CHAPTER 6

Inclusion of Refugees from Armed Conflict

Combatants and Ex-combatants

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This chapter suggests that the time has come to elaborate the process by which consideration of the body of international legal standards applicable to armed conflict, international humanitarian law (IHL), influences understanding of the scope of Article 1A(2) of the 1951 Convention relating to the Status of Refugees (Refugee Convention) in some cases. The underlying justification for this can be described as follows:

i. Armed conflict is a continuing part of the human condition. The *lex specialis* expressing normative standards applicable to armed conflict under international law is IHL. If applicable, IHL often operates in parallel to international human rights law (IHRL), and it may also operate indirectly through IHRL as an interpretative tool in relation to IHRL standards. The best theoretical approach to the relationship of IHL and IHRL is that where preconditions for the operation of both are met, they are in general ‘though separate and non-overlapping...nonetheless complementary’;

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2 This chapter, focusing on three specified categories of claim and employing these to examine the effect of applying IHL as a *lex specialis*, of aid in the interpretation of IHRL standards in ascertaining the protective ambit of the Refugee Convention, shows the application to these categories of the broader conclusions I have set out set out in a separate but closely linked paper, ‘International Humanitarian Law and the Interpretation of “Persecution” in Article 1A2 CSR51’, incorporating work done as a foundation for this chapter, which is to be published by the International Journal of Refugee Law.

ii. The term ‘persecution’ at Article 1A(2) was minimally defined by those who created the 1951 Refugee Convention. In the absence of internal definition the dominant modern interpretation, advanced by James Hathaway, determines whether persecution arises by reference to IHRL, in particular defining persecution via the breach of ‘certain basic rights…which all states are bound to respect as a minimum condition of legitimacy’. On this approach ‘persecution is most appropriately defined as the sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community’. That approach to Article 1A(2) should not be regarded as entirely closed or inflexible, and is not inconsistent with IHL standards being relevant as a tool for the elucidation of IHRL-based standards;

iii. Storey and Wallace have clearly identified the degree to which realising the protective scope of the Refugee Convention may require a proper assessment of the relevance of IHL norms to refugee law: ‘to be objective, assessment of refugee claims requires reference to international standards which include ‘two distinct, but overlapping, sets of relevant standards: [IHRL and IHL]’;

iv. The classification of armed conflicts under IHL and the ascertainment of applicable IHL provisions may sometimes raise complicated factual or legal questions, in the same way as do other issues relevant to refugee

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