

Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law

Arusha, Tanzania, 11-13 April 2011

Summary Conclusions

The Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Criminal Tribunal for Rwanda (ICTR) organized an expert meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, which was held in Arusha, Tanzania, from 11 to 13 April 2011.

The discussion was informed by a number of research papers.¹ Participants included 34 experts from 24 countries, drawn from governments, NGOs, academia and international organizations. Among those attending were delegates from the Office of the High Commissioner for Human Rights (OHCHR), the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Committee of the Red Cross (ICRC), the Special Tribunal for Lebanon and the African Court of Human and Peoples' Rights. The roundtable is one in a series of events organized to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness.²

The following Summary Conclusions do not necessarily represent the individual views of participants, of UNHCR or of ICTR, but reflect broadly the themes, issues and understandings emerging from the discussion.

Fragmentation of International Law and the Rise of Specific International Legal Regimes

1. International refugee law, international humanitarian law, international criminal law and international human rights law should be interpreted in light of general rules of international law.
2. There is no hierarchical relationship between these strands of international law. They are, however, interconnected.
3. The simultaneous application of different legal regimes has raised particular issues in terms of fragmentation and specialization, but situations of normative conflict should not be exaggerated. Normative differences not only exist between distinct international legal regimes but also within each of these regimes.
4. Harmonization is not an objective in and of itself; the overriding concern should be clarity on the ordinary meaning of the provision at hand guided by the object and

¹ See G. Acquaviva, "International Criminal Law and Forced Displacement"; J. Rikhof, "Exclusion at a Crossroads: The Interplay between International Criminal Law and Refugee Law in the Area of Extended Liability", published in the Protection Policy and Legal Research Series, available at: <http://www.unhcr.org/pages/4d22f95f6.html> and at: <http://www.unhcr.org/pages/4a16b17a6.html>.

² For more information and documentation on the events relating to the commemorations see, www.unhcr.org/commemorations.

purpose of each regime or instrument, or the particular norm in question. Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the notion of “systemic integration” are the main tools of treaty interpretation which are important in the resolution of normative conflict.³

5. The relationship between international, regional and national laws and the role of domestic and regional law and institutions are other dimensions to take into account in the process of interpreting and applying international norms.

Forced Displacement, Deportation and Forcible Transfer

6. There is strong interaction between international refugee law, international human rights law, international humanitarian law and international criminal law as regards forced displacement. Relevant provisions of these branches of law establish a prohibition on arbitrary displacement under international law.⁴

7. Forced displacement is not a new phenomenon; the slave trade remains one of the more tragic examples of forced displacement carried out on a large scale.

8. The focus of the roundtable discussion revolved around the specific crimes of deportation and forcible transfer as defined under international humanitarian law and international criminal law.

9. Deportation and forcible displacement are both war crimes and crimes against humanity.⁵ In ICTY jurisprudence, deportation is understood to involve forced movement across a state or *de facto* state border, while forcible transfer takes place within state boundaries.⁶

10. The concept of “ethnic cleansing”,⁷ while not an international crime as such, encompasses a cluster of crimes, including deportation and forcible transfer.

11. In international jurisprudence, a shared element in both crimes is a lack of genuine choice. Action intended to raise fear among the targeted population and resulting in their flight (e.g., shelling, bombing, destruction of property) has been considered evidence of a lack of genuine choice.⁸ It would be worth considering whether large refugee outflows or situations of large-scale internal displacement could be evidence of a lack of genuine choice for the purpose of establishing the crime of deportation or forcible transfer.

³ International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, Report of the Study Group of International Law Commission finalized by Marti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 415.

⁴ See e.g. Art. 13 of the Universal Declaration of Human Rights; Art. 12 of the 1966 International Covenant on Civil and Political Rights; Principle 6.1 of the Guiding Principles on Internal Displacement; and Art. 49 of the Geneva Convention (III).

⁵ See, on international humanitarian law and war crimes, Art. 147 of the Geneva Convention (IV); Art. 17 of the Additional Protocol II; Art. 2 of the ICTY Statute; Art. 8(2)(e)(viii) of the ICC Statute; see also, on crimes against humanity, Art. 3 of the ICTR Statute; Art. 5 of the ICTY Statute; and Art. 7 of the ICC Statute.

⁶ *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 278 (*‘Stakić Appeals Judgment’*).

⁷ Ethnic cleansing is defined as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas”. Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), para.130.

⁸ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, 17 September 2003, paras. 229, 233; *Stakić Appeals Judgement*, para. 281.

12. The definitions of both deportation and forcible transfer under international criminal law refer to the “lawful presence” of the population. This should not be interpreted in an overly strict manner; rather, lawful residence is usually assumed based on *de facto* residence in a specific area, including for populations displaced to that area.

Persecution

13. Many of the same acts are considered persecution under both international criminal law and international refugee law; international human rights law has been used at times by both branches of law to define “persecution”, albeit to differing degrees. That said, there are also important distinctions in the ways in which the concept has been applied and interpreted under each legal regime. In particular, the differing purposes of each branch of law need to be borne in mind.

14. Persecution is only one element in the 1951 Convention refugee definition and is part of an assessment as to whether an individual is in need of international protection from prospective harm. The refugee definition requires that the fear of being persecuted be linked to one or more of the Convention grounds, namely race, religion, nationality, membership of a particular social group or political opinion. Moreover, in refugee claims based on the persecutory conduct of non-state actors, status is granted on the basis of the state’s inability or unwillingness to protect; no specific discriminatory intent is required.

15. Meanwhile, international criminal courts and tribunals must concern themselves with prosecution of harm committed in the past and for the purposes of criminal prosecution. The additional elements to establish the crime of persecution as a crime against humanity under international criminal law - primarily the requirements of discriminatory intent and that the crime be part of a widespread or systematic attack against a civilian population – are not required for a finding that a particular kind of harm amounts to persecution under international refugee law. Such an interpretation would undermine the international protection objectives of the 1951 Refugee Convention, as this could be construed as meaning that persons would fall outside the Convention definition even if they nonetheless face serious threats to their life or freedoms, broadly defined.

16. The *actus reus* of persecution under international criminal law requires that the act(s) constitutes discrimination *in fact* violating fundamental human rights and that its consequences for the victims be at least as serious as the effects of other crimes. However, certain human rights violations have been found to meet the threshold for persecution as a crime against humanity even if they do not as such constitute international crimes, including: denial of freedom of movement, denial of employment, denial of access to the judicial process, denial of equal access to public services, and hate speech.

17. While international refugee law developed at first in relative isolation from international human rights law, the latter has been a helpful guide to establishing persecution in some cases. The existence of a serious human rights violation (e.g., torture) is not necessary, however. This is because not all forms of violence or harm have yet been codified in binding human rights treaties.

18. Human rights violations, other kinds of serious harm, or other measures, though not in and of themselves amounting to persecution, can meet the threshold of seriousness required to constitute persecution through accumulation. Furthermore, a series of non-persecutory acts can collectively provide evidence of a well-founded fear of being persecuted in the future.

19. Although persecution in international refugee law must be interpreted and understood in connection with the other elements of the refugee definition in Article

1(A)(2) of the 1951 Refugee Convention, persecution is a concept in its own right and should not be conflated with the notion of surrogacy or the absence or failure of state protection.

20. As a basis for refugee status under the 1951 Convention, discrimination has been a central feature of claims relating to gender-related persecution, not least by the link to one or more of the Convention grounds, which are proscribed forms of discrimination. It is well accepted that gender-related forms of persecution fall within the 1951 Convention, and that “gender” can properly be within the ambit of the “social group” category. Forms of gender-related violence can also take the form of political or religious acts, even when committed by non-state actors. Notions of equality should be contextualised, relying on analyses of disadvantage, power, hierarchy, or deprivations of rights, rather than the strict comparator-based discrimination approach.

21. Despite these foundational differences between international criminal law and international refugee law, findings of fact by judges in one of these areas of international law may establish a pattern of evidence, which can be relevant in the other.

Armed Conflict and International Protection

22. There is convergence between international humanitarian law and international criminal law as regards the definition of “armed conflict”. There is broad agreement that for an armed conflict to exist, there must be resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. Indicia to ascertain the level of organization of an armed group include, inter alia, the existence of a command structure; logistical capacity; capacity to implement international humanitarian law; and whether the group can speak with a single voice.

23. From the perspective of international refugee law, the determination of the existence of an armed conflict can have important implications. It is particularly relevant when considering the application of the exclusion clauses in Article 1F(a) of the 1951 Convention, as acts which take place in connection with an armed conflict would need to be assessed under relevant provisions of international humanitarian law and/or international criminal law with a view to determining whether they fall within the category of war crime provided under Article 1F(a).

24. While there is jurisprudence relying on international humanitarian law to interpret Article 15(c) of the EU Qualification Directive, international humanitarian law should be regarded as informative rather than determinative and its relevance should not be overstated. There are situations that may not meet the threshold of armed conflict, yet persons displaced by those situations should nonetheless receive some form of complementary protection. The 1969 OAU Convention and the 1984 Cartagena Declaration have in fact extended, in the regions where they apply, the refugee definition to include flight from aggression, conflict, situations seriously disturbing public order, generalized violence and massive human rights violations. What should be determinative in providing protection is the need for protection, not the legal qualification of the conflict that generates that need.

25. It is however often wrongly assumed that “war refugees” or those fleeing armed conflict are outside the scope of the 1951 Convention. In fact, many modern conflicts are characterized by targeted violence against particular ethnic, racial or religious groups. A full assessment of the applicability of the 1951 Convention criteria must be undertaken before granting complementary forms of protection, which are often associated with fewer rights.

Civilians

26. International humanitarian law considers those who are not members of state armed forces, or of organized armed groups that are a party to the conflict, as “civilians”. Civilians lose their protection as such under international humanitarian law if they directly participate in hostilities. Different approaches have been adopted to identify when civilians are taking a direct part in hostilities, including personal characteristics (e.g. activity; weapons; clothing; age; gender); the specific acts carried out; or a framework approach, which encompasses consideration of specific acts as well as membership and participation in an armed group. None of these approaches has proven fully satisfactory however, and a mix of different criteria might in fact prove more appropriate.

27. Conflict often leads to mixed movements of populations, comprising not only refugees and other civilians, but also armed elements seeking sanctuary in neighbouring countries. UNHCR’s international protection mandate is civilian and humanitarian in character, and combatants and other armed elements⁹ are not entitled to protection or assistance from UNHCR. Maintaining the civilian and humanitarian character of asylum, in particular through the separation of civilians from combatants, is critical in this regard.

28. The presence of armed elements raises many protection risks for asylum-seekers, refugees, returnees, internally displaced persons and/or stateless persons. These include the diversion of humanitarian aid to armed elements; the targeting of camps by parties to the conflict; the risk of *refoulement* by host states who perceive camps as supporting opposition forces; a breakdown of law and order; and military recruitment, including of children.

29. To maintain the civilian and humanitarian character of asylum persons engaged in armed activities should be separated from refugees and interned in accordance with international humanitarian law standards. Such persons should be denied access to the refugee status determination process, until it is established that they have permanently and genuinely renounced military activities.

30. In determining whether an individual has permanently and genuinely renounced military activities such that access to the refugee status determination process can be granted, the criteria identified in international humanitarian law for determining who is and is not a civilian, explained at paragraph 25, may be of assistance.

31. Once access to refugee status determination is viable, past involvement in combat is not per se a sufficient basis to exclude an individual from refugee status. A thorough exclusion assessment is, however, necessary in such cases in order to determine whether

⁹ For the purposes of ensuring the civilian and humanitarian character of asylum, the emphasis must be on identifying all individuals who, because of their involvement with armed activities, pose a threat to refugees, and for that reason need to be separated. UNHCR’s “Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum”, September 2006, p. 17, available at: <http://www.unhcr.org/refworld/pdfid/452b9bca2.pdf>, use the following non-technical terminology, which is different from that applied under international humanitarian law: “[T]he term ‘combatant’ is applied to any member, man or woman, of regular armed forces or an irregular armed group, or someone who has been participating actively in military activities and hostilities, or has undertaken activities to recruit or train military personnel, or has been in a command or decision-making position in an armed organization, regular or irregular, and who find themselves in a host State”. “Armed elements” are defined as “all individuals carrying weapons, who may be either combatants or civilians, [which] is intended to include civilians who may happen to be carrying weapons for reasons of self-defence or reasons unrelated to any military activities (for example hunting rifles, defensive weapons)”. See, also, Executive Committee of the High Commissioner’s Programme, Conclusion No. 94 (2002) on the civilian and humanitarian character of asylum.

there are serious reasons for considering that the person concerned has committed a crime within the scope of Article 1F of the 1951 Refugee Convention.

32. Additional categories of persons, such as political leaders involved with armed groups, do not fit neatly into existing classifications of “armed elements” as used in international refugee law, yet their role and activities may also impact on refugee protection, security and camp management. Screening and identification procedures should be in place at the beginning of a refugee exodus, to ensure that any possible exclusion grounds are assessed and to otherwise preserve the civilian and humanitarian character of asylum and the integrity of the system as a whole.

Exclusion from international refugee protection

33. Article 1F of the 1951 Refugee Convention excludes from international refugee protection persons who otherwise meet the “inclusion” criteria of the refugee definition in Article 1(A)(2), but with respect to whom there are serious reasons for considering that they have committed certain serious crimes or heinous acts.¹⁰ This provision was included in the 1951 Refugee Convention (i) because persons responsible for these crimes or acts were deemed undeserving of international refugee protection, and (ii) to ensure that persons fleeing prosecution rather than persecution should not be able to hide behind the institution of asylum in order to escape justice.

34. For exclusion to be justified, it must be established, on the basis of clear and reliable evidence, that the person concerned incurred individual responsibility for acts which fall within one of the three categories under Article 1F of the 1951 Convention.

35. Article 1F(a) refers to crimes against peace, war crimes and crimes against humanity “as defined in the international instruments drawn up to make provision in respect of crimes”. There is thus a direct link between the exclusion grounds in the 1951 Refugee Convention and other areas of international law. The interpretation and application of Article 1F(b) and (c) are also informed by international standards.

36. When assessing the applicability of exclusion from international refugee protection, asylum adjudicators often turn to international criminal law, international humanitarian law, international human rights law as well as general international law, both with regard to the definitions of the kinds of conduct which fall within the scope of Article 1F and the determination of individual responsibility. This is reflected in national jurisprudence as well as UNHCR’s guidance on exclusion from international refugee protection.¹¹

¹⁰ Article 1F of the 1951 Convention reads: “The provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

¹¹ UNHCR, “Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, 4 September 2003, HCR/GIP/03/05, available at: <http://www.unhcr.org/refworld/docid/3f5857684.html>.

Exclusion and the International Criminal Process: Indictments and Acquittals

37. Although asylum adjudicators considering exclusion must apply concepts developed in criminal law, there are important differences between an exclusion assessment and a criminal trial. The former is concerned with the person's eligibility for international refugee protection, rather than his or her innocence or guilt for a particular criminal act.

38. Falling within Article 1F means that an individual does not qualify for refugee status and is, therefore, also not within the mandate of UNHCR. Most significantly, it means that he or she does not benefit from protection against *refoulement* under international refugee law. Exclusion from international refugee protection does not, however, affect the excluded person's entitlement to protection, including against *refoulement*, under relevant international human rights law provisions, where applicable, nor does it in any way detract from the universally recognized principle of presumption of innocence in criminal proceedings.

39. Where criminal proceedings for international crimes or other serious crimes are pursued against an asylum-seeker or a refugee, the significance of the indictment and any subsequent acquittal on exclusion from international refugee protection needs to be examined in light of all relevant circumstances.

40. At the level of national courts, whether or not an indictment, or for that matter, a conviction, is sufficient to meet the "serious reasons for considering" threshold required under Article 1F must be assessed on a case by case basis, taking into consideration all relevant factors, including the possibility that criminal prosecution may be a form of persecution. Similarly, in considering whether an acquittal by a national court would establish that there are no "serious reasons for considering" that the individual concerned is excludable, adjudicators would need to examine the grounds for acquittal as well as any other relevant circumstances.

41. An indictment by an international criminal tribunal or court is, on the other hand, generally considered to meet the "serious reasons for considering" standard required under Article 1F of the 1951 Convention. If the person concerned is subsequently acquitted on substantive (rather than procedural) grounds, following an examination of the evidence supporting the charges, the indictment can no longer be relied upon to support a finding of "serious reasons for considering" that the person has committed the crimes for which he or she was charged.

42. An acquittal by an international criminal tribunal or court does not mean, however, that the person concerned automatically qualifies for international refugee protection. It would still need to be established that he or she has a well-founded fear of being persecuted linked to a 1951 Convention ground. Moreover, exclusion may still apply, for example, in relation to crimes not covered by the original indictment.

43. Procedurally, if the asylum determination was suspended pending the outcome of the criminal proceedings, it can be resumed following the acquittal. Likewise, where the person was previously excluded on the basis of the indictment, the acquittal should be considered as a sufficient reason to reopen the asylum determination. If the indictment had been used to cancel or revoke previously granted refugee status, a reinstatement of refugee status may be called for.

44. UNHCR's current guidelines on the interpretation and application of the exclusion clauses under Article 1F of the 1951 Refugee Convention do not expressly address the situation where an individual indicted by an international criminal tribunal or court is subsequently acquitted. The forthcoming revised guidelines will provide clarification on this issue.

45. In practical terms, the question of the relocation of acquitted persons who are unable to return to their country of origin due to threats of death, torture or other serious harm is

a real one. The problem of such relocation of persons is not easy to resolve and this problem is expected to persist beyond the existence of the ICTR and to arise in the future for other international criminal institutions and, in particular, the ICC. At present, three out of eight individuals who have been acquitted by final judgment before the ICTR have been unable to find countries willing to accept them. It was agreed that durable solutions need to be found for those acquitted by an international criminal tribunal or court and who are unable to return to their country of origin. Indeed, this is a fundamental expression of the rule of law and essential feature of the international criminal justice system. Concern was accordingly expressed about the consequences of failing to find such solutions.

46. The responsibility for resolving this problem does not lie with UNHCR, ICRC or OHCHR, none of which are in a position to implement a solution for the persons concerned without the consent of states. Rather, the question has to be addressed by Member States of the United Nations as part of their cooperation with and support to international criminal institutions, possibly through the establishment of a mechanism to deal with such cases, which fully respects international refugee, humanitarian and human rights law.

47. ICTR, ICTY, UNHCR and OHCHR agreed to embark on a joint advocacy strategy with the aim of sensitizing the UN Security Council and Member States to, and finding a sustainable solution for, the plight of acquitted persons.

Exclusion and Individual Criminal Responsibility

48. Exclusion under Article 1F of the 1951 Convention requires a determination that the person concerned has incurred individual responsibility for a crime within the scope of that provision, either directly as perpetrator or through his or her participation in the commission of crimes by others. The statutes of international criminal tribunals or courts and in particular, of the ICC, provide appropriate criteria for the determination of individual responsibility in an exclusion context. In applying the relevant concepts, states and UNHCR can find useful guidance in the jurisprudence of international criminal tribunals and the ICC.

49. International jurisprudence provides guidance on the criteria for establishing individual responsibility in those cases where the commission of a crime is brought about by two or more persons, and in particular, the different forms of joint criminal enterprise (JCE). The notions of JCE I, II and III were developed primarily by the ICTY in a manner independent of domestic law, in recognition of the collective nature of the commission of the most serious crimes and the need to punish those most responsible for international crimes. By contrast, the criteria for aiding and abetting, as interpreted and applied by both the ICTY and the ICTR, are more closely related to the ways in which individual responsibility is established at national levels for persons who make a substantial contribution to the commission of crimes by others.

50. The first pronouncements of the ICC on issues of individual responsibility indicate a shift away from joint criminal enterprise towards greater reliance on concepts such as co-perpetration or indirect perpetration of international crimes, although it is not yet fully clear to what extent the ICC's criteria for determining the responsibility, especially of persons in positions of authority as well as those contributing to the commission of the acts in various other ways, are different from those developed and applied by the ICTY and ICTR. Further analysis will be needed.

51. At the national level, the notions of extended liability have been, until recently, developed in an autonomous fashion, without regard to international criminal law, although the elements of some of the concepts used, such as "personal and knowing participation" or "common purpose", have a close resemblance to their international counterparts. There are some recent examples of exclusion decisions by courts in which

individual responsibility was considered with express reference to the criteria developed by the ICTY for establishing liability on the basis of a JCE, although there seems to have been a certain degree of confusion as to the criteria applicable to the different forms of JCE. Both in state practice and in the experience of UNHCR, one can sometimes observe a tendency to apply the more complex criteria of JCE when on the facts of the case the concepts of aiding and abetting or common purpose would be more appropriate.

Evidence and Witnesses

52. In refugee status determination procedures, evidence will be considered and assessed in light of its relevance and reliability. Refugee status determination must necessarily maintain a flexible yet fair approach given its protection purpose. Evidentiary standards of international criminal law, which might preclude or restrict the consideration of certain evidence, should therefore not be imported into refugee status determination procedures.

53. Evidence gathered and produced in connection with international criminal proceedings or human rights cases may be pertinent in specific asylum cases and any evidence obtained from criminal proceedings should be considered to the extent relevant as any other information.

54. However, as international criminal proceedings can take several years to be completed, and as the test for refugee status is prospective in orientation, the extent to which evidence from international trials can be relied on may be limited. Should evidence obtained raise questions about the correctness of an earlier grant of refugee status, it may provide a sufficient basis for cancellation proceedings.

55. Evidence secured in criminal proceedings might be particularly useful, however, both in establishing general country conditions in the country of feared persecution at a time relevant to the application for refugee status, and in confirming the occurrence of specific events. In particular, the establishment of international criminal tribunals or courts, the referrals of particular situations to the ICC by the Security Council or by a state party, or an action *proprio motu* by the Prosecutor, provides strong indications that serious violations of human rights and/or other international crimes have occurred or are ongoing.

56. The involvement of refugees and other displaced persons in criminal justice processes can play an important role in reconciliation, reconstruction and the search for durable solutions. International criminal institutions must engage with victims, witnesses and others in such way as to minimize the impact this may have on their safety and security and that of the broader community.

57. Responsibility for witness and victim protection rests primarily with the international criminal justice system and with states parties to the relevant international criminal law instruments. UNHCR's refugee status determination and resettlement channels cannot therefore be relied on as a surrogate witness protection system. There may however be linkages to international refugee law and asylum systems in specific cases.

58. Sharing of information by criminal law institutions should be governed by principles of confidentiality and privacy.

UNHCR
July 2011