CHAPTER 16

Non-Refoulement between ‘Common Article 1’ and ‘Common Article 3’

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This chapter considers the question of whether non-refoulement obligations in armed conflicts arise for non-belligerent States. According to Article 1 Common (CA1) to the 1949 Geneva Conventions, all High Contracting Parties (HCPS) undertake to ‘respect and to ensure respect’ for the Conventions ‘in all circumstances’. \(^1\) CA1 was described as ‘the humanitarian law analogue to the human rights *erga omnes* principle’. \(^2\) It will be argued that CA1 applies both in international armed conflicts (IACs) and in non-international armed conflicts (NIACs). In turn, the terms of Article 3 Common (CA3) to the 1949 Geneva Conventions, which regulates NIACs, serve as a ‘minimum yardstick’ \(^3\) which ‘must a fortiori be respected in the case of international conflicts’. \(^4\)

This chapter concerns situations where persons ‘taking no active part in hostilities’ flee from territories where, due to an armed conflict, they are exposed to real risk of violations of CA3, to the territory of a HCPS that is *not party to that armed conflict*. It is contended that the undertaking to ‘ensure respect’ for the Conventions in an armed conflict extends to HCPS that are not parties to that conflict; and, in particular, that CA1 entails that non-belligerent

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\(^1\) Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (First Geneva Convention); Convention (II) For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (Second Geneva Convention); Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (Third Geneva Convention); Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (Fourth Geneva Convention). See also Art 1(1) Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (First Additional Protocol).


States should not *refoule* such persons back to territories where they are exposed to real risk of CA3 violations.⁵ Notably, this *IHL-based* obligation is undertaken notwithstanding assessments of whether such persons should be recognised as refugees pursuant to Article 1A(2) of the Refugee Convention⁶ or as beneficiaries of complementary or subsidiary forms of protection.⁷ Likewise, the analysis does not affect the explicit (limited) protection from *refoulement* that the Fourth Geneva Convention accords to ‘protected persons’ in belligerent States.⁸ This chapter also does not consider the question of the circumstances under which IHL permits or prohibits internal and external displacement of persons during an armed conflict.

An ‘undertaking’ as per CA1 ‘is not merely hortatory or purposive’: rather, ‘[t]o [U]ndertake means to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation’.⁹ The undertaking in CA1 should be read in tandem with other obligations of non-belligerent States arising under the 1949 Geneva Conventions. Most pertinently, all *HCPs* are required to take specific (lawful) measures to repress ‘grave breaches’ of the conventions and to take measures necessary for the suppression of all acts contrary to the conventions *other than* the grave breaches. *Non-refoulement* is

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⁵ Compare W. Kālin, ‘Flight in Times of War’ (2001) 83 IRRC 629, 633, positing that IHL ‘does not apply to refugees who are citizens of a belligerent State and flee to a State that is not party to the conflict they seek to escape...[and] does not specifically address the plight of those who escape internal armed conflicts by fleeing abroad. It is in these two situations that the Refugee Convention becomes particularly important’. This chapter challenges the unequivocal nature of this statement.


⁸ Fourth Geneva Convention, Arts 45, 49(5); these provisions are considered in Section 3 below. For discussion see the contribution by Cantor to this volume.