protected person under international humanitarian law is conferred, the law on non-international armed conflicts does not. Rights are no longer linked to a status, but to the fact that one is affected or victimized by the conflict. Instead, there is a progressive development from strict international humanitarian law logic to a human rights-like protection. This shift is consequential for those armed elements in a non-international conflict that have crossed an international border and express a fear of being persecuted if forcibly returned to their country of origin. The formal disappearance of the protected person status may create protection gaps and complicate the transition (if any) from international humanitarian law to the refugee law logic. A critical question remains whether these gaps have been partially bridged through case law, consistent practice of States and perhaps customary international law and, if so, whether the response is similar to the one provided by the law on international armed conflicts.

3. The formal non-applicability of the law of neutrality

The law of neutrality, and in particular the 5th Hague Convention, does not formally apply during non-international armed conflicts. Neutrality is defined as "the legal condition of a State that exercises *jus ad neutralitatem*, that is, chooses not to take part in an international armed conflict [emphasis added]."[84] It will be crucial to examine whether second States, and in particular States bordering a country in the middle of a civil war, have a similar obligation of "non-involvement" in a conflict which is mainly internal.

Internment under Article 11 of the 5th Hague Convention and more generally the law of neutrality govern the prevention duties of a neutral country and should not be seen as a challenge to the sovereignty of the State at war. The law of neutrality serves three main

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[81] Article 3 common to the four Geneva Conventions, *supra* note 15.
[82] Article 4, paragraph 1 of Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August, 1948, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter Additional Protocol II), *supra* note 15.
[83] Executive Committee Conclusion No. 94 (LIII 2002), Conclusion on the Civilian and Humanitarian Character of Asylum (hereinafter ExCom Conclusion No. 94).
[84] Pietro Verri, *Dictionary of the International Law of Armed Conflict*, Geneva, ICRC, 75 (1992).

purposes. First, it protects the neutral power's territory as it renders it immune from armed attacks. Second, it protects the territory of the State at war against armed attacks emanating from foreign troops using the territory of a third State. Third, it offers a protective status under international humanitarian law to the persons who have been interned.[85]

The duty of a Neutral State to remain out of the conflict resembles the obligations under Article 2, paragraph 4 of the UN Charter which is, as we will see under Section (IV)(E), *infra*, a norm of customary international law. It is therefore reasonable to conclude that Article 11 of the 5th Hague Convention belongs to these core norms applicable to all armed conflicts, including internal ones.[86] ICRC agrees that the provisions of the 5th Hague Convention "can be considered to have attained customary status"[87] and that it is "ICRC's view that it can also be applied by analogy in situations of non-international conflicts, in which combatants either from the government side or from armed opposition groups have fled into a neutral state."[88]

4. Inability to distinguish armed elements from civilian population

The blurring of the legal concepts is further compounded by the reality that members of non-governmental armed groups or local militias mingle with civilians and rarely wear military uniforms or distinctive signs.[89] Upon crossing an international border, they very often dispose of their arms and present themselves to the authorities of the host country as "civilians." It is very difficult for the host country to assess the credibility of such statements, especially when military elements are mingled with women, children and elderly or when they are part of a larger group of undocumented people.

Further complicating the situation is that in most civil wars, especially in the context of collapsing States, both the governmental and the non-governmental sides resort to forced recruitment of civilians, including children, who often have no choice but fighting.[90] In addition, in many parts of the country "soldier" is the only available job and the only way to feed one's family. Moreover, many civil wars go through different stages with ceasefires, low intensity fightings as well as frequent changes in the control of territory. Mobilisation is

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[85] As discussed in Section III (C)(2), it is a protective status similar to prisoner of war but is not prisoner of war (since that formal status can only apply when a combatant is in the hands of the enemy State).

[86] Chaloka Beyani also considers that internment of armed elements by a third State in the case of non-international armed conflicts "can now be regarded as having become part of the corpus of customary law…[based on the principles of the 1928 Convention on the Rights and Duties of States in the Event of Civil Strife]." Chaloka Beyani, *International Legal Criteria for the Separation of Members of Armed Forces, Armed Bands and Militia from Refugees in the Territories of Host States*, 12 International Journal of Refugee Studies 251 at 268 (Special Supplementary Issue 2000). This is based, *inter alia*, on the obligations under the UN Charter as well as on Article 1 of the 1928 Convention concerning the Duties and Rights of States in the Event of Civil Strife, which requires States to disarm and intern every rebel force crossing their boundaries.

[87] "The Civilian Character of Asylum: Separating Armed Elements from Refugees," Official Statement of the International Committee on the Red Cross to the UNHCR Global Consultations on International Protection, 1st meeting, (8-9 March 2001).

[88] *Id.*

[89] *See* the Chairman's report of the First Periodical Meeting on International Humanitarian Law held in Geneva on 19-23 January 1998, as well as the preparatory documents drafted by ICRC, in particular the one on Disintegration of States Structures and the so called "anarchic" conflicts.

[90] Action for the Rights of Children, Critical Issues: Child Soldiers 8 (2001).

followed by de-mobilisation and re-mobilisation. Mobilised people frequently try to escape or desert. In short, it is a volatile context in which the notion of "direct participation in the hostilities" may have a biased meaning and in which "today's fighter is tomorrow's civilian" and vice versa.

B. Consequences of Inaction

Today, non-international armed conflicts occur with greater frequency than international armed conflicts.[91] Moreover, it is frequently difficult to distinguish between international and non-international conflicts since armed conflicts often have aspects of both.[92] Since World War II, non-international conflicts have been one of the main "producers" of refugees. There is an obvious contradiction between the recurrence of non-international armed conflicts – and the suffering they entail – and the apparent deficit in protection as compared to international armed conflicts. When a State does not prevent armed elements from mingling with genuine refugees, the consequences can be grave. They are not merely theoretical but well documented,[93] in particular among weak or destructured States or States which openly lend support to guerrilla or rebel movements. The following categories encompass many of the likely results of inaction:

1. A mass influx of genuine refugees is in itself a strain on the asylum country. In such a context, the presence of armed elements often upsets an already fragile balance. It can create an escalation in the security concerns of the State and be the determining factor in the proclamation of a state of emergency.[94] The end result may be the curtailment of all non-derogable human rights of both refugees and nationals.

2. A likely scenario is the rapid deterioration of the security situation in parts of the country. There might be a total or partial absence of law and order in refugee populated areas, as the latter progressively become inaccessible to law enforcement officers. Armed elements among the refugee population may be responsible for human rights abuses against both nationals and refugees. The military leaders mingled with the refugee population may result in the military leaders taking *de facto* control of part of the territory of the host country.

3. Militarized refugee camps lead to an escalation in the armed violence, not only internally but also externally. Such camps are more vulnerable to attacks and infiltrations from neighbouring countries, which might feel "justified" to retaliate or to resort to what is called "hot pursuit." In extreme cases, the militarization can become so intense that the very nature of the camp (its civilian character) might be challenged by the country of origin. The country of origin might then view the refugee camp no longer as a "civilian object" but as a legitimate military target. If

[91] Sassòli and Bouvier, *supra* note 28, at 202.
[92] See, e.g., Meron, *supra* note 14, at 260.
[93] *See* Sassòli and Bouvier, *supra* note 28; *see also* Bonaventure Rutinwa, *The Aftermath of the Rwanda Genocide in the Great Lakes Region*, Study Commissioned by the International Panel of Eminent Personalities on the 1994 Genocide in Rwanda and the Surrounding Events (IPEP), (July 1999), *see* in particular Chapter 3 on "Camp Security and Destabilisation of Rwanda,". Some of the consequences of inaction are also listed in the 2002 Report of the UN Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict. *See* n. 1.
[94] To use the language of Article 4 of the International Covenant on Civil and Political Rights: "public emergency which threatens the life of the nation."

the challenge takes the form of a military response, it will then internationalise a conflict, which was essentially an internal one. A number of non-international armed conflicts have had spillover effects across frontiers. Neighbouring States get "contaminated" and the entire region may be affected. In such contexts, forced displacement of populations is one aspect of a bigger problem, which is often defined by the UN Security Council as constituting a "threat to or a breach of international peace and security."[95]

4. When armed elements take effective control over refugee camps or settlements, the following events are likely to take place:
   - military recruitment (more or less forced) of refugees, including adolescents and even children;
   - unfair distribution of humanitarian assistance, with the armed elements and their supporters receiving more than their fair share;
   - harassment of or threats against humanitarian workers; and
   - physical or psychological pressures from military leaders against refugees who want to be repatriated; alternatively, there could be pressure on the refugees by the military leaders to prematurely return, depending on what serves the political or military interests of the military leaders. In short, refugees are prevented from taking free and informed decisions and become pawns in the hands of military elements.

5. The presence of armed elements or ex-fighters is a source of tension in the relations between the host country and the country of origin. Short of disarming, separating and interning armed elements and persons with a military agenda, the host country may not be able to lessen the justified apprehension of the country of origin.

6. The presence of foreign armed elements on its soil undermines the internal stability of the host country. Confronted with repeated security incidents and clear violations of its sovereignty, the host country may be likely to resort to harsh, uncoordinated and "emotional" measures. It might also be encouraged to take a tough stand by the local population, who grows weary of human rights abuses by the militias and deeply suffers from the absence of law and order. If unable to tackle the very problem of insecurity, and insufficiently armed or trained to stop the military escalation, the authorities either at the local or at the national level might be inclined to adopt a "scapegoat" policy. Such a policy may include closing of the border with the country of origin, thus denying access to safety to thousands of genuine civilians in need of international protection. It may also include the random expulsion or forcible repatriation of refugees.

This catalogue of possible consequences is not exhaustive but illustrates the risks involved.

C. Common Applicable Principles in International Humanitarian Law, Refugee Law and the UN Charter

The complicating factors and consequences of inaction listed above necessitate a response that draws upon three branches of law:[96] refugee law, international humanitarian law and

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[95] Security Council Resolutions 1208 (19 November 1998) and 1296 (19 April 2000).

[96] It would probably be more appropriate to call them "sub-branches of law" rather than "branches."

the UN Charter.[97] These three branches of law, as they relate to persons who have taken a direct part in the hostilities and find themselves in a host country, contain certain underpinning principles in common.[98]

1. An armed element cannot be a refugee

One cannot be a refugee and a fighter at the same time. Though the expression "refugee warrior"[99] has gained some recognition and prominence in the languages of political science and philosophy, it is a contradiction in terms which has no legal meaning. It refers to a behaviour which is condemned by the international community and in clear violation of international law. Such a claimant would be ineligible for refugee status, because there is an irreconcilable tension between seeking international refugee protection and at the same time planning or conducting military activities in and from the territory of the host state.

2. An ex-armed element can be eligible for refugee status

A person who has taken an active part in the hostilities in the context of a non-international armed conflict and has genuinely and permanently renounced military activities is a refugee if she/he "passes the double refugee law test"[100] of inclusion and exclusion.

3. Duty of host country to address security threats posed by armed elements

The presence of armed elements on the soil of the host country poses a threat to both internal and international peace and security. The State in question has both a right and a duty to take provisional measures to address these security concerns.

4. Duty of States to prevent subversive acts directed at other States

States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of another State.[101] States shall not tolerate foreign nationals being involved in subversive activities against any other State, including their country of origin, and using their territory to plan or wage attacks against another State.[102] The host State has a responsibility to prevent such acts.

5. Duty of States to accept refugees and strictly respect the principle of non-refoulement

States have an obligation to admit on their territory all persons who are in need of

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[97] To a lesser extent, human rights law is also part of the analysis. *See also* note 13, *supra*. Human rights law has also influenced the formation of the customary rules on international humanitarian law and the jurisprudence of the tribunals and courts of international organizations. Meron, supra note 14, at 244.

[98] See Global Consultations on International Protection, Key Conclusions/Recommendations, UNHCR, 2nd Meeting, UN Doc. EC/GC/01/9 (30 May 2001) [hereinafter Key Conclusions].

[99] See Howard Adelman, *Why Refugee Warriors are Threats*, The Journal of Conflict Studies, Spring, 49-69 (1998).

[100] The double test of first inclusion and then exclusion is discussed at n. 3, *supra.*

[101] UN Charter, Article 2, para. 4.

[102] *See id.*

international protection[103] and to treat them in accordance with minimum human rights standards. Particularly significant are respecting the principles of *non-refoulement* and humane treatment. States also have the responsibility to ensure the physical protection of refugees on their territory.[104]

6. *Duty of States to preserve the humanitarian and civilian character of asylum*

States have an obligation to maintain the purely humanitarian and civilian character of refugee camps and refugee populated areas, and more broadly, to safeguard the civilian and humanitarian character of asylum.[105]

7. *Duty of States to take special protective measures for refugee children and child soldiers* [106]

States must recognize that refugee children are particularly at risk of exploitation and forcible recruitment by armed forces or groups and must take measures to prevent the latter.[107] Former child soldiers should also benefit from special protection and assistance measures, in particular as regards their demobilization and rehabilitation.[108]

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[103] This includes former armed elements that have genuinely, sincerely and durably laid down their arms and pass the double test of inclusion and exclusion.

[104] *See*, *e.g.,* Statement of the President of the Security Council, S/PRST/2002/41 (20 December 2002), at 2.

[105] ExCom Conclusion No. 94, *supra* note 83.

[106] Unfortunately, this paper cannot do justice to the complex question of child soldiers "seeking refuge" in another country. A few observations, however, should be mentioned.

a) The expression "child soldier" is not a legal concept but is convenient to describe children under the legal age of compulsory recruitment or direct participation in the hostilities. The age limit varies between 15 and 18, depending on what treaties have been acceded to (of particular relevance are Articles 38 of the Convention on the Rights of the Child, 1 and 2 of the Optional Protocol on the Involvement of Children in Armed Conflict, 77 paragraph 2 of Additional Protocol I and 4 paragraph 3 of Additional Protocol II).
b) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in the hostilities is a war crime both in the context of an international and a non-international armed conflict (Article 8, paragraph 2 (b)(xxvi) and E (vii)).
c) Child soldiers younger than 15 years of age who are captured, detained or interned should continue to enjoy the special protection granted them by international humanitarian law and international human rights.
d) The latter are in particular recognised as combatants and entitled to prisoners of war status.
e) If interned, they should be held in quarters separate from the quarters of adults.
f) An age-sensitive approach should be taken throughout the process.

Researchers should be encouraged to write a separate paper on this issue. There is significant interest in this topic in the Security Council and the UN Secretary General. *See*, in particular, Resolutions 1261 (1999), 1314 (2000), 1379 (2001) and 1460 (2003) of the Security Council and the report of the Secretary General, entitled Report on Children and Armed Conflict, UN. Doc.S/2003/1053 (10 November 2003). In addition, it is a priority of both ICRC and NGOs. (The website of ICRC, which is www.icrc.org ,contains a wealth of information on child protection and child soldiers.)

[107] *See* Report of the UN Secretary-General on Children and Armed Conflict, Un Doc. S/2002/1299 (26 November 2002), at 5.

[108] *See* ExCom Conclusion No 94, para. C(viii), supra note 83, and Security Council Resolution 1460 (2003), para. 13.

D. State Obligations under the UN Charter[109]

1. Duty to abstain from the threat or use of force against the territorial integrity of another state

a. The principle

This cardinal principle appears in Article 2, paragraph 4 of the UN Charter:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The Purposes of the United Nations, listed in Article 1 of the UN Charter, include the maintenance of international peace and security, the development of friendly relations among nations, the achievement of international cooperation in solving international problems of a humanitarian character and the promotion and the encouragement of respect for human rights and for fundamental freedoms for all without distinction. Although there is no formal hierarchy among purposes, it is widely acknowledged that the "essential" purpose of the UN is the maintenance of international peace and security. Peace is not merely the absence of war.[110] States not only have a duty to refrain from acts which would endanger international peace and security but also to take concrete steps towards the strengthening of peace through the development of friendly relations among nations.

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[109] The supremacy of the UN Charter can be easily derived from Article 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." This provision, adopted by unanimous approval, has been invoked, *inter alia*, by the ICJ, which has emphasized that binding Security Council Resolutions under Chapter VII of the UN Charter supersede State obligations under any other international agreement, whether bilateral or multilateral. *See* Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* 1118 at 1124 (1995). The Charter shall also prevail with respect to agreements concluded by international organisations, *see* Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 12 March 1986, Article 30.
Security Council Resolutions, however, cannot result in the suspension of norms, which have attained the status of jus cogens. Although human rights treaties (including the refugee instruments) are international agreements formally covered by Article 103 (with the exception of human rights norms, such as the right to life or the prohibition against torture, which are considered as jus cogens), they retain a unique status under international law because they embody the purposes of the United Nations. The human rights treaties should serve as a yardstick determining the lengths and limits of Security Council resolutions. Human rights rules and standards, including those applying to refugees, should not be seen as prima facie conflicting with obligations under the UN Charter. If there were a situation where the former seems to be at variance with the latter, States and UNHCR should, instead of establishing a hierarchy, reconcile them and interpret refugee provisions in the context of international security concerns; these concerns have a double dimension, that of collective security and human security (which is the fulfillment of human rights). *See* Vera Gowland-Debbas, *The Functions of the United Nations Security Council in the International Legal System: Some Reflections* in Michael Byers (ed.), The Role of Law in International Politics, 305 (2000).
[110] Bruno, *supra* note 109, at 50.

Both the essential purpose and the principle encapsulated in Article 2, paragraph 4 of the Charter were interpreted and elaborated by the International Court of Justice (ICJ) in a precedent setting decision on the responsibility of the United States of America for military and paramilitary activities in Nicaragua.[111] In that case, both Nicaragua and the United States adopted the view that Article 2, paragraph 4 was an authoritative declaration of the modern customary law regarding the threat or use of force against the territorial integrity of another State. After confirming the customary nature of the prohibition of the use of force as well as of the obligation not to violate the sovereignty of another State, [112] the ICJ also added that not only the gravest forms of the use of force (those constituting an armed attack) were prohibited but also less grave forms. The ICJ referenced General Assembly Resolution 2625 (XXV) to clarify the notion of the use of force.[113] Thus, prohibitions contained in this resolution have "pre-eminent value in contemporary international law."[114]

Four paragraphs of Resolution 2625 (XXV) bear directly on the issue:

> … Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.….
> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State…
> …Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[115]

The prohibition goes much beyond the direct use of classical inter-State military force and includes any use of armed force across borders,[116] such as incursion into the territory of another State, as well as indirect armed force. Indirect armed force includes the "instrumentalisation" by a State of unofficial armed bands, irregulars, mercenaries or rebels, but also the mere "assisting," "encouraging" and even "tolerating" armed activities by private individuals, whether nationals or foreigners. The host State has an obligation to identify the "dividing line between criticism and subversion." When private individuals work towards "the violent overthrow of the regime of another state," the host State must suppress and prevent the use of its territory for such purposes.[117] Failure in this regard will lead to international responsibility of the same magnitude as direct State action.[118] In other

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[111] Military and Paramilitary Activities (*Nicaragua v. U. S.*), 1986 I.C.J. 14 at 89-90 (27 June 1986).
[112] *Id.*
[113] *Id.* at 91.
[114] Oppenheim's International Law, 9th edition (R. Jennings and A. Watts, eds.), Vol. I, "Peace," 334 (1992-1993).
[115] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN. Doc.G.A. Res. 2625 (XXV) (24 October 1970).
[116] Simma, *supra* note 109, at 117.
[117] Oppenheim's International Law, *supra* note 114, at 393-394.
[118] Steven Corliss, *Asylum State Responsibility for the Hostile Acts of Foreign Exiles*, 2 International Journal of Refugee Law 184 (No.2 1990).

words, such a State will be in breach of international law, in particular of Article 2 paragraph 4 of the UN Charter.

b. The application

While the above mentioned principle is clear and undisputed, its application, and in particular the scope of responsibility, needs further clarification. In the case of wrongful acts by private individuals, State responsibility is neither direct nor absolute. The State is not liable for the harmful conduct of individuals as such, but for its own delinquency in failing to prevent or punish the acts of the individuals.[119] State responsibility has two dimensions: knowledge of the act and power to prevent and/or suppress.

i. State knowledge of the wrongful acts

A consensus has emerged among scholars, supported by both State and UN practice, that the host State has a duty of "due diligence" or a "duty to employ all means at its disposal" to prevent or suppress the wrongful acts of individuals residing on its territory.[120] One of the determining factors in this respect is what Baxter and Sohn call "the foreseeability of the risk."[121] In circumstances in which it can be assumed that a State must have anticipated the possibility of wrongful acts by private individuals, that State's knowledge of the harmful conduct of individuals must be presumed. Atle Grahl-Madsen asserts that, in most circumstances, armed activities by foreign exiles cannot go unnoticed by the authorities of the host country, unless such armed activities are marginal. The State concerned will then become responsible on the basis of culpable negligence and the plea of ignorance will be inadmissible.[122]

Knowledge of wrongful acts is only one aspect and it is not sufficient in itself to trigger State responsibility. A State must also have the power or capacity to prevent and/or suppress the wrongful acts.

ii. State power to prevent and/or suppress the wrongful acts

This power dimension is clearly reflected in the State's "duty to use all the means at its disposal." There is a distinction between the obligation *per se*, which is a given, and the scope of the obligation which may vary and depends upon the particular circumstances of each case. States which have geographic and resource constraints cannot be expected to be as effective as wealthy States with easily controllable borders.[123] Such constraints are valid limitations but cannot excuse total inaction. A State confronted with foreign armed activities on its soil has an obligation to act, both in its own interest and out of its

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[119] *Id.*

[120] *See*, *e.g.*, Ian Brownlie, Principles of Public International Law, 4th edition, 452-454 (1980); ICJ Judgements in case concerning *United States Diplomatic Consular Staff in Tehran* 1980 I.C.J. 3 and *Corfu Channel case* I.C.J. Reports 1949, (Judgement of 9th April, 1949).

[121] Corliss, *supra* note 118, at 186.

[122] Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. II "Asylum, Entry and Sojourn", 191 (1972).

[123] Unlike geographic and resource constraints, political factors (such as the local support a guerrilla movement may receive in the host country) are not considered as valid limitations. See Corliss, *supra* note 118, at 190.

obligations under the UN Charter. If a State fails to act, then it must bring the problem to the attention of the political organs of the United Nations.

States generally have discretion as to what means and methods will be used to prevent or suppress military activities by private individuals against another State. State responsibility will only arise if the means used are reasonably insufficient or inadequate.[124] However, when foreign armed elements pose a threat to both international and internal security, any measure short of internment may well be insufficient to adequately prevent the implementation of a military agenda.

2. State obligation to protect civilians in armed conflict under Security Council Resolutions

Under Article 39 of the UN Charter, the Security Council has the power to determine whether a situation constitutes a threat to international peace and security. In addition to issuing resolutions that are binding upon States (Article 25 of the UN Charter), the Security Council can also authoritatively interpret the Charter.[125] Though the Security Council is not an organ that creates legal norms, its resolutions and interpretations contribute to the formation of international law and have an impact on the international legal order, provided that their subject matter is not limited to particular circumstances, but are of a more general nature. "The Council can thereby influence the process of customary international law and the process of subsequent authentic interpretation of the Charter.…It is true that the Council does not influence this development in any 'legislative' sense but by 'cumulative actions' which reflect changes in the opinio juris of States."[126]

Read together, Security Council Resolutions from 1991 to 2000 indicate a coherent and consistent interpretation of the Charter, in at least two directions that are relevant to this paper.[127] The first development is that violence perpetrated against civilians, mass violation of human rights and refugee law, as well as grave breaches of international humanitarian law may constitute a breach of international peace and security.[128] Violations of the laws which have been designed to protect human beings have, as a result, become a constituent element of a threat to international peace and security. As highlighted by Vera Gowlland-Debbas, the direct implication of this conceptual expansion to account for both collective and human security is that even those violations within a State's borders might constitute a breach of international peace and security.[129]

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[124] *Id*. at 191.

[125] Marc Perrin de Brichambaut, *The Role of the United Nations Security Council in the International Legal System,* in Byers, supra note 109, at 272.

[126] Georg Nolte, *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*, in Byers, *supra* note 109, at 324.

[127] This interpretation of the UN Charter by the Security Council can probably be traced back to Security Council Resolution 688 (1991) and has culminated with respectively Security Council Resolutions 1208, 1265 and 1296 (2000).

[128] Security Council Resolution 1296 (2000), para. 5.

[129] *See* Gowlland-Debbas, *supra* note 109, at 289. ("The concept of international peace and security has thus acquired a meaning that extends far beyond that of collective security (envisaged as an all-out collective response to armed attack), one in which ethnic cleansing, genocide, and other gross violations of human rights…as well as grave breaches of humanitarian law, including those encompassed within a State's own borders, are considered component parts of the security fabric."

The second and even more relevant development is that refugee protection (at least in the case of persons fleeing a situation of armed violence) has become linked with national, regional and international security. Forced displacement of populations can result in mass violation of human rights and grave breaches of international humanitarian law. These forced displacements, particularly in the context of mass influxes, can result in mixed flows in which genuine refugees are mingled with armed elements. The provisions of Security Council Resolutions 1208 (19 November 1998) and 1296 (19 April 2000) set out the parameters of this connection:

a. Acts of violence directed against refugees have an impact on durable peace, reconciliation and development (4th preambular paragraph of SC Resolution 1296).

b. Situations where refugees are vulnerable to the threat of harassment or where their camps are vulnerable to infiltration by armed elements may constitute a threat to international peace and security (paragraph 14 of SC Resolution 1296).

c. The provision of security to refugees and the maintenance of the civilian and humanitarian character of refugee camps and settlements is an integral part of the national, regional and international response to refugee situations and can contribute to the maintenance of international peace and security (3rd preambular paragraph and paragraph 3 of SC Resolution 1208).

d. It is unacceptable to use refugees and other persons in refugee camps and settlements to achieve military purposes in the country of asylum or in the country of origin (7th preambular paragraph of SC 1208).

e. Measures have to be taken by the host State, with the support of the international community, if need be, to disarm armed elements and to then separate them from the refugee population and prevent them from getting engaged in military activities (paragraphs 3 and 6 of SC Resolution 1208).

f. Armed or military elements and persons who want to achieve military purposes from the territory of the host country do not qualify for the international protection afforded refugees (8th preambular paragraph and paragraph 6 of SC Resolution 1208).

In addition to implementing the UN Charter through standard-setting type Resolutions, the Security Council has provided additional clear-cut guidance by promoting a comprehensive and coordinated approach by Member States and international organizations and agencies to address the problem of the protection of civilians in situations of armed conflicts. On 12 February 1999, the Security Council held an open meeting on this matter and requested the UN Secretary-General to submit concrete recommendations on ways that the Security Council, acting within its sphere of competence, could improve the physical and legal protection of civilians in armed conflict.[130] The first report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict was submitted on 8 September 1999.[131] This first report has been followed, to date, by two additional

[130] Statement by the President of the Security Council, S/PRST/199/6 (12 February 1999), p.3.
[131] Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict, S/1999/957 (8 September 1999).

reports.[132] The three reports highlight the destabilizing effect for an entire region of the presence of combatants or armed elements in refugee camps and the necessity to separate armed elements from civilians, particularly refugees. As stated in these reports of the Secretary General:

> Where refugees are involved, experience has demonstrated that it is essential to separate civilians from armed elements in refugee camps and elsewhere immediately. The longer the camps remain militarized, the more difficult the problem will be to redress.[133]
> Such separation can prevent further aggravation of conflict, and ensure that persons fleeing persecution or war get the protection and assistance they require.[134]

On 15 March 2002, the Security Council adopted an Aide Memoire to facilitate its considerations of issues pertaining to protection of civilians in armed conflict. The Aide Memoire provides practical guidance both during peacekeeping operations and in circumstances when the Security Council may wish to consider action outside the scope of a peacekeeping operation. The Aide Memoire is considered as a work in progress, to be regularly updated. The last update, which is from 15 December 2003, contains seventeen primary objectives. It is significant that one of them is "prioritize and support the maintenance of the humanitarian and civilian character of camps and settlements for displaced persons." Under this objective, the following issues are for consideration:

- Provision of external and internal security (screening procedures to separate armed elements from civilians; demobilization and disarmament measures; technical assistance and training by international civilian police and/or military observers; location of camps at a significant distance from international border and risk zones; regional and sub-regional arrangements).
- Cooperation with the host State in provision of security measures, including technical assistance and training.
- Deployment of multi-disciplinary assessment and security evaluation teams.
- Regional approach to massive population displacement, including appropriate security arrangements.[135]

Thus, Security Council decisions have an impact on refugee protection and on the obligations of the State; they also have an impact on the interpretation and the implementation of international refugee law, at least in situations where there is a clear link between forced displacement and threat to international peace and security. In situations where forced displacement across international borders is related to mass violation of human rights, grave breaches of international humanitarian law, and generates mixed flows in which genuine refugees live side by side with persons who have a foreign military agenda, the relevant refugee instruments can neither be applied nor interpreted in isolation but as part of a broader and coherent system.

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[132] These two additional reports are dated respectively 30 March 2001 (S/2001/331) and 26 November 2002 (S/2002/1300).

[133] Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, S/2002/1300 (26 November 2002), para. 35.

[134] Report of the Secretary-General, S/2001/331 (30 March 2001), para. 29.

[135] Annex to the Statement by the President of the Security Council, S/PRST/2003/27 (15 December 2003), p. 5.

E. State Obligations under International Humanitarian Law

1. Towards the application of some of the rules of international armed conflict to non-international armed conflict

Recent but consistent developments lead to the conclusion that a humanitarian norm initially designed for international armed conflicts should also apply in the case of a non-international armed conflict when such a norm has clearly a protective nature and is not regarded by States as an intolerable infringement upon their sovereignty.[136] It is posited that one way to distinguish what rules from international armed conflicts should be applied to non-international armed conflicts is to only apply those norms that are primarily designed to benefit individuals *qua* human beings, and not those intended to protect State interests.[137]

Since the drafting of the Geneva Conventions in 1949, the law on international armed conflicts and the law on non-international armed conflicts have been treated as separate components of a "two-box" system.[138] Although there have been attempts in the past to expand the scope of the Geneva Conventions, they have not been successful. For example, in 1971, the ICRC[139] submitted a draft recommendation that all of international humanitarian law should be applied to a civil war if there was the intervention of foreign troops.[140] In 1978 the Norwegian delegation to the Conference of Government Experts recommended that, instead of two categories of armed conflict of international and internal, there should be a single law applicable to all kinds of armed conflicts.[141] "Commentators agree that the distinction [between the different rules for international and non-international conflicts] is 'arbitrary,' 'undesirable,' 'difficult to justify,' and that it 'frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.'"[142]

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[136] According to the ICTY, norms of international humanitarian law are not intended to protect State interests, but are primarily designed to benefit individuals qua human beings. *See* Judgment, Trial Chamber, *Kupreskic et al.*, IT-95-16 Judgment (14 January 2000), para. 518. It would, for example, be unthinkable to extend the status of combatant and then of prisoner of war to members of guerrillas captured by the governmental side. It would mean that a government is no longer in a position to suppress rebellion on its soil. No doubt, there would be strong objection to such an expansion.

[137] It is not suggested that all rules from international armed conflicts should be applied wholesale to non-international conflicts.

[138] Sonja Boelaert-Suominen, *The Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts*, 13 Leiden Journal of International Law, 619 at 621 (2000).

[139] Interestingly, in 1948 the ICRC had recommended that the Geneva Conventions should apply international humanitarian law to "all cases of armed conflict, which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties." Jean S. Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949*, *Vol. III: Geneva Convention relative to the Treatment of Prisoners of War*, Geneva, ICRC, 31 (1960).

[140] ICRC, "Report on the Work of the Conference of Government Experts, Geneva, 1971, Vol. I, para. 284, cited in Stewart, *supra* note 14, at 313, n. 6.

[141] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Official Records, Summary Record, Vol. 5, CDDH/SR.10 (1978) p. 91, cited in Stewart, *supra* note 14, at 313, n. 8.

[142] Stewart, *supra* note 14, at 313 [citations omitted].

The jurisprudence developed by the ICTY has significantly contributed to bridging the gap between norms applicable in each of these two "boxes." In a number of judgments, in particular those of the Trial Chamber of 14 January 2000 in *Prosecutor v. Kupreskic and others* of 3 March 2000 in the case of *Prosecutor v T. Blaskic*,[143] the ICTY has ruled that a common core of substantive international humanitarian law norms of a customary nature applies to international and internal conflicts alike, including instances when the law on non-international armed conflicts is silent:

> There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare.[144]

In addition to the jurisprudence from the ICTY[145] blurring the distinction between international and non-international conflicts, there have been other sources that have minimized the differences. For example, some countries, in their rules for their armed forces, acknowledge that the same standards of international humanitarian law should be applicable to all kinds of armed conflicts.[146] As stated by one commentator:

> In recent years, remarkable progress has been made in the identification of customary rules and the willingness of states to recognize the extension of rules to noninternational armed conflicts. This progress is attributable to the establishment of the two ad hoc tribunals and the direction of their jurisprudence, the drafting and adoption of the statute of the international criminal court, and even the as-yet unpublished ICRC study on customary rules of international humanitarian law.[147]

There have been many commentators who have been critical of the distinctions between armed conflicts that are international and those that are non-international.[148] For example, James G. Stewart has recently called for "a single law of armed conflict by illustrating the failure of the current regime to deal with conflicts that contain both international and non-international elements, namely internationalized armed conflicts.[149] L. Moir has stated that:

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[143] *See*, in particular, paragraphs 163-164. The judgement is available on www.un.org/ICTY/blaskic/trialc1/judgement/index.htm

[144] Judgment, Trial Chamber, *Prosecutor v. Milan Martic*, IT-95-14/2-PT, Review of the Indictment Pursuant to rule 61, ICTY Trial Chamber, 8 March 1996, para. 11.

[145] It should be noted that the decisions by different ICTY chambers have sometimes been contradictory. *See* Meron, *supra* note 14, at 261.

[146] The instruction of the United States Joint Chiefs of Staff provides that the "Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized." Chairman, Joint Chiefs of Staff, Instruction 5810.01, Implementation of the DOD Law of War Program (1966), quoted in Meron, *supra* note 14, at 262.

[147] Meron, *supra* note 14, at 262.

[148] *See, e.g.* I. Detter, The Law of War (2002); L. Moir, The Law of Internal Armed Conflict (2000); W. Michael Resiman and J. Silk, Which law applies to the Afghan conflict, 82 American Journal of International Law 465 (1988); S. Boaelaret-Suominen, Grave breaches, universal jurisdiction and internal armed conflict: Is customary law moving towards a uniform enforcement mechanism for all armed conflicts?, 5 Journal of Conflict and Security Law, No. 263, (2000), at section 5.

[149] Stewart, *supra* note 14, at 314. Stewart describes "internationalized armed conflicts" as including "war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of

> …we would appear to be moving tentatively towards the position whereby the legal distinction between international and non-international armed conflict is becoming outmoded. What will matter as regards legal regulation will not be whether an armed conflict is international or internal, but simply whether an armed conflict exists *per se*.[150]

The question of whether a conflict is international or internal then becomes mostly irrelevant because common substantive international humanitarian law norms should apply,[151] regardless of the nature of the conflict.[152] The trend away from the two-box system towards a convergence of the laws on international and non-international armed conflicts seems bound to continue.[153]

2. Internment of armed elements

a. <u>Law of neutrality</u>

As discussed in Section IV (A)(3), there is an issue as to whether Article 11 of the 5th Hague Convention applies in the case of non-international armed conflicts so that a State which borders a country in the middle of a civil war has an obligation to intern persons who have taken a direct part in the hostilities and found themselves on its territory. The 1907 Hague Conventions were adopted at a time when international law only regulated inter-State conflicts.[154] The law of neutrality, in particular, was concerned with the behaviour of a State vis-à-vis other States engaged in a classical international armed conflict. Nevertheless, it is suggested that an approach that keeps to the letter of treaties adopted close to a century ago would be too formalistic and out of line with the most recent developments in international humanitarian law.[155] Moreover, we can safely conclude that Article 11 of the 5th Hague Convention belongs to these core norms applicable to all armed conflicts, including internal ones. *See* Section IV (A)(3), *supra*.

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opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government." *Id.* at 315.

[150] Moir, *supra* note 148, at 51, quoted in Stewart, *supra* note 14, at 344.

[151] *See, e.g.* "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (Workshop 1)," 28th International Conference of the Red Cross and Red Crescent, Geneva 2 to 6 December 2003 (comment by one presenter that "it was generally accepted that many of the rules on conduct of hostilities in the treaties regulating international conflicts now formed part of the customary rules of IHL applicable in non-international conflicts, including the principle of distinction, the definition of military objectives, the prohibition of indiscriminate attacks and the principle of proportionality.")

[152] See Boelart-Suominen, *supra* note 134, at 644. ("The regulatory gap between international and internal armed conflicts is shrinking" and "though the distinction between international and internal armed conflict remains 'on the books' …, the move towards the convergence of the substantive law, applicable to all armed conflicts, regardless of their nature, seems unstoppable.")

[153] *Id.* at 634, 646.

[154] *See* Section IV (A)(3), *supra*.

[155] It is understood, in its broader sense, to include the law of neutrality. The expression "law of armed conflict" might be more appropriate in this context.

b. Protecting the civilian character of refugees and the principle of distinction

Refugees caught up in an armed conflict[156] are treated by international humanitarian law as civilians[157] and are protected as such. Refugee settlements are, by nature, both civilian objects (as dwellings) and civilian populations (the refugees themselves) to which apply the principle of distinction, which is now considered part of customary international law. This principle is expressed in Articles 48-54 of Protocol I[158] and Articles 13-14 of Protocol II of the Geneva Conventions and can be summarized as follows:

a. The civilian population and individual civilians shall enjoy general protection against the danger arising from military operations.
b. The parties to the conflict shall, at all times, distinguish between the civilian population and those engaged in combat.
c. The parties to the conflict shall, at all times, distinguish between civilian objects and military objects,
d. The civilian population and individual civilians shall not be the object of attacks. The parties to the conflict shall therefore direct their operations only against military objectives.

According to Article 52, paragraph 2, military objectives "are limited to those objects which by their nature, location and purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." Three criteria are used to define military objectives. The first two (i.e. objects which are military because of their nature or location) are not relevant since they make reference to either objects directly used by the armies (weapons, fortifications, barracks, etc.) or which may have a strategic location from a military viewpoint, such as bridges.[159]

The third criterion, the purpose of the objects, is more complicated as it clearly indicates that civilian objects might be used for military aims, thus becoming military objects. Under Article 52, paragraph 3 of Additional Protocol I, there must be a serious and objective analysis of the purpose of the object before concluding that a change of nature, in the purpose for which the object is used, has taken place. In case of doubt, a civilian object must be presumed to serve civilian purposes.[160]

Given these criteria, how would one define a refugee camp or settlement which has become militarized in international humanitarian law? As a dwelling hosting persons defined as civilians, a refugee camp or settlement is presumed not to be used for military purposes. The

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[156] International humanitarian law only applies when the threshold of an armed conflict has been reached. In this respect, the law of neutrality (whether part of international humanitarian law or not) is an exception as it is applied by and in a country which is, in principle, not at war.
[157] *See,* in particular, Articles 44 and 70 paragraph 2 of the 4th Geneva Convention as well as Article 73 of Additional Protocol I, *supra* note 15.
[158] Additional Protocol I is applicable to international armed conflicts and not to non-international armed conflicts. *See supra* note 15.
[159] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 636 (1987) (hereinafter ICRC, Commentary Additional Protocols).
[160] *Id.* As an example of such a change of nature, the ICRC's Commentary on the Additional Protocols cites a school or a hotel used to accommodate troops or headquarters staff.

presumption is maintained even when a refugee camp is located in places where military activities are carried out, in particular in border areas.

If such a camp is genuinely civilian, its location cannot provide any military advantage, unlike, for example, bridges or telecommunications networks which can make a difference from a military viewpoint.

In addition to the presumption laid down in Article 52, paragraph 3 of Additional Protocol I, the presence within the civilian population of individuals who do not fall under the definition of civilians does not deprive the population of its civilian character.[161] According to ICRC, in times of war it is "inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population."[162]

Thus, we can conclude that a refugee camp or settlement is *prima facie* civilian, that the presence of small numbers of armed elements does not impact on the civilian character of such sites. While the civilian character presumption is rebuttable, the onus of the proof lies with those claiming that a civilian object has been turned into a military one. This represents an advance in refugee protection by preventing belligerents from "arbitrarily and unilaterally" declaring a civilian object as a military target.[163]

In exceptional circumstances, a refugee camp or settlement may be so heavily militarized that it has become a key military position from which regular and deadly attacks are launched. Then, the civilian character of such a site is questionable. However, it may accommodate thousands of genuine civilians who are not involved in the military operations. In these mixed situations, two conflicting interests have to be reconciled. On one hand, the genuine refugee (civilian) population needs to be protected against military attacks. On the other, the "enemy" side may have a legitimate interest in silencing the attacks emanating from the refugee settlements.
International humanitarian law has developed rules that apply to military attacks on "mixed targets." While these rules are from the Geneva Conventions that apply to international armed conflicts, they have relevance to non-international armed conflicts.[164] In addition, these rules do not apply to countries that are not at war, such as the host States, but most of the principles can be applied by analogy.[165] The rules for international armed conflicts that apply to military attacks on "mixed targets" can be labelled into the categories of prohibitions and positive obligations. The prohibitions are the following:

1. The practice of using the civilian population or civilian objects for military purposes is prohibited in absolute terms. Article 51, paragraph 7 of Additional Protocol I strictly prohibits use of civilians as "human shields": "The presence or movements of the civilian population or individual civilians shall not be used to render certain

[161] Article 50, paragraph 3 of Additional Protocol I, *supra* note 15.
[162] ICRC, Commentary Additional Protocols, *supra* note 160, at 612.
[163] *Id.* at 638 ("[A]n essential step forward has been taken in that belligerents can no longer arbitrarily and unilaterally declare as a military objective any civilian object, as happened all too often in the past.").
[164] *See* Section IV (E), *supra*.
[165] They basically implement the principle contained in Article 2 paragraph 4 of the UN Charter and coincide with fundamental and non-derogable human rights.

points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."[166]

2. Attacks against objects of a mixed nature, such as heavily militarized refugee camps, are permitted if a definite military advantage is gained by their total or partial destruction, capture or neutralization, during the circumstances prevailing at the time. This condition, which stems from the principle of proportionality and from a careful balancing between military and humanitarian concerns, was added to offer increased protection to the civilian population. In fact, many objects are comprised of both components, civilian and military. Some clearly identified military objects may be located in densely populated areas or cities. According to ICRC, such attacks are not "legitimate" if the advantages are simply "potential" or "indeterminate," and "the safety of the civilian population… must be taken into account."[167]

3. Article 51, Additional Protocol I, which prohibits indiscriminate attacks, is equally relevant. An interesting example of such an indiscriminate attack is "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[168] The expression "concrete and direct" indicates that such gains should be "substantial and relatively proximate." The "golden rule" to keep in mind is the duty to "spare" civilians and civilian objects in the conduct of military operations."[169]

While Article 51 prohibits certain actions, Article 57 of Additional Protocol I imposes positive conduct upon parties to an armed conflict. Those who plan or decide upon an attack shall take a number of precautions in military attack, all of them listed in this provision. Paragraph 2(b) states that "an attack shall be cancelled or suspended if it becomes apparent that…the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Ignoring the concrete and relatively detailed obligations laid down in Article 57 of Additional Protocol I[170] may constitute a grave breach of the Protocol, in other words a war crime.

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[166] Unfortunately, this practice continues as armed elements will often use refugee camps in an attempt to immunize themselves from attack. The use of "human shields" is a war crime according to Article 8, para. (2)(b)(xxii) of the Rome Statute of the International Criminal Court of 17 July 1998. According to Article 58 of Protocol I, the parties to the conflict shall, to the maximum extent feasible: (a)… endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

[167] ICRC, Commentary Additional Protocols at 636, *supra* note 159.

[168] Article 51, paragraph 5(b) Additional Protocol I, *supra* note 15.

[169] ICRC, Commentary Additional Protocols at 684, *supra* note 159.

[170] Paragraph 2, in particular, describes a situation labelled by the Protocol (Article 86) as a "failure to act when under a duty to do so."

The whole raison d'être of international humanitarian law is that those in command should take into account humanitarian considerations *before* planning and conducting a military operation. Both Articles 51 and 57 aim to outlaw a practice Kalshoven dubbed "shoot first and question later."[171]

As discussed in Section IV (E) (1), *supra*, the ICTY, in a number of its judgments, treats these norms concerning military attacks as authoritative statements of customary international law, thus extending the protection to both international and internal armed conflicts.

F. State Obligations under International Refugee Law

The separation of armed elements from civilian refugee populations is critical to core principles of refugee law, including: 1) the humanitarian and non-political nature of asylum and refugee status;[172] 2) the civilian character of refugee camps and settlements; 3) the principle of non-refoulement; and 4) asylum for all those who meet the refugee criteria.[173]

1. Asylum as a strictly humanitarian, friendly and peaceful act

As early as 1951, the States who negotiated and adopted the Refugee Convention were conscious that the grant of asylum could be a source of tension between the country of origin and the country of asylum. To reduce this tension, they chose to approach the refugee problem from a strictly humanitarian angle, as reflected in paragraph 5 of the Preamble of the Convention: "Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States…." In addition, though clearly a human rights treaty,[174] the Convention accounts for security concerns in a number of its provisions,[175] indicating its roots in both the Universal Declaration of Human Rights and the United Nations Charter.[176]

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[171] Quoted in Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols* in Astrid J .M. Delissen & Gerard J. Tanja (eds.), Humanitarian Law of Armed Conflict. Challenges Ahead. Essays in Honour of Frits Kalshoven, 109 (1991).

[172] Preamble to 1951 Refugee Convention, *supra* note 7.

[173] *See* Global Consultations on International Protection, "The Civilian Character of Asylum: Separating Armed Elements from Refugees," UN Doc. EC/GC/01/5 (19 February 2001), (hereinafter Global Consultations), para. 4; *see also* General Assembly, Executive Committee of the High Commissioner's Programme, Notes on International Protection, paragraph 7, UN Doc. A/AC.96/975 (2 July 2003); Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2001/1331 (30 March 2001), para. 34; Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2002/1300 (26 November 2002); Security Council Resolution 1296 (2000), para. 14; Security Council Resolution 1265 (1999), paras 12, 17; Security Council Resolution 1208 (1998), paras 3-5.

[174] The human rights nature of the treaty can easily be deducted from paragraphs1 and 2 of the Preamble and from the several provisions which grant human rights to refugees.

[175] *See, e.g*., Articles 1F, 2, 9, 32 and 33 (paragraph 2).

[176] The Preamble starts with an express reference to both the Universal Declaration on Human Rights (UDHR) and the UN Charter.

The United Nations Declaration on Territorial Asylum[177] adopted unanimously by the General Assembly on 14 December 1967 recognized, in its Preamble, after a detailed reference to the purposes of the United Nations, that the grant of asylum is "a peaceful and humanitarian act and…, as such, cannot be regarded as unfriendly by another State." This Declaration is interesting not only because it reflects a consensus among States, but also because it uses a key adjective "friendly" which is borrowed from the UN Charter. It means that the granting of asylum does not benefit persons who are engaged in subversive or military activities. It also means that the grant of asylum to a foreign exile with a military agenda is unfriendly, thus in violation of the obligations under the UN Charter.[178]

The principle of asylum as a peaceful humanitarian and friendly act is a critical foundation of refugee protection. It is intrinsically related to the civilian nature of the asylum system. The separation of active armed elements is necessary to preserve the humanitarian and friendly nature of asylum.[179] While the issue of armed elements crossing an international border and falling into the responsibility of another State was not very significant at the adoption of the 1951 Refugee Convention, it was prominently on the agenda of the African States that negotiated the 1969 Organisation of African Unity (OAU) Convention. On the one hand, the latter turned out more generous, especially through the expansion of the refugee definition,[180] but on the other hand, it was much stringent and more conscious of the security aspects. These latter concerns were given due consideration in no less than four paragraphs of the Preamble:

> Recognizing the need for an essentially humanitarian approach towards solving the problem of refugees,
> Aware, however, that refugee problems are a source of friction among many Member States, and desirous of eliminating the source of such discord,
> Anxious to make a distinction between a refugee who seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside,
> Determined that the activities of such subversive elements should be discouraged, in accordance with the Declaration on the Problem of Subversion and Resolution on the Problem of Refugees adopted at Accra in 1965…[181]

This Preamble and some key provisions of the OAU Convention, especially Article 3, contain principles and rules which have since been endorsed universally:

- a foreigner with a military agenda in the host country does not qualify and is not eligible for refugee status;

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[177] UN General Assembly Resolution 2312 (XXII) (14 December 1967).

[178] This Declaration is a landmark in the cross-fertilisation between refugee law and the UN Charter.

[179] "State practice clearly prohibits the entry of refugees with unauthorized arms and the humanitarian character of refugee protection requires the demilitarisation of refugee camps and settlements, the prohibition of recruiting, arming and training in these and other places of refuge, as well as using these as springboards for mounting cross border attacks against other States." Beyani, *supra* note 86, at 258.

[180] Under Article 1, paragraph 2 of the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, of 10 September 1969, 1001 UNTS 45 (10 September 1969), the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

[181] *Id.* at Preamble, paras 2-5.

- military elements must be separated from genuine refugees;
- the host country must both prevent foreign armed elements from using its territory to attack another State and prevent genuine refugees from joining them; and
- the exclusively civilian and humanitarian character of asylum serves several purposes. It, *inter alia,* contributes to the reduction of potential tensions between the asylum country and the country of origin, provides refugees with a better protection, facilitates the identification and separation of armed elements and helps address the internal and external security concerns.

The issue of attacks on refugee camps and settlements has been regularly on the agenda of UNHCR's Executive Committee (ExCom) and has led to the adoption of several Conclusions.[182] In 1979 (Resolution 14 (XXX)), ExCom severely condemned "recent inhuman attacks on refugee camps in Southern Africa." The situation in the South-African region attracted heated interest from ExCom resulting in the adoption in 1987 of Conclusion No. 48 (XXXVIII) on Military or Armed Attacks on Refugee Camps and Settlements In 1981, ExCom invited UNHCR to "examine the serious humanitarian problems resulting from military attacks on refugee camps and settlements."[183] This Resolution led to the appointment of former UNHCR High Commissioner Felix Schnyder to undertake a survey of the various aspects of the problem.[184] On 15 March 1983, the Schnyder Report was released but not fully endorsed.[185] A number of conflicting views were expressed. Some were linked to concerns that although the refugee camps attacked by the South-African troops were militarized, the armed elements were struggling against a racist regime which had been condemned by the international community. The outgrowth of this process was a decision to continue discussion until an international consensus could be reached. Five years later in October 1987, Conclusion No. 48 (XXXVIII) was adopted.

That ExCom Conclusion was the product of protracted discussions in a politically loaded context. It represents the minimum to which the international community was ready to agree. Paragraph 3 of the Preamble states: "Predicating this Conclusion on the assumption, inter alia, that refugee camps and settlements have an exclusively civilian and humanitarian character and on the principle that the grant of asylum or refuge is a peaceful and humanitarian act that it is not to be regarded as unfriendly by another State;…." This wording is interesting in two respects. First, it clearly indicates that the "civilian and humanitarian character of asylum" has a double dimension: granting asylum is a friendly act in international relations and refugee settlements have an exclusive civilian character. Second, the civilian and humanitarian character of asylum is not seen as a specific rule but as an intrinsic part of the refugee protection regime, as one of the foundations upon which the regime is built. Undermining the principle leads to the collapse of the regime. This overarching principle entails concrete obligations for States. These obligations include:

1. upholding the civilian and humanitarian character of refugee camps and settlements;

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[182] *See*, in particular, Nos. 22 (XXXII), 27 (XXXIII), 32 (XXXIV), 45 (XXXVII) and 48 (XXXVIII); more recently Nos. 72 (XLIV), 77 (XLVI)(q), 82 (XLVIII)(d)(vii), 84 (b)(ii), 87 (q) and 94 (LIII).

[183] Conclusion 21 (XXXII)(h).

[184] The process which led to the adoption of ExCom Conclusion No. 48 (XXXVIII), including the Schnyder Report, has been well studied by M. Othman-Chande, *International Law and Armed Attacks in Refugee Camps*, 59 The Nordic Journal of International Law 153-177 (1990).

[185] The Schnyder Report was recently republished in 19 Refugee Survey Quarterly 114 (2000).

2. ensuring the security of refugee camps and settlements, in particular through locating them in secure locations and providing effective physical protection to refugees and asylum-seekers;
3. identifying and separating armed elements from refugee populations;
4. preventing all acts which may endanger the safety and stability of States.[186]

the adoption of Conclusion No. 48 (XXXVIII), this topic was not on ExCom's agenda for a few years. The genocide in Rwanda and the 1994-1996 Great Lake refugee crisis, during which armed elements who had been instrumental in the genocide were in control of refugee camps, was the saddest and most painful reminder that this issue was more topical than ever. Largely as lessons learned from the international community's failure in the Great Lakes, UNHCR prepared two mainly operational papers in 1999 and 2000 to be discussed by the Standing Committee.[187] One year later, in 2001, the separation of armed elements from refugees became one of the main issues to be discussed in the context of the UNHCR-initiated Global Consultations on International Protection.[188] The consensus on several standards which emerged during the ExCom/Global Consultations meeting of 8-9 March 2001 encouraged States and UNHCR to seek the adoption of an ExCom Conclusion, which would not only reiterate the general principles of Conclusion No. 48, including the primary responsibility of the host state, but also offer more specific guidance as to the manner in which the civilian character of refugee settlements could be maintained.
ExCom Conclusion No. 94 (LIII - 2002) on the Civilian and Humanitarian Character of Asylum is, in many respects, an encompassing document, which takes into account and incorporates the latest developments on the UN Charter, international humanitarian law and refugee law. It supports and reinforces, in particular, the approach adopted by both the Security Council and the UN Secretary-General in its Reports on the Protection of Civilians in Armed Conflicts. ExCom Conclusion No. 94 includes, *inter alia*, principles on the early identification, separation and internment of armed elements; security arrangements in refugee settlements; the protection of former child soldiers; the treatment of former fighters once they are separated; and the unacceptability of various forms of exploitation of refugee situations for the purpose of promoting military objectives.[189]

It also states that:

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[186] ExCom Conclusions Nos. 77 (XLVI)(q) and 87 (L)(q).
[187] Executive Committee of the High Commissioner's Programme, Standing Committee, 14th Meeting, "The Security, and Civilian and Humanitarian Character of Refugee Camps and Settlement," UN Doc. EC/49/SC/INF.2 (14 January 1999). 18th Meeting, "The Security, Civilian and Humanitarian Character of Refugee Camps and Settlements: Operationalizing the "Ladder of Options," (27 June 2000).
[188] Global Consultations on International Protection, "The Civilian Character of Asylum: Separating Armed Elements from Refugees," UN Doc. EC/GC/01/5 (19 February 2001), in 22 Refugee Survey Quarterly 62-69 (No. 2/3 2003).
[189] In ExCom Conclusion No.94, the Executive Committee recognizes the host States' "primary responsibility to ensure the civilian and humanitarian character of asylum…"; it also "urges refugee-hosting States to respect the civilian and humanitarian character of refugee camps by preventing their use for purposes which are incompatible with their civilian character" and "calls upon States to ensure that measures are taken to prevent the recruitment of refugees by government armed forces or organised armed groups….", *supra* note 83.

> Combatants[190]should not be considered as asylum-seekers until the authorities have established within a reasonable timeframe that they have genuinely and permanently renounced military activities…

Persons who had previously been armed elements are not precluded from seeking asylum or becoming refugees.[191] A reasonable amount of time needs to have elapsed to ensure that they have "genuinely and permanently renounced military activities."[192]

2. Internment under Article 9 of the 1951 Refugee Convention

Under Article 9 of the 1951 Refugee Convention:

> Nothing in this Convention shall prevent a Contracting State, in time of war or other grave exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measure is necessary in his case in the interests of national security.[193]

A question concerning this provision is whether it can serve as a legal basis for the internment of armed elements. One reason to believe that it can be a basis is the history of this provision. The United Kingdom, which proposed the provision, made express reference to the Second World War during which internment was used to screen genuine refugees from those persons whose presence on the territory of the host State was motivated by a politico-military agenda and were "masquerading as refugees."[194]

According to the main commentators on the drafting of the Convention, the sorts of "grave and exceptional circumstances" sufficient to trigger the application of Article 9 of the 1951 Refugee Convention included intermediate areas between war and national security, international crises calling for certain internal precautions, state of emergency, a state of

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[190] For the purpose of ExCom Conclusion No. 94, the term "combatant" is loosely and broadly defined as covering persons taking active part in hostilities in both international and non-international armed conflict who have entered a country of asylum. This wording is somehow unfortunate, as the concept of "combatant" is only used in the context of international armed conflicts. It would have been more appropriate to use "combatants" for military persons fleeing an international armed conflict and "armed elements" for those fleeing a non-international armed conflict.

[191] As stated in Chairman's Summary of the first meeting of the UNHCR Global Consultation's third track, there is a "[r]ecognition of the right of former combatants to seek asylum…" Chairman's Summary, "Global Consultations: Protection of Refugees in Situations of Mass Influx" (9 March 2001) in 22 Refugee Survey Quarterly 84, 87 (No. 2/3 2003). In addition, "[p]ersons with a past military background have the right to seek asylum: before considering their asylum applications, a reasonable amount of time should be allowed to elapse to ascertain that they have assuredly disavowed violence." Global Consultations on International Protection, 2nd Meeting, *UNHCR Regional Symposium on Maintaining the Civilian and Humanitarian Character of Asylum Refugee Status, Camps and Other Locations*, 26-27 February 2001, Pretoria, UN Doc. EG/GC/01/9 (30 May 2001), in 22 Refugee Survey Quarterly 313 at 314 (No. 2/3 2003).

[192] ExCom Conclusion No. 94, *supra* note 83.

[193] 1951 Refugee Convention, *supra* note 7.

[194] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*, (1963), republished by UNHCR, 44 (1997).

neutrality in a conflict, existence or threat of civil war.[195] On the basis of the Travaux Prépratoires, the main measure envisaged by Article 9 was internment and the latter was meant to have a "screening out, screening in" purpose.[196] Thus, a State bordering a country in the middle of a civil war, affected by mixed flows of refugees and armed elements, would be entitled to invoke Article 9 of the 1951 Refugee Convention because such a situation conceivably constitutes a threat to international peace and security that would qualify under "other and grave circumstances."

To be considered as "essential in the interest of national security," the measure must address a threat to "sovereignty, independence, territorial integrity, constitution, governmental, external peace, war potential, armed forces or military installations."[197] This is clearly the case when foreign armed elements are willing to use the territory of the host State to wage attacks against their country of origin.

Article 9 contains other conditions that limit its application. First, it cannot be applied to the entire refugee population, but only against persons with a certain profile. This can be deducted from the expression "any person," which rules out "large scale measures."[198] Second, provisional measures may only be applied when there is some reason to believe that certain persons are a threat to national security. Suspicion supported by objective elements may provide a sufficient basis[199] because a State confronted with an emergency may not be able to make an immediate distinction between a person who will be determined to be a refugee and a person who does not qualify for refugee status.[200]

Internment, as provided for by Article 9 of the 1951 Refugee Convention, serves the double purpose of addressing the serious security concerns of the host State (which cannot take the risk of letting at liberty foreign exiles with a military agenda) and the human rights of the genuine refugees. Internment of the latter shall cease as soon as they have been determined to satisfy the three conditions for being a refugee.[201] The word "pending" clearly stresses the provisional character of the measures envisaged in Article 9.

As part of the internment, human rights requirements must also be included. These human rights provisions clarify and define the conditions of the internment.[202] It is agreed that

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[195] *Id.* at 43; Nehemiah Robinson, *Convention relating to the Status of Refugees. Its History, Contents and Interpretation*, Institute of Jewish Affairs/World Jewish Congress, (1953), reprinted by UNHCR, 80 (1997).
[196] *Id.* at 79.
[197] Grahl-Madsen, *supra* note 195, at 44.
[198] *Id* at 45.
[199] *Id*.
[200] Robinson, *supr*a note 196, at 79.
[201] The criteria are genuinely laid down arms, meet inclusion criteria under Article 1A and do not fall under the exclusion clauses of Article 1F. Internment could also cease after there has been a determination that the person has genuinely and permanently renounced military activities. The person could then be released from internment and released to a refugee camp or settlement while awaiting the individualized refugee status determination.
[202] For example, on the restrictions on freedom of movement, relevant provisions include Article 13(1) of the Universal Declaration of Human Rights, Un Doc. General Assembly Resolution 217 A(III) (10 December 1948); Article 12(1) of the International Covenant on Civil and Political Rights (ICCPR), UN Doc. General Assembly Resolution 2200 A(XXI) (16 December 1966); Article 12(1) of the African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 n (27 June 1981); Article 22(1) of the American Convention on Human Rights, OAS Treaty Series,

internment is a restriction on at least one of the human rights, i.e. freedom of movement. As such, it must be based on law and be proportionate to the protection of national or international security. In the case of the presence of armed elements among refugees, there are numerous possible consequences, including the internationalisation of the conflict, control of part of the territory by foreign exiles, human rights abuses against both refugees and nationals. Internment, even if it affects genuine refugees, is not disproportionate as long as it is temporary, the internment conditions are humane and that the principle of non-refoulement is upheld.

Article 9 authorizes the continuance of security measures, even after the person gains refugee status when such continuance is "necessary … in the interest of national security." The wording places great responsibility on the discretion of the host State[203] but also indicates that genuine refugees may also be interned when they pose a serious threat to the asylum country.

In summary, Article 9 of the 1951 Refugee Convention authorizes States, which are bordering a country in the middle of a civil war and which are affected by a mass influx of populations comprising both refugees and foreign armed elements, to intern the latter. The decision to intern can be based on suspicion if there is objective support. It normally affects persons who *prima facie* share certain characteristics, including persons who might be determined to be refugees after a careful investigation. In case of doubt, given the interests at stake,[204] the persons concerned should be interned on a provisional basis, pending a determination of her/his refugee status. Internment shall cease as soon as the person is found to be a refugee.[205]
As discussed in Section IV (F)(1), this interpretation is supported by UNHCR EXCOM Conclusion No. 94 which also contemplates the separation and interment of armed elements.

No.36 (11 December 1969); Article 2(1) of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (16 September 1963). The right to freedom of movement of refugees lawfully in the host country, subject to any regulations applicable to aliens generally in the same circumstances, is also provided for in Article 26 of the 1951 Refugee Convention.
For conditions in which deprivation of liberty may be lawful, relevant provisions include Article 9 of the Universal Declaration of Human Rights; Article 9(1) of the ICCPR; Article 6 of the African Charter of Human and Peoples' Rights; Article 7(1)-(3) of the American Convention on Human Rights; Article 5(1) of the ECHR.

[203] Grahl-Madsen, *supra* note 195, at 46.

[204] It is agreed that internment is a restriction on at least one of the human rights, i.e. freedom of movement. As such, it must be based on law and be proportionate to the protection of national or international security. In our case, the presence of armed elements among refugees has, as we have seen, numerous possible consequences, including the internationalisation of the conflict, control of part of the territory by foreign exiles, human rights abuses against both refugees and nationals. Internment, even if it affects genuine refugees, is not disproportionate, as long as it is temporary for the latter, the internment conditions are humane and that the principle of non-refoulement is upheld.

[205] Internment could also cease after there has been a determination that the person has genuinely and permanently renounced military activities. *See* n. 202, *supra*.

3. Mass influx situations and respect for the principle of non-refoulement at all times

Refugee law emphasizes that in situations of mass influx, the first priority is to provide protection to those in flight. In such cases, according to ExCom,[206] separation should not be implemented at the border so as to hinder the admission of those in the mass influx.[207] Instead the movement of the entire population within the host country can be restricted for security reasons until such time as armed elements can be identified and separated from the civilian population.[208]

While internment can be ordered on the basis of suspicion with some objective criteria, different criteria should be applied as regards admission or non-admission to the territory of a safe country. Admission can never be denied on the basis of suspicion, especially in a mass-influx context during which a State does not have the means and resources to fairly screen people at the border. In fact, admission shall be secured in all instances, but may be made conditional upon disarmament and separation of armed elements and persons suspected of military activities.

The difference between internment and non-admission mainly lies in the respective consequences of applying each measure. The consequence of internment is a temporary restriction on the freedom of movement and deprivation of liberty of genuine refugees (as internment is provisional for the latter), while the consequence of non-admission may be return to persecution (including torture and death) for genuine refugees. Considering that admission of persons suspected of having a military agenda is coupled with their internment, non-admission would then clearly be disproportionate to the protection of national and international security, especially since internment addresses the State's security concerns. States must at all times respect the principle of *non-refoulement*.[209]

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[206] Executive Committee Conclusion No.22 (XXXII 1981), Protection of Asylum Seekers in Situations of Large-Scale Influx.

[207] Asylum seekers in mass influx situations should be admitted into the country to which they seek admission and should not be rejected at the border; they also should not be forced to return. See Beyani, *supra* note 86.

[208] *Id*. at 255.

[209] *See* Section III (B)(5), *supra*.

IV. CONCLUSIONS

It took 51 years for the international community, since the adoption of the 1951 Refugee Convention, to arrive at a clear and unambiguous response to the question which is at the core of this paper. ExCom Conclusion No. 94 of 8 October 2002 on the Civilian and Humanitarian Character of Asylum states uncompromisingly that "combatants should not be considered as asylum-seekers until the authorities have established within a reasonable timeframe that they have genuinely and permanently renounced military activities…"

This rather long and tortuous standard-setting process is interesting as the answer was already contained in Article 2 paragraph 4 of the United Charter, which was agreed upon in 1946. The 1951 Refugee Convention itself, through Preamble (paragraph 5) and Article 9, was also indicating the appropriate direction. Since then, a number of visible landmarks have been strategically placed, including the UNGA Declaration on Territorial Asylum (1967), the UNGA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), the 1969 OAU Refugee Convention and ExCom Conclusion No. 48 (1987). What apparently prevented the international community from reaching a clear understanding was sheer political considerations, as many States considered they had, for good (for example, in the case of the racist South African regime) or bad reasons, a vested interest to offer shelter and support to "guerrilla" movements.

The increasing concern of the Security Council in the early 1990's that such support was detrimental to international peace and security and the collective failure of the international community during and immediately after the genocide in Rwanda gave the final push and forced policy makers and lawyers to join forces. The UN Charter and international humanitarian law, which had been traditionally promoted through different vehicles, were, along with international refugee law, put to a better use and more importantly were implemented and interpreted in a spirit of convergence and creative interface.

We are now at a crossroad for the international community. In the absence of political will to implement them, clear standards are almost meaningless. Separating and interning armed elements require human and financial resources as well as political courage. Most countries of first asylum are poorly equipped and need the political and economic support of richer and more powerful States. Will that support be forthcoming? Let's hope that it will not take another 51 years to translate good law into good practice.

APPENDIX

COMPARATIVE CHART, INCLUDING STATUS AND DUTIES OF THE STATE FOR INTERNATIONAL CONFLICTS AND NON-INTERNATIONAL CONFLICTS

International Conflict

	Status	State Duties	Future	Miscellaneous
Combatant—captured by enemy state	Prisoner of war (3rd Geneva Convention)	If not seriously sick or injured, then interned and given protective status until cessation of hostilities (3rd Geneva Convention) In principle, sick or injured POW are repatriated as soon as possible (throughout the hostilities), but no sick or injured POW may be repatriated against his/her will during the hostilities (Article 109, 3rd Geneva Convention)	Released at end of hostilities and given option of repatriation or apply for asylum	ICRC mandate to provide protection and assistance to POW
Combatant—captured by neutral state	Strictly speaking, not a prisoner of war since not captured by enemy state but is treated as prisoner of war, 3rd Geneva Convention, Article 4(B)(2)	State obligation to intern; in principle lasts till end of hostilities	Released at end of hostilities and option to apply for asylum; exception that internment can end before end of hostilities if person assessed as deserter, or unequivocally	ICRC mandate to provide protection and assistance to internees on territory of a neutral power

	(can be given "more favourable treatment")		laid down arms	

Internal Conflict[210]

	Status	State Duties	Future	Miscellaneous
Armed Element—captured by own state[211]	Treated as persons who have violated the law of the country	Persons protected by Articles 5-7 of Protocol II[212]		
Armed Element—captured by a third state		Disarm, separate and intern[213] Posit that Article 11 of 5th Hague Convention should apply Can also use Article 9 of 1951 Refugee Convention as a legal basis for internment	After period of time, assess for genuineness of cessation of armed activities; if genuinely laid down arms, then individualized refugee status determination (meet criteria under Article IA of 1951 Refugee Convention and then not excludable under Article IF)	

[210] Rights are not linked to status, as they are in international conflicts, but to the fact that a person is affected or victimized by the conflict.
[211] Persons captured by own state and who have not crossed an international border have no interface with refugee law.
[212] These Articles offer protection to any person, regardless of status.
[213] Source is from convergent application of Article 11 of 5th Hague Convention, Article 9 of 1951 Refugee Convention and Article 2 paragraph 4 of the UN Charter.