

IHL as *Lex Specialis* and Convention Refugee Claims in Canada

Revisiting Canada's 1996 *Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations* Given Recent Developments in International Law

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Introduction

The whole of human history is a story of migration. Before there were borders, checkpoints or passports, human beings fled disaster, violence and ruin. The year 2015 tells this intrinsically human story and of the crushing desperation behind a dangerous sea crossing. It tells of those drowned en route from North Africa and the Middle East to Europe, and of those surviving and dying under barrel bombs in Syria, airstrikes in Yemen, sectarian violence in Iraq and suicide bombings in Lebanon and France. The year 2015 tells of those left adrift and starving on fishing boats in the Andaman Sea, of those shelled in Ukraine and of the quiet rumblings of an impending, preventable slaughter in Burundi. It tells of the largest refugee crisis since the end of the Second World War and of an international system cracking under the weight of xenophobia and fear.

How to protect those fleeing the horrors of war is as pertinent a question in the year 2015 as it was in the aftermath of World War II. In the field of international law, a growing body of scholarship asks whether further collaboration between different legal regimes offers a way forward. The recent anthology, *Refuge from Inhumanity? War Refugees and International Humanitarian Law*,¹ addresses the plight of those fleeing armed conflict – ‘war refugees’ – and their place in a system that provides them with woefully inadequate protection. The collection presents the work of leading academics who interrogate the possible role of international humanitarian law (IHL) in alleviating the protection ‘gaps’² in the international refugee regime.

One particular line of thinking asks how IHL as the *lex specialis* of international human rights law in times of armed conflict – a relatively new way of framing the relationship between these regimes – relates to the assessment of refugee claims arising in the context of war. This thesis considers this question as it applies to refugee status determination in the specific context of Canada, a country that has ratified the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The Canadian discussion about the proper

¹ David James Cantor and Jean-Francois Durieux, *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (2014).

² *Id.* See generally *Refuge from Inhumanity? Canvassing the Issues*.

approach to these claims occurred during the early 1990s and was ostensibly resolved by the 1996 Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations. However, subsequent developments at the international level – namely, the further clarification of the relationship between IHRL and IHL by the International Court of Justice – suggest this issue is ripe for review.

This thesis accepts the argument advanced by Hugo Storey³ and others that IHL as *lex specialis* is indeed relevant to the analysis of who is and who is not a Convention refugee and does not engage with the broader academic debate surrounding this premise. Rather, this thesis is concerned with the *how* of the matter and thus attempts to identify and delimit the situations in which reference to IHL as *lex specialis* would accord with domestic and international law.

Research Question

Given how Canadian courts have interpreted the core elements of the Convention refugee definition and given the relevant interactions of IRL, IHRL and IHL at international law, when would reference to IHL as *lex specialis* by refugee decision-makers be appropriate?

Methodology & Structure

The thesis proceeds in four parts. Chapter 1 discusses the interactions of international refugee law, international human rights law and international humanitarian law as they relate to the central question of this thesis. Specifically, this section explains the influence of IHRL on the interpretation of the 1951 Refugee Convention and then considers the relationship between IHRL and IHL, with a particular focus on the principle of *lex specialis*. Chapter 2 highlights the refugee definition contained in the 1951 Convention and explains how Canadian courts have interpreted its core elements. This section also provides a brief overview of the Canadian refugee system.

Chapter 3 discusses how persons fleeing armed conflict are treated under the 1951 Convention and outlines the early doctrinal debate in Canadian case law over the proper

³ Hugo Storey, *The 'War Flaw' and Why it Matters*, in *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (David James Cantor & Jean-Francois Durieux, eds., 2014).

approach to such claims. As well, this section examines the Canadian Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations, which were issued in 1996 to aid refugee decision-makers. Finally, Chapter 4 draws upon academic commentary and Canadian jurisprudence to identify the situations in which reference to IHL as *lex specialis* by Canadian decision-makers would be appropriate.

Chapter 1

Regime Interactions in International Law: IRL, IHRL, IHL

In the eyes of A.A. Cançado Trindade, international human rights law, international refugee law and international humanitarian law comprise “the three regimes of protection of the human person.”⁴ They are all founded upon basic considerations of humanity:⁵ IHRL protects the rights and freedoms of the individual vis-à-vis the State, IRL offers surrogate protection when the State fails to meet this responsibility and IHL sets forth a code of conduct to safeguard the humanity of combatants and civilians in times of war. These three regimes are not sequestered in silos, but interact habitually as complementary bodies of law, albeit with crucial points of divergence.⁶

Apart from customary rules of international law, the sources of IHRL, IRL and IHL consist primarily of instruments developed and adopted by the international community in the twentieth century. Collectively known as the International Bill of Rights, the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) form the basis of contemporary IHRL and operate as a normative springboard for later international and regional human rights instruments.⁷ The

⁴ A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* 511 (2010) [hereinafter Cançado Trindade].

⁵ *Id.*

⁶ *Id.* 512.

⁷ Universal Declaration of Human Rights 1948, G.A. Res. 217 A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights 1966, G.A. Res. 2200 A (XXI), 999 U.N.T.S. 171, U.N. Doc. A/6316 (Dec. 16, 1966); entered into force March 23, 1976 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights 1966, G.A. Res. 2200 A (XXI), 993 U.N.T.S. 3, U.N. Doc. A/6316 (Dec. 16, 1966); entered into force Jan. 3, 1976 [hereinafter ICESCR].

1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Protocol are the chief international refugee law treaties,⁸ supplemented at the regional level by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), the Cartagena Declaration on Refugees (Cartagena Declaration) and the European Union Qualification Directive.⁹ With respect to the law of armed conflict, the modern rules of IHL are codified in the 1907 Hague Regulations, the four 1949 Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions.¹⁰

The premise buttressing this thesis is that IHL as *lex specialis* is relevant to the analysis of refugee claims arising in the context of armed conflict. Chapter 1 discusses the regime interactions in international law that underpin this logic. The first section of this Chapter explains the relationship of international human rights law to the international refugee regime, specifically to the interpretation of the 1951 Refugee Convention. The second section of this Chapter discusses the historical and contemporary understandings of the relationship between international human rights law and international humanitarian law, with a particular emphasis on the principle of *lex specialis*.

⁸ Convention Relating to the Status of Refugees 1951, 189 U.N.T.S. 137; entered into force April 22, 1954 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees 1967, 606 U.N.T.S. 267; entered into force October 4, 1967 [hereinafter 1967 Protocol].

⁹ Organization of African Unity (now African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government, Addis Ababa, Sept. 10, 1969; entered into force June 20, 1974 [hereinafter OAU Convention]; Cartagena Declaration on Refugees 1984, adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico and Panama [hereinafter Cartagena Declaration]; Council Directive 2004/83/E.C. of April 29 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, adopted by the Council of the European Union, September 30, 2004 [hereinafter EU Qualification Directive].

¹⁰ The Hague Convention for the Pacific Settlement of International Disputes 1907, U.K.T.S. 6 (1971) Cmnd, 4575/1 Bevans 577/2 Am. J. Int'l L. Supp. 43 (1908); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31 [hereinafter GC-I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85 [hereinafter GC-II]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter GC-III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287 [hereinafter GC-IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3 (June 8, 1977) [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 (June 8, 1977) [hereinafter AP II].

1.1. The Relationship of International Human Rights Law to International Refugee Law

International refugee law and international human rights law both trace their modern origins to the aftermath of the Second World War. The flourishing of these legal regimes in the postwar period helped to facilitate the shift from a state-centric international system towards what Cançado Trindade considers the precious legacy of twentieth century, the rise of the individual as a subject of international law.¹¹ Given their concomitant development and shared humanitarian purpose, it is unsurprising that there is substantial cross-referencing between IRL and IHRL. The express reference to the 1948 Universal Declaration of Human Rights in the preamble to the 1951 Convention affirms this nexus, as does the frequency with which contemporary refugee law jurisprudence refers to international human rights instruments.¹²

Treaty interpretation in international law is a complex process guided by the principles articulated in the Vienna Convention on the Law of Treaties (VCLT) and international jurisprudence, among other sources. According to Article 31 of the VCLT, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹³ The good faith requirement – also known as *pacta sunt servanda* – is the key principle buttressing the provision. Article 31(2) provides that the sources of a treaty’s context include its text, preamble and annexes.

The preamble of the 1951 Convention refers to “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination” and the endeavor by the UN to “assure refugees the widest possible exercise of these fundamental rights and freedoms.”¹⁴ In accordance with Article 31 of the VCLT, the strong human rights lan-

¹¹ Cançado Trindade, *supra* note 4 at 213.

¹² See Guy S. Goodwin-Gill, *The Dynamic of International Refugee Law*, 25(4) Int’l J. Ref. L. 651, 661 (2014) who notes that courts are increasingly using accepted interpretations of fundamental rights to identify “the characteristics of rights and the elements central to human dignity that no one should be expected or required to change.”

¹³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969) Art. 31 [hereinafter VCLT].

¹⁴ 1951 Convention, *supra* note 8 at preamble.

guage¹⁵ in the Convention's preamble suggests that a proper interpretation of the treaty's provisions is one contextualized by international human rights law. By consciously including these broad commitments to human rights and by specifically invoking the UN Charter and UDHR in the treaty's preamble, the drafters of the 1951 Convention tethered international human rights law to the refugee regime at its inception.

Despite this early connection, IHRL was in its infancy at the time of the Convention's adoption and thus its interpretive influence was limited. As the modern international human rights system evolved, however, the relationship between the two regimes was increasingly subjected to academic scrutiny. In his 1991 pivotal work, *The Law of Refugee Status*, James Hathaway pioneered a human rights approach to the Convention refugee definition contained in Article 1 of the treaty.¹⁶ Chapter 2 of this thesis considers the refugee definition in detail, elucidating the human rights standards that inform its core components. It is important to note, however, that Hathaway's work in this regard has been adopted in jurisprudence across the common law world. His conceptualization of persecution as "the sustained or systemic denial of basic human rights demonstrative of a failure of state protection"¹⁷ finds widespread support and is endorsed by UNHCR.¹⁸ Thus, the notion that international human rights law informs core refugee law concepts is largely uncontroversial in international law today.

1.2. The Relationship Between International Human Rights Law and International Humanitarian Law

1.21 Historically

International human rights law and international humanitarian law were traditionally understood as separate, mutually-exclusive regimes. IHRL governed in peacetime and IHL applied during war. The two bodies of law were thus conceived as alternatives to one an-

¹⁵ See UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) paras 2-5 [hereinafter UNHCR, Article 1].

¹⁶ James Hathaway, *The Law of Refugee Status* (1991) [hereinafter Hathaway 1991].

¹⁷ *Id.* 101.

¹⁸ See generally UNHCR, Article 1, *supra* note 15.

other, a view reinforced by a number of notable differences between them.¹⁹ For instance, IHRL obliges States to respect, protect and fulfill human rights, whereas IHL obligations bind belligerents in armed conflict, including non-state actors. In IHRL, the individual has the right to petition a court or other body in order to seek redress for violations of the law, a feature unknown to the humanitarian regime. The two bodies of law also developed along distinct historical trajectories, with IHRL's emergence from the ashes of the Holocaust standing in contrast to IHL's substantial development during the nineteenth century.

The 'silos' approach to these two legal regimes began to break down during the late 1960s as international human rights law blossomed and the notion that IHRL ought to apply in conflict situations began to gain traction. In 1966, for instance, the ICCPR and ICESCR distinguished between derogable and non-derogable rights. The treaties' acknowledgment "that certain human rights could be curtailed in armed conflict"²⁰ implicitly meant that others could not be similarly circumscribed. Regional human rights instruments adopted similar provisions.²¹ A spate of bloody international and civil conflicts dotting the globe during this era also encouraged questions about human rights in wartime.²² In 1968 the UN General Assembly adopted a resolution titled, "Human Rights in Armed Conflict,"²³ and later, in 1977, the Additional Protocols to the Geneva Conventions expanded protections for civilians in war, including in conflicts of a non-international nature. While some read these developments as part of the 'humanization' of IHL,²⁴ those with a more traditionalist perspective thought them almost heretical. Draper, for instance, wrote,

The attempt to confuse the two regimes of law is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametri-

¹⁹ See, for instance, Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 Int'l Rev. Red Cross 856 (2004) 789; Noëlle Quénivet, *Introduction. The History of the Relationship Between International Humanitarian Law and Human Rights Law*, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Roberta Arnold & Noëlle Quénivet, eds., 2008) 2-3 [hereinafter Quénivet].

²⁰ Quénivet, *id.* 4.

²¹ *Id.*

²² These conflicts include the wars in Vietnam and Nigeria, as well as the Israeli occupation of Arab territories. See Quénivet, who cites Keith Suter, *Human Rights in Armed Conflicts*, XV Military Law and Law of War Review 400 (1976) 395.

²³ "Respect for Human Rights in Armed Conflicts," GA Res. 2444 (XXIII), December 19, 1968.

²⁴ See generally, Theodor Meron, *The Humanization of International Law* (2006).

cally opposed... At the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things, be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions. The humanitarian nature of the modern law of war neither justifies the confusion with, nor dispels the opposition to, human rights.²⁵

The nature of the relationship between IHRL and IHL is the subject of ongoing debate well into the twenty-first century. Most scholars have long since abandoned the conventional approach as espoused by Draper, although this view still lingers at the periphery. Instead, the contemporary discussion centers on the principles of complementarity and *lex specialis*, which are taken up in the following section.

1.22 Complementarity and *Lex Specialis*

State practice today affirms the applicability of human rights in armed conflict,²⁶ and both the International Committee of the Red Cross and the UN Human Rights Committee²⁷ support this position. Contemporary scholarship explains the relationship between IHRL and IHL in this context with reference to the principles of complementarity and *lex specialis*. The theory of complementarity holds that IHRL and IHL are distinct but mutually-reinforcing regimes, a sentiment best captured by Calogeropoulos-Stratis who writes, “[t]he two laws are two crutches on which the individual may lean to avoid – insofar as possible – the disastrous consequences of armed conflict.”²⁸ The utility of this theory is limited, however, in that it is only an adequate explanation of the relationship between IHRL and IHL to the extent that the two bodies of law do not conflict. When the IHRL norms governing a

²⁵ G.I.A.D. Draper, *Humanitarian Law and Human Rights*, Acta Juridica 193, 205 (1979), cited by Quénivet, *supra* note 19 at 6.

²⁶ See generally Ilia Siatitsa & Maia Titberidze, *Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges*, ADH Research Paper (2011).

²⁷ See UN Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, (August 31, 2001) CCPR/C/21/Rev.1/Add.11; UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (May 26, 2004) CCPR/C/21/Rev.1/Add.13.

²⁸ See translation in John Quigley, *The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population have a Right to Freedom of Assembly and Expression?* Boston College Int'l and Com. L. Rev. 12 (1989) 8.

given situation are inconsistent with the applicable humanitarian law rules, courts must seek out an alternate explanation of their relationship in order to resolve the normative conflict.

When a subject matter is governed by both a general standard and a specific rule, the specific rule prevails. This maxim, known as *lex specialis*, is a widely accepted principle of legal interpretation.²⁹ The more specific rule takes precedence over a conflicting general one in order to “give effect to the intentions of the parties and to take into account the particularities of the case.”³⁰ This rationale is premised on the idea that those crafting legislation or treaties could not have intended to give effect to two equal yet conflicting norms. Thus, *lex specialis* has an arguably sturdier foundation in domestic orders with clearer legal and political hierarchies than in the international system, which lacks a central legislative body and where the relationship between separate bodies of law is murkier.³¹

The *lex specialis* maxim has nonetheless been accepted as valid in international legal scholarship and jurisprudence. Most discussions of the principle trace its origins back to Roman law and routinely quote Grotius who in the 17th century wrote of his preference for the rule “which is most specific and approaches most nearly to the subject in hand.”³² Milanovic argues, however, that while the maxim has historical roots, the mainstream use of *lex specialis* in international legal thinking, particularly as it pertains to the relationship between IHRL and IHL, stretches only as far back as the ICJ’s Nuclear Weapons³³ decision in 1996. He writes,

It is simply factually incorrect to say that *lex specialis* was always ‘there’ somewhere in the ether, that it represents the ‘traditional’ position that its alternatives have the burden of disproving, or that is entrenched in long-standing

²⁹ Martti Koskeniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, International Law Commission, 58th Session, U.N. Doc. A/CN.4/L.682 (April 13, 2006) para 38 [hereinafter ICL Study].

³⁰ Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 77 *Nordic J. Int’l L.* 27 (2005) 36 [hereinafter Lindroos].

³¹ *Id.* 28.

³² Hugo Grotius, *De Jure Belli Ac Pacis* 428 (1625). Cited in the ILC Study at para 59.

³³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (July 8, 1996) 1996 ICJ 226 [hereinafter ICJ, *Nuclear Weapons*].

custom.³⁴

Tasked with the momentous question of whether the threat or use of nuclear weapons is permitted under international law, the ICJ's 1996 advisory opinion considered the argument that such use would violate the right to life guaranteed in Article 6 of the ICCPR. The Court flatly rejected the proposition that international human rights protection ceases in times of war but recognized the normative conflict between the right to life under IHRL and the rules surrounding the unlawful loss of life in hostilities in IHL, the body of law governing armed conflict. The Court stated,

In principle, the right not arbitrarily to be deprived of one's life also applies in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.³⁵

The ICJ reaffirmed this stance in its 2004 advisory opinion *Construction of a Wall*³⁶ when it considered the legal consequences arising from Israel's constructed barrier in the Occupied Palestinian Territory. Here, the Court mused further on the relationship between IHRL and IHL, declaring:

[S]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.³⁷

³⁴ Marko Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law*, in *Theoretical Boundaries of Armed Conflict and Human Rights* (Jens David Ohlin, ed., forthcoming), 23 available at SSRN <http://ssrn.com/abstract=2463957> [hereinafter Milanovic].

³⁵ ICJ, *Nuclear Weapons*, *supra* note 33 at para 25.

³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (July 9, 2004) 2004 ICJ 131.

³⁷ *Id.* Para 106.

The two ICJ advisory opinions spurred numerous mentions of *lex specialis* in academia. However, despite the principle's near-ubiquitous presence in literature about conflicts of sources and legal interpretation, Anja Lindroos astutely observes that there is scant exploration of the principle itself, either by scholars or in the jurisprudence of the international courts applying the maxim. She argues,

[*Lex specialis*] has been employed relatively rarely and rather mechanically by international tribunals, with no analysis of the maxim itself...it is hard to give a clear scope to *lex specialis*, and...international judicial bodies have generally used it in a rather loose fashion.³⁸

The International Law Commission spent a significant portion of its 2006 study on the fragmentation of international law addressing the function and scope of the principle. The study suggests that a true distillation of *lex specialis* and its potential applications is hindered by the fact that any analysis invoking the maxim necessarily involves a set of highly contextual factors. The ILC describes *lex specialis* in the following terms:

Its power is entirely dependent on the normative considerations for which it provides articulation: sensitivity to context, capacity to reflect State will, concreteness, clarity, definiteness. Its functioning cannot be assessed independently of the role of consideration of the latter type in specific context of legal reasoning.³⁹

In his discussion about the current state of the debate over *lex specialis* in international law, Milanovic formulates three possible conceptions of the principle: “as a rule of *total displacement*; as a rule of *partial displacement* or norm conflict resolution; and as a mere *interpretative tool* or rule of norm conflict avoidance.”⁴⁰ The notion that *lex specialis* operates in the first manner described, as a rule of total displacement, finds little support in international law today. Such an understanding “is essentially a restatement...of the classical divide between the law of war and the law of peace.”⁴¹ Commenting on the Nuclear Weapons case, the ILC affirmed that the invocation of IHL by way of *lex specialis* did not operate to displace IHRL:

³⁸ Lindroos, *supra* note 30 at 48.

³⁹ ILC Study, *supra* note 29 at para 119.

⁴⁰ Milanovic, *supra* note 34 at 24.

⁴¹ *Id.*

The Court was careful to point out that human rights law *continued to apply* within armed conflict. The exception – humanitarian law – only affected one (albeit important) aspect of it, namely the relative assessment of ‘arbitrariness.’⁴²

Milanovic’s second and third conceptions of *lex specialis* mirror the understanding of the principle presented in the ILC Study. The second variant, where the maxim operates as a conflict-resolution technique, covers the situation in which two legal provisions “are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same facts.”⁴³ In this scenario, the normative conflict cannot be resolved through interpretation and one must apply the more specific rule to arrive at a legal conclusion. For instance,

The two cases in which such norm conflicts would arise most frequently would be killing and detention. If such conflict was unavoidable *lex specialis* would operate as a rule of norm conflict resolution, so that IHL would displace or qualify the conflicting rule of IHRL to *the extent strictly required* to resolve the conflict. Thus, a killing that would in principle violate IHRL...but was compliant with the rules of IHL...would now also become compliant with IHRL by virtue of *lex specialis*.⁴⁴

The final conception of *lex specialis* is that the principle is an interpretative tool. Here, “the specific rule should be read and understood within the confines or against the background of the general standard.”⁴⁵ Accordingly, when a situation is regulated by an IHRL and IHL norm, the latter of which is more specific, “IHL would need to be *taken into account*, but...it would not necessarily be dispositive for the interpretation of IHRL.”⁴⁶ Thus, IHL would not outright overrule a human rights norm merely because its applicability is triggered by the presence of armed conflict.

The distinction between these second and third variants of the *lex specialis* maxim is not immediately obvious, but is conceptually significant. Whereas the second variant operates to *displace* the IHRL norm in favour of the corresponding IHL norm in order to

⁴² ILC Study, *supra* note 29 at para 104.

⁴³ *Id.* Para 57.

⁴⁴ Milanovic, *supra* note 34 at 17.

⁴⁵ ILC Study, *supra* note 29 at 56.

⁴⁶ Milanovic, *supra* note 34 at 28.

resolve the conflict between the two, the third variant draws upon the appropriate IHL rule in order to *inform* the interpretation of a human rights provision if the condition of armed conflict is met. This latter understanding of the maxim is a relatively benign statement of the principle and conforms with the standard rules of legal interpretation. Accordingly, the notion that IHL as *lex specialis* provides interpretative guidance to IHRL as *lex generalis* in times of armed conflict is largely uncontroversial.

The second, narrower variant in which *lex specialis* is a conflict-resolution technique is posited as theoretically valid in the ILC Study, but notably finds little doctrinal support.⁴⁷ The limited jurisprudence of international courts and tribunals applying IHL as *lex specialis* do so as a means of obtaining interpretive guidance.⁴⁸ Beginning in the late 1990s, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights sustained a lengthy doctrinal debate over the appropriate use of IHL in their human rights decisions.⁴⁹ In its early cases, the Inter-American Commission “invoked the direct application of IHL, and found that it [the Commission] was competent to determine violations thereof.”⁵⁰ This approach was roundly rejected by the Inter-American Court, which maintained that the system’s constitutive document – the American Convention on Human Rights (ACHR) – only enabled the judicial bodies “to determine whether the acts or norms of the States are compatible with the ACHR,”⁵¹ not assess violations of humanitarian law. However, the Court did acknowledge “that IHL may and should be utilized as an interpretive reference of human rights norms during times of conflict.”⁵² The Commission has since adopted the Court’s position thereby alleviating the jurisprudential schism. Tabak describes the significance of this approach in the following terms:

[W]hen these judicial organs consult IHL as an interpretive reference, they do not to find countries in violation of IHL, but instead, seek to use IHL in or-

⁴⁷ *Id.* At 32-34 Milanovic comments that the ILC provides no examples of this variant in jurisprudence.

⁴⁸ This is how Milanovic understands the operation of *lex specialis* in the Nuclear Weapons case.

⁴⁹ Shana Tabak traces these cases in *Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?* in *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Derek Jinks et al, eds., 2014).

⁵⁰ *Id.* 233.

⁵¹ *Id.* Citing the Las Palmeras Case.

⁵² *Id.*

der to bring greater precision to their holdings on violations of international HRL within the context of armed conflict or occupation.⁵³

Given the above discussion, this thesis adopts the interpretive variant of IHL as *lex specialis*, as it is the only conceptualization of this principle that finds broad support in international law today. Accordingly, IHL is understood as an interpretive tool to contextualize human rights standards and does not operate to displace or overrule IHRL norms.

Chapter 2

The Refugee Defined

2.1 The Convention Refugee and Regional Definitions

Although commonly used to describe anyone fleeing perilous conditions in their home country, ‘refugee’ is ultimately a term of art.⁵⁴ Certain legal criteria must be satisfied before a person is declared a refugee under international law. The widely-ratified 1951 Convention and its 1967 Protocol specify these criteria and establish the framework for determining if one qualifies for refugee status. The UNHCR Handbook, first published in 1979, provides governments, judges and other decision-makers with guidance on the refugee status determination process. Drawing upon State practice, jurisprudence and academic literature, the Handbook helps alleviate disparities in interpretation between jurisdictions.⁵⁵

The 1951 Convention was drafted in response to Europe’s postwar refugee crisis and the initial text reflected an era-specific understanding of ‘refugee.’ The Convention originally imposed a temporal limitation on the refugee definition so that only those who became refugees “as a result of events occurring before 1 January 1951” were covered by the treaty. State parties also had the option of restricting their obligations under the Convention to European refugees.⁵⁶ Both the temporal and geographic limitations were re-

⁵³ *Id.* 253.

⁵⁴ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 15 (3d ed. 2007) [hereinafter Goodwin-Gill & McAdam].

⁵⁵ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (reissued 2011) [hereinafter Handbook].

⁵⁶ Goodwin-Gill & McAdam, *supra* note 54 at 36.

moved by the 1967 Protocol and today, Article 1A(2) of the Convention defines a refugee as a person who,

owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.⁵⁷

The Convention refugee definition serves as a jumping-off point for the expanded refugee definitions found in regional instruments. For contrast purposes, the African and Latin American definitions are discussed briefly here.

The Organization of African Unity (now African Union) adopted the first regional refugee instrument in 1969. While the 1951 Convention formed against the backdrop of World War II, a very different set of political realities influenced the drafters at the African level. The OAU Convention emerged during a period of bloody civil war, apartheid and anti-colonial liberation struggles.⁵⁸ In response to these conflicts, Article 1(2) of the African instrument expanded the refugee definition beyond the 1951 Convention to encompass “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order...is compelled to leave his place of habitual residence in order to seek refuge.”⁵⁹ The expanded definition is considered one of the most notable achievements of the OAU Convention as it confers refugee status to those fleeing armed conflict and other situations of violence – ie, those who fall outside the 1951 Convention framework. While this broader definition is legally significant, the practical implementation of this protection framework has been less remarkable. As Abass and Mystris point out, “concerns remain over the lack of commentary on the determination of refugee status, which is left solely to the States’ discretion.”⁶⁰

⁵⁷ 1951 Convention, *supra* note 8 at Art. 1A(2).

⁵⁸ Ademola Abass & Dominique Mystris, *The African Union Legal Framework for Protecting Asylum Seekers, in Regional Approaches to the Protection of Asylum Seekers: An International Legal Perspective* (Ademola Abass & Francesca Ippolito, eds., 2014) 22-23 [hereinafter Abass & Mystris] ; George Okoth-Obbo, *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, 20 Ref. Survey Quarterly (2001) 112.

⁵⁹ OAU Convention, *supra* note 9 at Article 1(2).

⁶⁰ Abass & Mystris, *supra* note 58 at 23.

Faced with their own regional refugee crisis, Latin American countries adopted the Cartagena Declaration in 1984. Inspired by the OAU Convention adopted some years earlier, the Declaration expanded the refugee definition beyond the 1951 Convention to include “persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”⁶¹ Although the Declaration is non-binding, many countries in the region have adopted this definition into their national legislation. Furthermore, the core asylum principles are reinforced by the Inter-American system of human rights protection.⁶²

2.2 The Refugee in Canadian Law

2.21 Legislative Background & The Refugee Determination System

The Immigration and Refugee Protection Act (IRPA) is the primary legislation governing immigration and refugee protection in Canada.⁶³ The Act confers refugee protection upon Convention refugees and ‘persons in need of protection.’ The latter category refers to those in danger of torture or cruel and unusual treatment in their home country.⁶⁴ Such persons fall under section 97 of IRPA and are afforded the same rights as Convention refugees – namely, the right to *non-refoulement* and the right to seek permanent residency in Canada.⁶⁵ Section 96 of IRPA covers Convention refugees and imports Article 1A(2) of the 1951 Convention into Canadian law.⁶⁶ Given the substantial judicial engagement with the Convention refugee definition since its first appearance in 1970s immigration legislation, Canadian federal courts have frequently been the bearers of key developments in international refugee law.

⁶¹ Cartagena Declaration, *supra* note 9.

⁶² Goodwin-Gill & McAdam, *supra* note 54 at 40.

⁶³ Immigration and Refugee Protection Act, S.C. 2001 c. 27 [hereinafter IRPA].

⁶⁴ *Id.* S. 97.

⁶⁵ See Immigration and Refugee Board of Canada Website <http://www.irb-cisr.gc.ca/Eng/Pages/index.aspx> [hereinafter IRB Website].

⁶⁶ IRPA, *supra* note 63 at S. 96.

The administrative authority tasked with inland refugee status determination is the Immigration and Refugee Board of Canada (IRB), specifically the Refugee Protection Division (RPD). Those seeking refugee status in Canada may make a claim at a port of entry upon arrival at the border or else at an inland office.⁶⁷ Eligible claims are referred to the RPD for a hearing. Claimants receiving negative decisions may seek appeal at the recently-enacted Refugee Appeal Division (RAD). The Canadian Parliament stalled the establishment of the RAD until 2012 although it had been provided for in IRPA since 2001. Prior to the RAD's enactment, rejected refugee applicants could only seek judicial review of their cases at the Federal Court, which was rarely granted.⁶⁸

2.22 The Human Rights Approach to Refugee Status Determination in Canada

Canadian jurisprudence affirms the human rights approach as the proper approach to the interpretation of section 96 of IRPA. This approach applies to each of the core elements of the Convention refugee definition.⁶⁹ The present discussion explores these core elements and their treatment by Canadian courts in order to understand how IRB decision-makers determine whether or not a refugee claimant satisfies the relevant legal criteria. The criteria are discussed in the following order: well-founded fear, persecution, nexus of persecution to the Convention grounds, availability of state protection and internal flight alternative. The part of the refugee status determination process that engages with these criteria is referred to as 'inclusion' – as in, it is the stage in which national decision-makers assess whether a claimant may be *included* as a Convention refugee. Exclusion is not taken up in this thesis.

⁶⁷ See 'Claimant's Guide' on IRB Website, *supra* note 65.

⁶⁸ Estimates suggest only 7 per cent of applications for leave to appeal were granted under the old system of judicial review. See Louise Elliott, *More refugee claimants get 2nd chance with new appeal process*, CBC News (November 16, 2014) <http://www.cbc.ca/news/politics/more-refugee-claimants-get-2nd-chance-with-new-appeal-process-1.2836985>

⁶⁹ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 29. See FN 9 for a brief list of relevant cases on this point.

Well-Founded Fear

A refugee must possess a well-founded fear of persecution in her country of origin or nationality. According to the UNHCR Handbook, this requirement involves both a subjective and an objective assessment: the claimant must subjectively experience fear and this fear must have a basis in reality.⁷⁰ Most countries in the common law world have adopted the Handbook's approach.⁷¹ In *Ward*, the Supreme Court of Canada adopted this bipartite test.⁷²

A number of Canadian cases address the standard of proof a claimant is required to meet in order to establish that her fear is well-founded.⁷³ In *Adjei*,⁷⁴ the Federal Court of Appeal allowed an appeal from an applicant whose claim was rejected after the IRB misapplied the standard of proof. *Adjei*, a Ghanaian, brought an application for refugee status on the basis of persecution for his political and economic activism. The IRB found he was not a Convention refugee on the basis that he had not established that his fear of persecution in Ghana was well-founded. In reversing, the Court observed,

[T]he objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not.⁷⁵

The ruling in *Ponniah* further elucidated the proper standard of proof.⁷⁶ *Ponniah* was a Sri Lankan Tamil who experienced unlawful arrest and torture at the hands of the Indian Peace Keeping Force and non-state rebel groups in his home country. The IRB rejected his claim predominantly on credibility grounds but, like in *Adjei*, had also misapplied the standard of proof when it came to assessing the objective basis of fear. In reviewing the Board's decision, the Court clarified that the appropriate standard is "a 'reasonable' or even

⁷⁰ Handbook, *supra* note 55 at para 38.

⁷¹ James Hathaway & Michelle Foster, *The Law of Refugee Status* (2d ed. 2014) 91 [hereinafter Hathaway & Foster].

⁷² *Canada (Attorney General) v. Ward* (1993) 2 S.C.R. 689 [hereinafter *Ward*].

⁷³ See generally Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law* (2010) Chapter 5 [hereinafter *IRB Interpretation*].

⁷⁴ *Adjei v. Canada (Minister of Employment and Immigration)* (1989) 2 F.C. 680 (C.A.).

⁷⁵ *Id.* Para 5.

⁷⁶ *Ponniah v. Canada (Minister of Employment and Immigration)* (1991) F.C.J. No. 359.

a ‘serious possibility’” of persecution. This standard “is less than a 50% chance...but more than a minimal or mere possibility.”⁷⁷

The question of how a claimant’s delay – whether in fleeing persecution or in making a refugee claim – affects the assessment of her subjective fear is a frequent discussion in Canadian jurisprudence. The IRB notes that the Federal Court’s decision in *Huerta* is a particularly crucial ruling on this point,⁷⁸ as it stipulates the general rule that

although the presence of delay does not mandate the rejection of a claim as the claimant may have a reasonable explanation for the delay, nonetheless, delay may, in the right circumstances, constitute sufficient grounds upon which to reject a claim.⁷⁹

In many cases a delay in leaving one’s country or a delay in claiming refugee status once in Canada will negate the subjective fear requirement of the Convention refugee definition, causing the claim to fail. However, the law requires a thorough examination of each situation given the highly contextual nature of each case.⁸⁰

Persecution

Persecution is not defined in the Convention and has no universally-accepted definition. The UNHCR Handbook provides little guidance on the issue apart from its statement that threats to life and freedom constitute persecution, as do “other serious violations of human rights.”⁸¹ As mentioned in Chapter 1, Hathaway conceives persecution as “the sustained or systemic denial of basic human rights demonstrative of a failure of state protection.”⁸² This conceptualization contains two aspects: serious harm and the failure of the state to protect the individual from said harm. Recourse to IHRL is necessary to their interpretation in order to provide decision-makers with objective standards to evaluate the seriousness of the harm facing the individual and the availability of state protection in the circumstances. As Hathaway and Foster explain,

⁷⁷ *Id.*

⁷⁸ IRB Interpretation, *supra* note 73 at Chapter 5.4.

⁷⁹ *Huerta v. Canada (Minister of Employment and Immigration)* (1993) 157 N.R. 225 (F.C.A.) 227.

⁸⁰ See generally discussion in IRB Interpretation, *supra* note 73 at Chapter 5.4.

⁸¹ Handbook, *supra* note 55 at para 51.

⁸² Hathaway 1991, *supra* note 16 at 101.

International human rights standards are rather uniquely suited to the task of defining which risks involve unacceptable forms of serious harm in a manner that offers not only consistency, but also normative legitimacy – these being precisely the standards that states themselves have established to define impermissibly serious harms.⁸³

The interpretation of ‘persecution’ has proven to be one of the most inconsistent areas of refugee law jurisprudence. However, Hathaway and Foster argue that, despite variance in some jurisdictions, the human rights approach is now the prevailing approach in the common law world, and is gaining similar momentum in civil law countries.⁸⁴

Canadian law has adopted the human rights approach and characterizes persecution as ‘serious and persistent harm.’⁸⁵ The mistreatment feared by the refugee claimant must encroach upon human dignity in a way that threatens a core human right; this is what is meant by the ‘serious’ requirement. The notion that persecution involves a persistent pattern of harm finds support in a number of decisions, including the frequently cited case of Rajudeen.⁸⁶ Rajudeen, a Sri Lankan, sought refugee status in Canada on the basis of religious and racial persecution. As a minority Muslim Tamil, he faced harassment and abuse from members of the ethnic and religious majority, including beatings and threats to his life. In reversing the IRB’s denial of his claim, the Federal Court of Appeal found that Rajudeen had sustained “a lengthy period of systematic infliction of threats and of personal injury”⁸⁷ and that such treatment fell within the meaning of ‘persecution.’ The Court relied upon definitions of persecution which emphasize repeated exposure to harm in reaching its conclusion on this issue.⁸⁸

⁸³ Hathaway & Foster, *supra* note 71 at 194.

⁸⁴ *Id.* 196.

⁸⁵ See generally IRB Interpretation, *supra* note 73 at Chapter 3.

⁸⁶ Rajudeen v. Canada (Minister of Employment and Immigration) (1984) F.C.J. No. 601.

⁸⁷ *Id.*

⁸⁸ *Id.* For instance, Oxford English Dictionary’s definition of persecution: “A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source.”

While the persistence of harm is critical to the notion of persecution, a lack of repetition in itself is not determinative. In *Ranjha*,⁸⁹ for instance, the Court cautioned against “an exaggerated emphasis on the need for repetition and persistence,”⁹⁰ finding that the IRB had failed to properly consider the *quality* of the harmful acts facing the claimant. *Ranjha*, a Pakistani political activist, had been tortured by police in the aftermath a political protest and on a separate occasion had sustained an arm fracture by the same assailants. While the IRB found these incidents were not systematic enough to amount to persecution, the Court held the proper assessment in this case was to consider whether the incidents were “serious enough as to constitute a fundamental violation of the applicant’s human dignity.”⁹¹

A single incident of discrimination or harassment is not typically considered persecution. Although this point is made repeatedly throughout the jurisprudence, even early cases acknowledged the distinction is not always easy to draw. In *Sagharichi*, for instance, the Court noted,

[T]he dividing line between persecution and discrimination or harassment is difficult to establish...the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved.⁹²

The contemporary position holds that instances of discrimination that do not in themselves rise to the level of persecution may cumulatively amount to persecution. The Handbook affirms this view, advising that discrimination may result in consequences of “a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.”⁹³

⁸⁹ *Ranjha v. Canada (Minister of Citizenship and Immigration)* (2003) F.C.J. No. 901.

⁹⁰ *Id.* Para 42.

⁹¹ *Id.* Para 44.

⁹² *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993) F.C.J. No. 796 para 3.

⁹³ Handbook, *supra* note 55 at para 54.

The IRB offers a non-exhaustive list of examples of persecution drawn from Canadian jurisprudence.⁹⁴ Physical abuse, torture and rape categorically constitute persecution as do other attacks on bodily autonomy, such as forced abortion, sterilization and female circumcision. Persecution need not be physical in nature, however, as serious economic and educational deprivations may also come within the term's meaning. As well, numerous cases address the question of when prosecution constitutes persecution.⁹⁵

Nexus of Persecution to a Convention Ground

The Convention refugee definition in Article 1A(2) enumerates five grounds of persecution. A person seeking refugee status must demonstrate that her well-founded fear of persecution is for reasons of race, religion, nationality, membership of a particular social group or political opinion. If a refugee claimant is unable to establish a nexus between the harm feared and one or more of these categories, the claim will not succeed.⁹⁶ Essentially, the law requires a connection between “who the claimant is or what she believes and the risk of being persecuted in her home state.”⁹⁷

From Hathaway's vantage point, the Convention grounds represent “fundamental socio-political disfranchisement defined by reference to core norms of non-discrimination law.”⁹⁸ The principle of non-discrimination underpinning these categories not only “identifies those potential human rights victims who are fundamentally marginalized in their state of origin”⁹⁹ but, by doing so, provides a means of distinguishing these claims from those arising out of a general risk of serious harm.¹⁰⁰ The Supreme Court of Canada held as much in *Ward* when it noted that the drafters of the 1951 Convention “did not intend to offer a haven for all suffering individuals.”¹⁰¹

⁹⁴ See IRB Interpretation, *supra* note 73 at Chapter 3.1.3.

⁹⁵ *Id.*

⁹⁶ Handbook, *supra* note 55 at paras 66-67.

⁹⁷ Hathaway & Foster, *supra* note 71 at 392.

⁹⁸ *Id.* 191.

⁹⁹ *Id.* 363.

¹⁰⁰ *Id.* 362-363.

¹⁰¹ *Ward*, *supra* note 72 at para 60.

When assessing a refugee claim, the RPD is required to consider not only the grounds raised by the applicant in her case, but all of grounds listed in the Convention refugee definition. If the RPD finds a nexus between the harm feared and one ground “it is not necessary to go on to consider all of the other grounds.”¹⁰² Furthermore, when determining whether persecution is “for reasons of” a Convention ground, “the relevant consideration is the perception of the persecutor,”¹⁰³ not whether the claimant in reality is a member of a certain race or holds a particular set of beliefs, for instance. The nexus between the harm feared and the ground is established even if the persecutor’s “motivation for the mistreatment is mixed.”¹⁰⁴

For reasons of space, this thesis does not explore the contours of each Convention ground but does explain the Canadian approach to ‘membership of a particular social group,’ the ground that has historically been the most difficult for decision-makers to assess. In *Ward*, the claimant was a member of the Irish National Liberation Army who facilitated the escape of several hostages upon learning they were going to be killed by other INLA members. He was punished by way of torture and death threats. He sought refugee status in Canada claiming he feared persecution on the basis of his membership in a particular social group. His claim was rejected on the basis that ILNA was not a social group within the meaning of the refugee definition and, in any event, his fear was not based on said membership but his actions taken as an individual.

The Court held that ‘particular social group’ consists of three categories.¹⁰⁵ First, it encompasses groups defined by an innate, unchangeable characteristic. Second, the term refers to groups whose members voluntarily associated for reasons so fundamental to their human dignity that they should not be forced to forsake the association. Third, ‘particular social group’ includes groups associated by a former voluntary status which is now unalterable due to its historical permanence. In Canadian jurisprudence, particular social group includes the family, unions, impoverished persons, LGBTQ individuals and women facing

¹⁰² IRB Interpretation, *supra* note 73 at Chapter 4.1.

¹⁰³ *Id.*

¹⁰⁴ *Id.* See IRB citation of Hanukashvili case.

¹⁰⁵ *Ward*, *supra* note 72 at para 70.

domestic violence, among other groups depending on the unique circumstances of the case.¹⁰⁶

Availability of State Protection

In order to be declared a refugee, a person must be unable or unwilling to seek the protection of her country of origin or nationality. This core element of the Convention definition relates to the fundamental principle of surrogate protection underpinning the refugee regime.¹⁰⁷ Under international law, the State bears the primary responsibility for protecting the rights of its citizens and others in its territory. When the State persecutes its own citizens or when it is unable to protect individuals from this harm, the persecuted person may avail herself of protection from the international community. As the Supreme Court of Canada noted in *Ward*, international protection “was meant to be a forum of second resort for the persecuted...approachable upon failure of local protection.”¹⁰⁸ A person seeking such protection must be outside the country of her nationality, as international protection “cannot come into play as long as a person is within the territorial jurisdiction of [her] home country.”¹⁰⁹

Ward set out two presumptions that apply to the state protection analysis of a refugee claim.¹¹⁰ The IRB advises that these presumptions are appropriately considered “at the stage of analysis when one is examining whether the claimant’s fear is well-founded.”¹¹¹ The first presumption is that, once the claimant has established a credible fear of persecution and that state protection is unavailable, persecution is presumed likely and the fear to be a well-founded one.¹¹² The second presumption is that States are presumed capable of protecting their citizens, save for situations of complete state breakdown.¹¹³ A claimant may rebut the latter presumption by presenting “clear and convincing evidence” to the con-

¹⁰⁶ See list in IRB Interpretation, *supra* note 73 at Chapter 4.5.

¹⁰⁷ Hathaway first advanced the notion of substitute or surrogate protection in Hathaway 1991, *supra* note 16.

¹⁰⁸ *Ward*, *supra* note 72 at para 33.

¹⁰⁹ Handbook, *supra* note 55 at para 88.

¹¹⁰ Throughout this section, see generally IRB Interpretation, *supra* note 73 at Chapter 6.

¹¹¹ *Id.* Chapter 6.1.3.

¹¹² See *ID* quoting *Ward* at Chapter 6.1.5.

¹¹³ *Id.*

trary. This may be achieved by showing, for example, that other individuals in similar circumstances were unable to access protection¹¹⁴ or that the claimant herself previously tried and failed to obtain protection from the State.¹¹⁵

Internal Flight Alternative

The refugee definition contained in Article 1A(2) of the 1951 Convention makes no mention of the ‘internal flight alternative’ (IFA), although the Handbook notes that decision-makers frequently consider this concept when assessing refugee status claims.¹¹⁶ IFA refers to “a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish...herself and live a normal life.”¹¹⁷ Some jurisdictions tie this concept to the well-founded fear of persecution element of the definition while others link it conceptually to the requirement that a claimant be unwilling or unable to avail herself of protection from the state.¹¹⁸

In the Canadian context, one of the most important decisions on the IFA is *Rasaratnam*.¹¹⁹ *Rasaratnam* was a Sri Lankan Tamil fearing persecution from the Liberation Tigers of Tamil Eelam. His claim was rejected¹¹⁹ by the IRB on the basis that Colombo, the capital city under the effective control of the Sri Lankan government, was an IFA. Upholding the Board’s decision, the Court made the following comments,

[S]ince by definition a Convention refugee must be a refugee from a country, not from some subdivision or region of a country, a claimant cannot be a Convention refugee if there is an IFA. It follows that the determination of whether or not there is an IFA is integral to the determination whether or not a claimant is a Convention refugee¹²⁰...That said, however, a claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at

¹¹⁴ *Id.* Chapter 6.1.9. IRB referring to cases of Sanxhaku.

¹¹⁵ *Id.* IRB referring to Ward.

¹¹⁶ Handbook, *supra* note 55 at paras 1-2.

¹¹⁷ *Id.* Para 6.

¹¹⁸ *Id.* Para 3.

¹¹⁹ *Rasaratnam v. Canada (Minister of Employment and Immigration)* (1992) F.C.J. No. 1256.

¹²⁰ *Id.* Para 8.

the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument.¹²¹

The Rasaratnam holding, in conjunction with the later ruling in Thirunavukkarasu,¹²² established a two-pronged test for Canadian decision-makers in approaching the question of whether a claimant has an IFA. First, the Board must be satisfied that there is no serious possibility of the claimant being persecuted in the part of the country the proposed IFA is located. Second, the conditions in the part of the country where the IFA is located “must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for [her] to seek refuge there.”¹²³ Subsequent cases have identified the factors decision-makers must take into account when determining whether an IFA would be unreasonable. Such factors include the claimant’s age, employability, access to education, health and family situations.¹²⁴

Chapter 3

Refugee Law and Persons Fleeing Violence and Conflict

The Second World War left over thirty million refugees in its wake while the partition of Germany and the rise of the Soviet Union expelled thirteen million more across the Iron Curtain.¹²⁵ The enormity of this postwar refugee crisis spurred a bold response from the international community in the creation of UNHCR in 1949 and the Refugee Convention in 1951. The cause-and-effect relationship between post-WWII displacement and the creation of the modern refugee system thus implicitly entangles armed conflict and IRL. This nexus is obvious even in nascent refugee law developments, such as the attempt by the League of

¹²¹ *Id.* Para 9.

¹²² Thirunavukkarasu v. Canada (Minister of Employment and Immigration (1994) 1 F.C. 589 (C.A.).

¹²³ IRB Interpretation, *supra* note 73 at Chapter 8.2.

¹²⁴ *Id.* Chapter 8.5.

¹²⁵ Timothy J. Hatton, *Refugee and Asylum Migration to the OECD: A Short Overview*, in International Handbook on the Economics of Migration (Edward Elgar, ed., 2013) 3.

Nations to protect Russians fleeing the conflict in their homeland during the early 1920s.¹²⁶ Violence has always fuelled flight.

It is somewhat ironic, then – or perhaps entirely unsurprising given the perennial anxiety over State sovereignty in international law – that a system so historically entwined with this moment of unprecedented bloodshed and humanitarian catastrophe is hostile to the general protection of civilians from war. This was true even at its inception: the original temporal and geographic limitations on the Convention refugee definition speak to this point, as do the drafters’ concerns about opening the floodgates to all those fleeing violence in search of safety.¹²⁷ Instead, States chose to delimit refugee status in the ways outlined in Chapter 2.

The existence of armed conflict in a refugee claimant’s country of origin has historically presented a challenge to decision-makers tasked with the application of the Convention refugee definition.¹²⁸ The proper approach to such claims is the subject of jurisdictional discord and yet the topic has received surprisingly little jurisprudential attention.

According to the UNHCR Handbook, “[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol.”¹²⁹ This general rule is tempered by the following statement:

However, foreign invasion or occupation of all or part of a country can result – and occasionally has resulted – in persecution for one or more of the reasons enumerated in the 1951 Convention. In such cases, refugee status will depend upon whether the applicant is able to show that he has a “well-founded fear of being persecuted” in the occupied territory and, in addition, upon whether or not he is able to avail himself of the protection of his government.¹³⁰

¹²⁶ Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, UNHCR Legal and Protection Policy Research Series (2012) 8 [Hereinafter Holzer, 2012].

¹²⁷ *Id.* 10-11.

¹²⁸ *Id.* 1.

¹²⁹ Handbook, *supra* note 55 at para 164.

¹³⁰ *Id.* Para 165.

Holzer notes that this position reflects the dominant view in scholarship and comports with State practice.¹³¹ Storey and Wallace refer to this position as the ‘exceptionality approach,’ meaning that the Convention does not apply to persons fleeing armed conflict save for special circumstances or exceptions.¹³² Thus, a refugee claimant escaping conflict or war in her home country who cannot link her fear to a Convention ground must rely on “extraconventional protection against *refoulement*.”¹³³

It should be noted that there is no attempt in this thesis to suggest this position is incorrect. The validity of this interpretation is affirmed not only by its widespread acceptance but also by the deliberate efforts of the OAU and Latin American countries to extend refugee protection to those cut off from Convention protection because of this precise limitation.¹³⁴ Before considering the Canadian approach to such refugee claims, a few words must be said about the terms used by decision-makers to describe war and conflict scenarios.

As Holzer points out, decision-makers employ a variety of descriptors to denote violence in a claimant’s home country, including armed conflict, civil war, unrest and widespread violence.¹³⁵ As well, the use of ‘generalized violence’ to distinguish between claimants facing untargeted violence and those facing persecution for reasons of a Convention ground is common throughout the jurisprudence.¹³⁶ Where this thesis employs these terms to describe conflict in a claimant’s home country, it does so to denote a situation of violence rising to the level of ‘armed conflict’ under IHL. This is an important point because the term ‘armed conflict’ has a distinct legal meaning under IHL, as it is the presence of armed conflict that triggers the application of humanitarian regime. The precise meaning of ‘armed conflict’ is taken up in Chapter 4.

¹³¹ Holzer, 2012, *supra* note 126 at 1-2.

¹³² Hugo Storey & Rebecca Wallace, *War and Peace in Refugee Law Jurisprudence*, Am. J. Int’l L 95 (2001) 350 [Hereinafter Storey & Wallace].

¹³³ *Id.* 351.

¹³⁴ See the discussion about the regional definitions in Chapter 2.

¹³⁵ Holzer, 2012, *supra* note 126 at 4.

¹³⁶ *Id.* 5. Holzer critiques this juxtaposition, however, saying that “these concepts may fall short of a careful analysis” given that “violence can be widespread *and* targeted.”

3.1. The Canadian Approach

In the Canadian context, a handful of cases in the early 1990s addressed the question of how decision-makers ought to approach refugee claims from those fleeing armed conflict or other situations of violence. The earliest and most significant of these cases was *Salibian v. Canada*, which was decided by the Federal Court of Appeal in 1990.¹³⁷

Salibian was a Lebanese citizen of Armenian descent and Christian faith. He brought a claim for refugee status on the basis of a series of persecutory incidents that occurred while his home country was mired in civil war. He argued that the incidents were due to his nationality and religion, but the RPD rejected his application on the grounds that the persecution he faced was not “directed against him in particular.”¹³⁸ The conflict in Lebanon, it was held, was a disruptive force in the lives of all Lebanese citizens and *Salibian* was no more a victim than anyone else.

The Federal Court of Appeal reversed, finding that the RPD had “misunderstood the nature of the burden the applicant had to meet.”¹³⁹ The RPD had zeroed in on the issue of whether the persecution was ‘personal’ – as in, individual to *Salibian* – and neglected evidence about the treatment of Armenian Christians in Lebanon writ large. The Court made the following pronouncement regarding claims from persons fleeing countries in conflict:

[A] situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition.¹⁴⁰

The Court also adopted Hathaway’s words:

[T]he best evidence that an individual faces a serious chance of persecution is usually treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in

¹³⁷ *Salibian v. Canada (Minister of Employment and Immigration)* (1990) 3 F.C. 250.

¹³⁸ *Id.* See paras 15-16.

¹³⁹ *Id.* Para 19.

¹⁴⁰ *Id.* Para 17.

her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status.¹⁴¹

The approach taken by the Court in *Salibian* is referred to as the non-comparative approach and was affirmed in the subsequent case of *Rizkallah* in 1992 wherein the Court stated that a refugee “must be targeted for persecution in some way, either personally or collectively.”¹⁴²

In the 1995 *Isa* ruling, however, the Federal Court took a different course.¹⁴³ *Isa* was a Somali claimant and member of the Marehan sub-clan of the Darod tribe. Fleeing the clan-based civil war in his home country, *Isa* applied for refugee status in Canada on the basis of his membership in a particular social group. The IRB rejected his status claim on the grounds that neither he nor his clan was targeted more than any other person or clan in Somalia. In its review of the decision, the Court stated, “[m]any, if not most civil war situations are racially or ethnically based. If racially motivated attacks in civil war circumstances constitute a ground for convention refugee status, then, all individuals on either side of the conflict will qualify.”¹⁴⁴ The Court then upheld the IRB’s decision, which found that “all clans and sub-clans are both perpetrators and victims and that the claimant’s clan is not differentially targeted.”¹⁴⁵

The Court in the *Isa* case followed the comparative or ‘differential-risk’ approach to the applicant’s case. According to this view, a decision-maker must consider “the predicament faced by the claimant, or her group, as compared with the circumstances of other persons in her country of origin who face harm from the same or other agents of persecution.”¹⁴⁶ By contrast, the non-comparative approach in the *Salibian* case did not focus on the claimant’s risk compared to others but “whether the claimant’s risk is a risk of sufficiently serious harm and is linked to a Convention reason.”¹⁴⁷

¹⁴¹ *Id.* Para 18 quotes Hathaway 1991, *supra* note 16.

¹⁴² *Rizkallah v. Canada (Minister of Employment and Immigration)* (1992) F.C.J. No. 412.

¹⁴³ *Isa v. Canada (Secretary of State)* (1995) F.C.J. No. 254.

¹⁴⁴ *Id.* Para 8.

¹⁴⁵ *Id.* Quoting the IRB decision at para 3.

¹⁴⁶ Immigration and Refugee Board of Canada, Chairperson Guideline I: Civilian Non-Combatants Fearing Persecution in Civil War Situations (1996) [hereinafter IRB Guidelines].

¹⁴⁷ *Id.*

The schism between these cases and ongoing confusion about this matter prompted the IRB to issue Chairperson Guideline 1: Civilian Non-Combatants Fearing Persecution in Civil War Situations in 1996. The Guidelines advocate the use of the non-comparative approach and provide decision-makers with a framework by which to conduct this analysis.

The Guidelines identify three general categories of claims that arise in the civil war context and have the potential to satisfy the Convention refugee definition. First, there are the claims based on a fear of persecution in a generalized civil war. These claims may involve either an individual or a group facing a harm that is distinguishable from the general risk of civil conflict. Examples offered in the Guidelines include claims from those who, for reasons of political conscience, refuse to participate in the hostilities and are subjected to persecution on this basis or claims from women uniquely targeted due to their gender. Second, there are the claims based on a fear of persecution in a civil war context when the persecution is directed against a particular group and the claimant is affiliated with said group. One example is a claimant who is part of a racial group targeted for ethnic cleansing. Third, there are the claims arising in the context of a civil war but which have no connection to the war itself. In this latter case, “the claim should be determined without reference to the civil war framework.”¹⁴⁸

Importantly, while the 1996 Guidelines refer to the international humanitarian law instruments that may assist decision-makers in assessing these claims, Holzer observes that there are no references to IHL norms in any recent decision.¹⁴⁹

Chapter 4

IHL as *Lex Specialis* and Refugee Claims in Canada

The 1996 Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations represent the only major statement in the Canadian refugee system on the proper approach to refugee claims arising in the context of armed conflict. Apart from the *Salibian* case and the subsequent decisions briefly regurgitating its holding, there is little judicial

¹⁴⁸ *Id.*

¹⁴⁹ Holzer, 2012, *supra* note 126 at 20.

interrogation of this issue. Given recent developments in international law and the ongoing concern about the protection of those fleeing armed conflict, a re-examination of the Guidelines is warranted.

Having discussed the nature of the principle *lex specialis*, the core elements of the Convention refugee definition and the approach to civilian non-combatants fleeing armed conflict, this thesis now turns to the question asked at its outset. This Chapter considers the limitations on the use of IHL as *lex specialis* in the refugee status determination process before turning to the question of how IHL norms may offer interpretive guidance to decision-makers conducting an inclusion analysis.

4.1 Limitations on the use of IHL as *lex specialis* in Refugee Status Determination

This thesis identifies two primary limitations on the use of IHL as *lex specialis* in refugee status determination. First, *lex specialis* is but one principle of treaty interpretation in international law. The maxim is thus limited by the operation of more authoritative principles. Specifically, *lex specialis* is limited by the requirement that the terms of a treaty be interpreted in good faith in light of the object and purpose. Second, the use of IHL as *lex specialis* is limited to refugee status claims arising in ‘armed conflict’ as defined in humanitarian law.

Limited by more authoritative interpretive principles

As discussed in Chapter 1, *lex specialis* is a widely-accepted principle of interpretation in domestic and international law. In the relationship between IHRL and IHL, *lex specialis* permits decision-makers to reach for more specialized norms in order to analyze legal questions with greater precision. It is, however, a relatively weak rule as it operates between these two regimes, offering interpretive guidance only where appropriate.

Articles 31-33 of the Vienna Convention on the Law of Treaties codify the rules of customary international law with respect to treaty interpretation. Within this scheme, *lex specialis* falls under Article 31(3)(c) as one of the “relevant rules of international law ap-

plicable between the parties.”¹⁵⁰ Although treaty interpretation is a highly contextual process, the VCLT establishes a certain hierarchy among the sources of interpretation. Before considering Article 31(3)(c), an interpreter “must first consider the plain meaning of the words in a treaty, if any, proceeding therefrom to the context and to considerations relating to object and purpose, subsequent practice and, eventually, *travaux préparatoires*.”¹⁵¹ *Lex specialis* is thus subordinate to these other sources in the interpretive process.

In light of the above discussion, one may deduce that where IHL as *lex specialis* contradicts the object and purpose of the 1951 Convention, its use is impermissible under international law.¹⁵² As per the VCLT, a treaty’s object and purpose is gleaned from the text, preamble and annexes.¹⁵³ Hathaway makes an important addition to this point, arguing that “the obligation to interpret the text of a treaty in the light of its object and purpose should be conceived as incorporating the overarching duty to interpret a treaty in a way that ensures its effectiveness.”¹⁵⁴ In the case of the 1951 Convention, the preamble’s invocation of human rights instruments and reference to the “widest possible exercise of...fundamental rights and freedoms”¹⁵⁵ speaks to a humanitarian impetus intent on safeguarding the rights of those who fall within the protective scope of the treaty. Thus, where the *lex specialis* principle narrows the scope of protection¹⁵⁶ or, as per Hathaway’s point, limits the effectiveness of the Convention, it is inconsistent with the customary rules of treaty interpretation.

Importantly, however, this does not mean that IHL is only properly drawn upon when it supports a claim for refugee status. Rather, where an IHL norm extends less protection to a civilian or combatant than the IHRL rule governing the same situation for the in-

¹⁵⁰ VCLT, *supra* note 13. See discussion in Durieux and Cantor, *supra* note 2 at 18.

¹⁵¹ ILC Study, *supra* note 29 at 223-234.

¹⁵² Holzer advances this argument in *Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insights from Customary International Humanitarian Law*, in *Refugee from Inhumanity? War Refugees and International Humanitarian Law* (David James Cantor & Jean-Francois Durieux, eds., 2014) 107. She concludes that “customary IHL can provide interpretative guidance only if it enables an inclusive interpretation of the refugee definition and thereby strengthens refugee protection.” [Hereinafter Holzer, 2014].

¹⁵³ VCLT, *supra* note 29 Article 31(2).

¹⁵⁴ James Hathaway, *The Rights of Refugees under International Law* (2005) 62.

¹⁵⁵ 1951 Convention, *supra* note 8 at preamble.

¹⁵⁶ Holzer, 2014, *supra* note 152 at 107.

dividual, it is improper to use the former to contextualize the latter as to do so would reduce the protective scope of the Convention and thus contradict the object and purpose of the treaty.¹⁵⁷

Storey observes that whether IHRL or IHL provides the more protective norm depends on the circumstances.¹⁵⁸ An interesting example highlighted by Storey and expounded upon by Milanovic¹⁵⁹ is the case of detention. Under human rights law, Article 9(1) of the ICCPR provides

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.¹⁶⁰

By contrast, IHL permits the detention of a civilian non-combatant under the Fourth Geneva Convention “if the security of the Detaining Power makes it absolutely necessary.”¹⁶¹ A refugee decision-maker faced with the question of whether a civilian claimant’s detention during armed conflict constitutes persecution may be inclined to reach for the IHL norm given the context. However, it is the contention of this thesis that to do so would be improper because the IHL norm provides less protection to the civilian than its IHRL equivalent.¹⁶² It is thus crucial for decision-makers to consider whether the more specialized rule – the IHL norm – is more or less protective than the IHRL rule it aims to inform.

Limited to Situations of Armed Conflict

International humanitarian law applies to situations of armed conflict and is the *lex specialis* of IHRL in this context. In order for decision-makers to properly draw upon IHL as an interpretive aid in a refugee status determination, the situation in the claimant’s country of

¹⁵⁷ *Id.* Holzer argues this is the case with persecution, but this thesis takes a different approach to this question.

¹⁵⁸ Hugo Storey, *Armed Conflict in Asylum Law: The “War-Flaw,”* 31 *Ref. Survey Quarterly* (2012) 17-18.

¹⁵⁹ Marko Milanovic, *Norm Conflicts, International Humanitarian Law, and Human Rights Law*, in *International Humanitarian Law and International Human Rights Law* (Orna Ben-Naftali, ed., 2011) 113-114.

¹⁶⁰ ICCPR, *supra* note 7 at Article 9(1).

¹⁶¹ GC IV, *supra* note 10 at Article 42.

¹⁶² On this point, this thesis also maintains that the example in the Nuclear Weapons case would also not comport with the Convention’s object and purpose.

origin or nationality must meet this definition. The use of IHL as *lex specialis* is thus limited to situations of violence that come within the meaning of ‘armed conflict’ under IHL.

Historically, international humanitarian law regulated only wars between states, viewing internal civil conflict as a purely domestic matter of little concern to the international community. With the adoption of the Geneva Conventions in 1949, however, IHL embraced two distinct legal classifications of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). Common Article 2 applies in situations of the former, construed in the 1949 Conventions as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”¹⁶³ Article 1(4) of Additional Protocol I in 1977 expanded the legal definition of IAC to include conflicts where “peoples are fighting against colonial domination, alien occupation or racist regimes.”¹⁶⁴

The notion that conflicts not of an international character ought to be subject to international law was an unsurprisingly contested proposition during the diplomatic conferences preceding the Geneva Conventions.¹⁶⁵ As Jean Pictet noted in his influential Commentary, however, the humanitarian principle driving the protection of the sick and wounded in IAC “could not fail to lead to the idea of applying the principle to *all* cases of armed conflicts, including those of an internal character.”¹⁶⁶ Common Article 3 of the Geneva Conventions and Additional Protocol II comprise the core IHL provisions applicable to NIAC, although the latter requires a much higher threshold of violence, control and organization on the part of non-state belligerents in order to trigger its application.

While the core IHL instruments distinguish between IAC and NIAC, they do not provide an authoritative definition of ‘armed conflict.’ The case law of the International Criminal Tribunal of the Former Yugoslavia (ICTY) however, has been especially illustrative in this regard. In *Tadic*, the Appeals Chamber declared an armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence

¹⁶³ GCs-I-IV, *supra* note 10 at Article 2 (Common to the Four Conventions).

¹⁶⁴ AP I, *supra* note 10 at Article 1(4)

¹⁶⁵ See Pictet’s Commentary, e.g. Jean S. Pictet, Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (1952) at 43.

¹⁶⁶ *Id.* 38.

between governmental authorities and organized armed groups or between such groups within a State.”¹⁶⁷ This statement is of critical importance to IHL, as the existence of NIAC has been historically difficult to adduce. The two elements ‘protracted armed violence’ and ‘organization’ help determine when a situation surpasses that of an internal disturbance to one of NIAC, thereby triggering the application of humanitarian law. Later in Haradinaj, the Trial Chamber examined the ICTY treatment of ‘protracted armed violence’ and found that this phrase denoted the ‘intensity’ of a conflict situation, which is determined by reference to the following criteria:

[T]he number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting, the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.¹⁶⁸

As well, the Trial Chamber posited that the “involvement of the UN Security Council may also be a reflection of the intensity of a conflict.”¹⁶⁹ With respect to the second element, the non-state armed groups involved in a conflict must attain a certain level of organization before the violence qualifies as NIAC. One determines organization by examining whether the group has a command structure, headquarters, control over territory, access to military equipment, coordination and capacity to negotiate agreements, among other factors.¹⁷⁰

Many scholars question the rigid distinction between IAC and NIAC in humanitarian law. Kolb and Hyde, for instance, point to new instruments that apply to armed conflict regardless of its classification as evidence that the significance of the IAC-NIAC dichotomy may be waning.¹⁷¹ This thinking mirrors developments in social science. In her influential work *New and Old Wars*, for instance, Kaldor argues that conflicts once characterized as civil, internal and ‘low-intensity’ now have an increasing number of transnational con-

¹⁶⁷ Prosecutor v. Tadic, Case No. IT-94-1-AR-72, Appeals Chamber, (October 2, 1995) para 70 [hereinafter Tadic].

¹⁶⁸ Prosecutor v. Haradinaj, Case No. IT-04-84-T, Trial Chamber (April 3, 2008) para 49 [hereinafter Haradinaj].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Para 60.

¹⁷¹ Robert Kolb & Richard Hyde, *An Introduction to the Law of Armed Conflicts* (2008) 68-69 [hereinafter Kolb & Hyde].

nections.¹⁷² These ‘new wars’ “involve a blurring of the distinctions between war...organized crime...and large-scale violations of human rights.”¹⁷³ While IHL today retains the two traditional legal classifications of armed conflict, most of the crucial protections apply to both situations, such as the rules governing protected persons and means and methods of warfare.¹⁷⁴

The humanitarian law notion of armed conflict is not foreign to the refugee status determination process. When applying the exclusion clause contained in Article 1F(A) of the 1951 Convention, for instance, decision-makers must determine whether the claimant has committed a crime against peace, war crime or crime against humanity—acts which are “intrinsically linked to armed conflict.”¹⁷⁵ Nevertheless, as Holzer argues, engagement with this IHL concept is troublesome in the refugee context for a few reasons. First, those conducting a refugee status determination do not have the authority to adduce whether a situation of violence constitutes an armed conflict as they do not possess the legal competence to directly apply IHL. Second, decision-makers are required to look to the future to consider the potential fate of the claimant upon return, whereas the question of whether or not an armed conflict exists is a matter of fact in the present. Third, inquiring about the presence of armed conflict may distract decision-makers from the crux of the claim and place an exaggerated emphasis on the conditions in the country of origin or nationality.

In light of these difficulties, national decision-makers attempting to distinguish armed conflict from other situations of violence in the claimant’s country of origin must proceed with caution. In particular, decision-makers should rely on the legal classifications of the ICRC and/or the UN Security Council as to the existence of armed conflict, as the opinions of these organizations are authoritative in this regard. Decision-makers must properly situate this information as background material intended to inform the overall refugee status determination and not unduly focus on whether or not an armed conflict is present. Importantly, because most situations of armed conflict in a claimant’s country of

¹⁷² Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (2d ed. 2012) at Introduction.

¹⁷³ *Id.*

¹⁷⁴ Kolb & Hyde, *supra* note 171 at 69.

¹⁷⁵ Holzer, *supra* note 152 at 104.

origin will be NIAC, decision-makers drawing upon IHL as *lex specialis* must ensure to refer to the appropriate body of rules.

4.2 Inclusion and IHL as *lex specialis* in Refugee Status Determination

This thesis considers how IHL as the *lex specialis* of IHRL offers interpretive guidance to national decision-makers when analyzing the claims of civilian non-combatants fleeing armed conflict. As discussed in Chapter 2, Canadian decision-makers examine refugee inclusion through a human rights lens, thereby centering refugee status determination around the relationship between the individual and the State. This approach finds broad support in international law today.

The inquiry underlying this final section is perhaps best articulated by Cantor as a question of how the “context-influenced obligations of HRL change as a result of the applicability of IHL in the country of origin.”¹⁷⁶ As discussed earlier in this Chapter, national decision-makers cannot draw upon IHL norms in order to narrow the scope of protection under the 1951 Convention. However, there are ways the inclusion analysis benefits from reference to the humanitarian law regime. This thesis advances two main arguments on this point. First, reference to IHL norms may assist national decision-makers in distinguishing between general consequences of war and persecution on the basis of race, religion, nationality, membership in a particular social group or political opinion. Second, drawing upon IHL may help national decision-makers to properly contextualize the standards for evaluating the claimant’s well-founded fear, availability of state protection and possibility of an IFA.

Persecution for Reasons of a Convention Ground

The Salibian holding and its subsequent endorsement by the 1996 Guidelines firmly establishes the non-comparative approach as the preferred method of refugee status determination when the crux of the claim relates to the presence of armed conflict in the claimant’s home country. According to this approach, a civilian non-combatant fleeing armed conflict

¹⁷⁶ David James Cantor, *The Laws of War and the Protection of ‘War Refugees’: Reflections on the Debate and its Future Directions*, 12 J. Crim. Justice (2014) 944.

is a refugee if she fears persecution for reasons of a Convention ground, either personally or collectively,¹⁷⁷ and cannot avail herself of state protection or relocate to an IFA. She is not required to demonstrate that she or her group is especially targeted compared to others, but that the harm she fears constitutes persecution and has a nexus to one or more of the five grounds.

The schism between the non-comparative and differential risk approaches indicates that the most challenging aspect of the inclusion analysis for these claims is distinguishing between generalized violence and persecution for reasons of a Convention ground. As Holzer argues, this distinction often eclipses the fact that violence is sometimes both widespread *and* targeted.¹⁷⁸ The Court recognized as much in *Salibian* when it noted that protection could theoretically extend to all citizens so long as they face a risk of persecution based on one of the established grounds.¹⁷⁹

International humanitarian law delineates permissible from impermissible conduct during armed conflict. Non-compliance with IHL is an unfortunately common feature of warfare,¹⁸⁰ particularly in NIAC where high civilian death tolls and crushing brutality are the norm. The regime lacks an effective enforcement mechanism and thus compliance poses a major challenge. However, IHL establishes a hierarchy among norms, viewing certain violations as graver than others. This framework helps distinguish generalized violence from persecution under the Convention as serious IHL violations indicate that the claimant may be facing something beyond “common victimization.”¹⁸¹

The phrase “serious violations of IHL” refers to conduct that either endangers protected persons or objects or breaches important values.¹⁸² Such violations constitute war

¹⁷⁷ Recall the holding in *Rizkallah*, *supra* note 142.

¹⁷⁸ Holzer, 2012, *supra* note 126 at 5.

¹⁷⁹ *Salibian*, *supra* note 137 at para 17.

¹⁸⁰ See generally International Committee of the Red Cross, Improving Compliance with International Humanitarian Law, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law (2004).

¹⁸¹ Storey & Wallace, *supra* note 132 at 362, citing Mark R. von Sternberg, *Political Asylum and the Law of Internal Armed Conflict: Refugee Status, Human Rights and Humanitarian Law Concerns*, 5 Int’l J. Ref. L. 153 (1993).

¹⁸² International Committee of the Red Cross, What are “Serious Violations of International Humanitarian Law?” Explanatory Note.

crimes as per customary international humanitarian law, which applies to both IAC and NIAC. A civilian non-combatant who fears death as a result of an armed conflict in her home country may have her claim dismissed on an assumption that civilian deaths are a general consequence of war. If one examines the IHL rules in conjunction with country of origin information, however, a different result may emerge. Belligerents in an armed conflict are bound by the principle of distinction, which requires differentiation between civilians and combatants as well as between civilian and military objects.¹⁸³ The deliberate targeting of civilians is prohibited under IHL. An attack against combatants or military objects which incidentally entails a loss of civilian life conforms with international humanitarian law so long as the loss is not excessive when compared with the military advantage gained.¹⁸⁴ Civilian death in this context is perhaps appropriately characterized as generalized violence. If, however, the conflict is marked by attacks on civilian populations and/or other serious violations of IHL, civilian deaths are better understood as targeted violence.

One notable characteristic of NIAC that is undoubtedly relevant to the present analysis is the fact that conflicts of this nature are typically based around racial, ethnic, political and/or religious rivalries. In these contexts, closer scrutiny of ‘generalized violence’ is warranted because violence against civilians is less likely to be random and indiscriminate than in conflicts without these dividing lines. Where the country evidence indicates that the conflict in question has a racial, ethnic, religious and/or political basis, national decision-makers must carefully consider the mindset of belligerents before determining that the claimant’s fear is of a general consequence of war. Reference to IHL norms may assist national decision-makers with this task. Serious violations of IHL entail individual criminal responsibility under international law and thus carry a *mens rea* component, which is typically ‘intent.’¹⁸⁵ As Storey and Wallace astutely point out, where serious IHL violations

¹⁸³ See International Committee of the Red Cross, Customary International Humanitarian Law Volume I (2005) at Part 1 [hereinafter ICRC, CIHL Vol. 1].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* See Rule 156 in Volume I and Volume II.

occur in the context of a conflict that “is racially, ethnically or politically based, then intent must surely be based on a protected ground.”¹⁸⁶

In many cases, a pure human rights approach may be limited in its ability to distinguish between generalized violence and that which is targeted on the basis of race, religion, nationality, political opinion and/or membership in a particular social group. Instances of civilian death, rape, arbitrary arrest and detention, for instance, may appear as random acts of indiscriminate violence without a nexus to a Convention ground but in truth are part of a widespread pattern of targeted violence occurring in the context of a racially, ethnically, religiously and/or politically-based war. IHL informs this assessment first and foremost by providing a framework in which certain norm violations are considered especially grave. When these violations feature in an armed conflict, their presence is an indication that the conflict falls outside IHL parameters, thereby warranting a closer assessment of the violence the claimant fears. From here, country information speaking to the bases of the conflict read in conjunction with IHL norms may help decision-makers avoid the erroneous conclusion that violence is not persecution with a nexus to a protected ground simply because it is targeted towards large groups of people.

Well-Founded Fear, State Protection and Internal Flight Alternative

Refugee status determination in the Canadian context proceeds according to a human rights framework. Chapter 2 outlined the Canadian standards for assessing each of the core elements of the Convention refugee definition. National decision-makers determine whether the claimant’s fear is well-founded by examining whether she objectively faces a reasonable possibility of persecution. Canadian law presumes the State is capable of protecting its citizens unless there is a complete State breakdown or the claimant is able to demonstrate by way of clear and convincing evidence that protection would not be forthcoming. The onus is on the State – the IRB in most cases – to raise the possibility of a specific IFA which is reasonable for the claimant in all circumstances.

¹⁸⁶ Storey & Wallace, *supra* note 132 at 363.

Each of these standards is informed by IHRL, which is predominantly a peacetime regime. Because they are construed through the lens of peace, they presume the absence of large-scale violence and instability in the claimant's home country. They are, however, fairly open-ended, contextual standards and thus may look secondarily to IHL as *lex specialis* for guidance.

When the violence in the claimant's country of origin falls within the IHL meaning of 'armed conflict,' the situation by definition involves 'protracted armed violence' either between the State and non-state actors or between different non-state groups.¹⁸⁷ The violence must meet a certain threshold of intensity in order to qualify as an NIAC to which IHL applies.¹⁸⁸ These conditions and the framework regulating them may help contextualize the aforementioned legal standards when analyzing the claim of a civilian non-combatant.

When the crux of a refugee status claim links to an NIAC in the country of origin, evidence of belligerent compliance or non-compliance with relevant IHL norms may provide assistance in determining whether the claimant faces a reasonable or more-than-minimal possibility of persecution. For instance, IHL regulates the means and methods of warfare with a high degree of specificity. In particular, the regime provides a detailed list of prohibited weapons and restrictions on the use of several others.¹⁸⁹ In the context of a refugee status determination, evidence that a belligerent identified by the claimant as a persecutor or potential persecutor uses weapons causing superfluous injury, for example, may make the possibility of persecution more likely than not. Therefore, national decision-makers may draw upon these norms and the language of IHL to inform the objective basis of the claimant's fear.

The burden of demonstrating either a complete State breakdown or clear and convincing evidence of a lack of protection is a high one for civilian non-combatants seeking refugee status in Canada. Many armed conflicts involve the State retaining control over some or most of the territory and thus avoid the type of total breakdown in cases like So-

¹⁸⁷ Tadic, *supra* note 167.

¹⁸⁸ Haradinaj, *supra* note 168.

¹⁸⁹ See ICRC, CIHL Vol. 1 Part IV.

malia. However, the ‘clear and convincing’ standard may be difficult to establish without reference to an IHL framework, particularly, as Storey and Wallace argue,¹⁹⁰ when the claimant is associated with the losing side of a war. They write,

[S]ituations in which one side has decisively gained the upper hand are precisely the type of context that often experiences the gravest violations of IHL norms... One-sided conflicts may give rise to one-sided protection. Certainly, if the winning side is violating international humanitarian law on a major scale, this feature should be enough on its own to demonstrate a lack of effective protection.¹⁹¹

From the IHRL perspective, States are presumed capable of protecting their citizens and to afford such protection on an equal basis. In the context of war, however, particularly where the dividing lines are racial, ethnic, religious and/or political, this presumption is unlikely to hold true. Reference to IHL in this context may soften the clear and convincing standard to better reflect the reality of the conflict in question, particularly as it affects certain segments of the population. This approach accords with Canadian jurisprudence, which has repeatedly emphasized that the availability of State protection is a highly contextual assessment and must not place an impossible burden on the claimant.¹⁹²

The possibility of an internal flight alternative may be significantly constrained by the presence of an armed conflict in the claimant’s home country. In considering whether a proposed IFA is reasonable, national-decision makers must examine a range of factors, including the presence of violence. Serious IHL violations and/or fighting in general will likely make the IFA an unreasonable option for the claimant and drawing upon IHL may assist in reaching this conclusion.

Conclusion

The overarching purpose of this thesis was to consider the relevance of international humanitarian law as *lex specialis* to the interpretation of the refugee definition contained in Article 1A(2) of the 1951 Convention. The thesis explored this question in the particular

¹⁹⁰ Storey & Wallace, *supra* note 132 at 360-361.

¹⁹¹ *Id.* 361.

¹⁹² See IRB Interpretation, *supra* note 110.

context of Canada, where refugee decision-makers analyze the claims of civilians fleeing armed conflict using the non-comparative approach.

Chapter 1 considered the regime interactions between IRL, IHRL and IHL in international law. Chapter 2 discussed the definition of a Convention refugee and its elemental characteristics through the lens of Canadian jurisprudence. Chapter 3 explained the varying approaches to civilian non-combatants in refugee law jurisprudence, with a focus on this discord in Canadian law. Finally, Chapter 4 considered how IHL as the *lex specialis* to IHRL provides interpretive guidance to national decision-makers and when reference to IHL would be appropriate under domestic and international law.

This thesis draws three broad conclusions on this question. First, where the use of *lex specialis* as an interpretive principle narrows the scope of refugee protection under the 1951 Convention, such use does not comply with international law. Second, the use of IHL as an interpretive tool is appropriate where the situation of violence in a claimant's country of origin is an armed conflict to which IHL applies. Third, national decision-makers may draw upon the IHL framework to interpret the core elements of the refugee definition when analyzing the claims of civilian non-combatants fleeing armed conflict. However, reference to IHL norms is most useful where the country information indicates pervasive non-compliance with the law of armed conflict and/or serious violations of IHL, and where the conflict is marked by racial, ethnic, religious and/or political tensions. Furthermore, IHL as *lex specialis* is a crucial interpretive tool to help decision-makers distinguish between the general consequences of war and persecution for reasons of a Convention ground. IHL norms may also bring greater precision to legal standards typically construed through a human rights lens.

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