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978-1-107-00597-6 - Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law

Mélanie Jacques

Excerpt

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Introduction

Armed conflict and displacement: the issue

There is an indisputable correlation between armed conflict and displacement. Armed conflict and internal strife are widely considered to be major causes of population movement, within and outside borders.¹ As observed in the 2005 Human Security Report:

For four decades the number of refugees around the world has tracked the number of armed conflicts – growing inexorably, though unevenly, from the 1960s to the early 1990s, then falling commensurably as the numbers of wars declined in the 1990s.²

At the end of 2010, the United Nations High Commissioner for Refugees (UNHCR) recorded some 43.7 million people displaced worldwide, as a result of armed conflict or persecution, the highest in more than fifteen years.³ According to the Internal Displacement Monitoring Centre (IDMC), displacement in 2010 was mostly caused by conflict between governments and armed groups, or by generalized violence.⁴

The tragedy is that the majority of those displaced never really escape conflict. Indeed, people fleeing situations of danger increasingly choose or are forced to remain within their own country and to become internally displaced persons (IDPs). As of December 2010, the total number of

¹ In a 1992 report, the Secretary-General on Internally Displaced Persons identified ‘armed conflict and internal strife’ as a major cause of displacement. UNCHR, ‘Analytical report by the Secretary-General on internally displaced persons’ (14 February 1992) E/CN/4/1992/23, para. 18. Similarly, a group of governmental experts observed, in 1986, that ‘wars and armed conflicts have been and continue to be a major cause of massive flows of refugees’ (UNGA, ‘Report of the Group of Governmental Experts on international cooperation to avert new flows of refugees’ (13 May 1986) A/41/324, para. 31)).

² Human Security Centre, *Human Security Report 2005*, 2005, p. 103.

³ UNHCR, *Global Trends 2010*, 2011, p. 5. ⁴ IDMC, *Global Overview*, 2010, p. 14.

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internally displaced persons worldwide was estimated at 27.5 million,⁵ nearly twice the number of refugees.⁶ The reasons for internal, rather than external, displacement are numerous. People generally prefer to stay within or close to, their own community and their homes, hoping for a speedy return, as soon as the hostilities end.⁷ In certain situations, geographical and topographical considerations may stand in the way of external flight.⁸ Military operations on the border may also constitute an obstacle. Recently, the obstacles have tended to be political, with governments growing progressively more reluctant to accept large numbers of refugees within their frontiers. Persons displaced by armed conflicts have thus faced closed borders, stringent travel restrictions and check points, forcing them to remain in camps at the frontier.⁹ Consequently, while they may be able to escape the fighting, internally displaced persons never escape the conflict, which eventually catches up with them, particularly during civil wars.

Alternatively, people may flee across international borders and seek refuge in neighbouring or third countries. However, as observed by Lischer, 'often the resulting refugee crisis leads to an expansion of violence rather than an escape'.¹⁰ Many analyses have demonstrated that there is a link between large-scale population movements and the spread of conflict.¹¹ A 2006 study suggested that countries that experienced an influx of refugees from neighbouring states were significantly more likely to experience civil wars themselves.¹² The presence of refugees may indeed threaten ethnic or inter-communal balance or endanger social and economic stability in the host country, thus sparking insurrection.¹³ Additionally, mass influxes of refugees bring with them 'arms, combatants and ideologies that are conducive to violence'.¹⁴ Militarized refugee camps may cause frictions between the host state and the state of origin,

⁵ *Ibid.*, p. 8.

⁶ At the end of 2010, the UNHCR recorded 15.4 million refugees worldwide, including 10.55 million under UNHCR mandate and 4.82 million Palestinian refugees under mandate of the UN Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) (UNHCR, *Global Trends 2010*, 2011, p. 5).

⁷ Phuong, *International Protection of Internally Displaced Persons*, 2004, p. 3.

⁸ UNHCR, *State of the World's Refugees*, 1997, ch. 3.

⁹ *Ibid.* ¹⁰ Lischer, *Dangerous Sanctuaries*, 2005, p. 2.

¹¹ *Ibid.*; Salehyan and Gleditsch, 'Refugees and the spread of civil war', 2006, 335; Weiner, 'Bad neighbors, bad neighborhoods', 1996, 5.

¹² Salehyan and Gleditsch, 'Refugees and the spread of civil war', 338.

¹³ Dowty and Loescher, 'Refugee flows', 1996, 48; Lischer, *Dangerous Sanctuaries*, pp. 13–14; Salehyan and Gleditsch, 'Refugees and the spread of civil war', 342–3.

¹⁴ Salehyan and Gleditsch, 'Refugees and the spread of civil war', 338.

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for which refugees constitute a potential military threat.¹⁵ Accordingly, 'those uprooted by armed conflict in one country are increasingly likely to include people who are already refugees from another'.¹⁶ As conflict spreads across borders, it becomes more difficult for civilians to escape violence. Many refugees caught up in armed conflict find themselves once again on the road. Some become internally displaced within their state of asylum, while others elect to return to their country of origin and face the violence all over again.¹⁷

Objective and structure of the study

As conflict creates displacement and displacement in turn spreads conflict, it is clear that the two issues are intrinsically related. In this context, it is apposite to examine how the law applicable in situations of armed conflict, namely international humanitarian law (IHL), deals with the issue of displacement. International humanitarian law protects civilians from becoming internally displaced persons or refugees by expressly prohibiting forced displacement. The question remains whether international humanitarian law sufficiently protects civilians from *all* instances of forced displacement in armed conflict. Failing that, how does international humanitarian law protect displaced persons caught up in armed conflict? The Geneva Conventions and Protocol I specifically refer to refugees in a few provisions, but no mention is made of internally displaced persons. Is the protection afforded to civilian victims of war sufficient to tackle displacement-related issues?

Several of these issues have been addressed by other authors.¹⁸ However, the protection of both refugees and internally displaced persons in time of war has never been dealt with in a comprehensive fashion. In addition, consideration of the issue of displacement in armed conflict from the perspective of refugee law has received extensive coverage

¹⁵ Lischer, *Dangerous Sanctuaries*, p. 2. ¹⁶ UNHCR, *State of the World's Refugees*, 1993.

¹⁷ E.g. when conflict erupted in Côte d'Ivoire in 2002, thousands of Liberian refugees fled back to Liberia, itself engulfed in civil war.

¹⁸ Bugnion, 'Réfugiés, personnes déplacées et droit international humanitaire', 2001, 277–88; Partsch, 'Refugees in armed conflict and internal disturbances', 1983, 419–28; Patrignic, 'Protection of refugees in armed conflict', 1981, 1–11; Dinstein, 'Refugees and the law of armed conflict', 1982, 94–109; Jacquemet, 'Cross-fertilization', 2001, 651–74; Obradovic, 'La protection des réfugiés dans les conflits armés internationaux', 1987, pp. 147–61; Krill, 'ICRC action in aid of refugees', 1988, 328–50; Lavoyer, 'Refugees and internally displaced persons', 1995, 162–80; Kälin, 'Flight in times of war', 2001, 628–48; Hulme, 'Armed conflict and the displaced', 2005, 91–116.

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in the literature.¹⁹ Similarly, the protection of internally displaced persons under international law has been widely covered.²⁰ While this study inevitably builds on those earlier developments, it takes a different perspective by looking at the global issue of displacement mainly from the viewpoint of humanitarian law. This book thus intends to produce a holistic study of the protection of ‘war migrants’ under international humanitarian law. With ‘displacement’ as the guiding thread, the purpose of this study is twofold. First, it seeks to derive from the relevant provisions of international humanitarian law a comprehensive legal framework for the protection of displaced persons in armed conflict. It will indeed be demonstrated that the regime forms a continuum of protection, both from and during displacement. Second, it aims to apply the issue of displacement within the broader context of civilian war victims generally and to identify and address the shortcomings of international humanitarian law in this respect.

The structure of this book is as follows. Chapters 1 and 2 focus on the protection against forced displacement in international and non-international armed conflicts. It is argued that, while international humanitarian law expressly and adequately prohibits the displacement in certain situations of armed conflict, it does not deal with all cases of forced displacement, and that the traditional state-centric concept of nationality and the dichotomy on which IHL is based no longer reflect the reality of contemporary armed conflicts. Chapter 3 focuses on the practice of population transfers in occupied territory, commonly used by occupying powers as a way to create *faits établis* in occupied territory. This chapter explores the legal issues arising from such practices through a study of Israel’s settlement policy and the recent International Court of Justice Advisory Opinion on the legality of the construction of a Separation Wall in Occupied Palestinian Territory. Chapter 5 examines the concept of forced displacement as an international crime. Chapter 6 analyses the specific, if limited, protection of refugees under international humanitarian law, while Chapter 7 concentrates on internally displaced persons as civilians in time of war. Finally, it is asserted, in Chapter 8, that the rules of international humanitarian law regulating the conduct of hostilities reinforce the prohibition of armed attacks on refugee and

¹⁹ I. C. Jackson, *The Refugee Concept in Group Situations* (The Hague: Martinus Nijhoff, 1999); P. Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (The Hague: Martinus Nijhoff, 1997).

²⁰ Phuong, *International Protection of Internally Displaced Persons*.

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IDP camps, particularly through the creation of protected zones immune from attacks.

Legal framework

International humanitarian law

In time of armed conflict, the legal regime applicable is international humanitarian law, also known as the international law of armed conflicts. The International Committee of the Red Cross (ICRC) defines ‘international humanitarian law applicable in armed conflict’ as:

international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods or means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.²¹

The principal sources of conventional international humanitarian law are the 1907 Hague Conventions, in particular Convention IV respecting the Laws and Customs of War on Land and the Regulations annexed to it,²² the four Geneva Conventions of 1949²³ and their two Additional Protocols of 1977.²⁴ In addition, an authoritative study published in 2005 under the auspices of the ICRC identified over 160 customary rules of international humanitarian law applicable in international and non-international armed conflicts.²⁵

IHL is based on a strong dichotomy between international and non-international armed conflicts and the extent of the protection afforded

²¹ Sandoz *et al.*, *Commentary on the Protocols*, 1987, p. xxvii.

²² Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations, 18 October 1907, AJIL Supplement, 2 (1908), 90–117.

²³ Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention III relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

²⁴ Protocol Additional to the Geneva Conventions, 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions, 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609.

²⁵ Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols., 2005.

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to the victims of war will depend on the qualification of the situation. Humanitarian law applicable to international armed conflicts is much more developed and detailed than that of internal armed conflicts. International armed conflicts, namely conflicts opposing two or more states,²⁶ are governed by the four Geneva Conventions, as well as the First Protocol and an extended body of customary law, which regulates the conduct of hostilities. In addition, the law of belligerent occupation, which regulates the relationship between the occupying power and the occupied population, is governed by the Hague Regulations,²⁷ the 1949 Civilians Convention²⁸ and Protocol I. Non-international armed conflicts, on the other hand, enjoy a much more restricted legal framework. Common Article 3 to the four Geneva Conventions applies to ‘armed conflict not of an international character’ and lays down minimum humanitarian principles for the protection of persons not or no longer taking part in hostilities. Protocol II is the first instrument entirely dedicated to non-international armed conflicts. However, its high threshold of applicability and a lack of ratification have meant that the Protocol has rarely been applied in practice. In addition, internal disturbances and tensions fall below the threshold of armed conflict and, as a result, are excluded from the scope of application of international humanitarian law.²⁹

The 1949 Geneva Conventions are mainly concerned with the treatment of enemy nationals in the hands of a party to an armed conflict. Entitlement to full protection under international humanitarian law is clearly linked to a traditional concept of nationality, and vast categories of civilians and other war victims are consequently excluded from its scope of application.³⁰ Nevertheless, all civilians, irrespective of their nationality, are protected against the effects of hostilities. The ICRC commentary on the First Protocol clearly states that: ‘[i]n protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves’.³¹

Refugees and internally displaced persons caught in the middle of an armed conflict are entitled, as civilians, to the protection of international humanitarian law. The extent of this protection will depend on various factors, including the characterization of the conflict and the nature of

²⁶ Geneva Conventions, Common Article 2(1).

²⁷ Section III, ‘Military Hostility over Hostile Territory’.

²⁸ Arts. 27 to 34 and Section III ‘Occupied Territories’.

²⁹ Protocol II, Art. 1(2). ³⁰ See below Chapter 1.

³¹ Sandoz *et al.*, *Commentary on the Protocols*, p. 610.

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their relationship with the power whose hands they are in. The various issues pertaining to the protection of displaced persons in armed conflict will be addressed in this book. However, no international legal framework should be seen as an isolated system. It is therefore necessary, as a preliminary matter, to place this issue within the wider context of international law, as a unified system of correlated and interdependent branches, and to examine the interaction between international humanitarian law and other branches of international law.

Interplay between international humanitarian law and other 'human' branches of international law

Similarities and differences

The three humanitarian branches of international law, i.e. international human rights law (IHRL), international humanitarian law and international refugee law (IRL), share a common interest in the protection of humanity. This ideological common ground was recognized by the International Tribunal for the Former Yugoslavia (ICTY) in the 1998 *Furundžija* decision:

The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.³²

However, the scope and conditions of application of each legal regime differ on a several important points. First, while international humanitarian law only applies in situations of armed conflict, human rights law and refugee law apply in principle at all time. However, most human rights instruments contain a derogation clause, which enables a state party to derogate from certain rights 'in time of public emergency threatening the life of the nation' and other exceptional circumstances.³³ Human rights may be derogated only 'to the extent strictly required by the exigencies of the situation' and the validity of these derogations will depend on the fulfilment of a number of strict requirements laid down in each

³² *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1, 10 December 1998, para. 183.

³³ [European] Convention for the Protection of Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950, 213 UNTS 222, Art. 15(1); International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, 999 UNTS 171, Art. 4(1); American Convention on Human Rights 'Pact of San José, Costa Rica' (ACHR), San José, 22 November 1969, 1144 UNTS 123, Art. 27(1).

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instrument's derogation clause.³⁴ This clearly indicates that, unless an affirmative step is taken to derogate and all the conditions are met, states involved in an armed conflict will continue to be bound by their obligations under international human rights law.³⁵

Not all human rights may be derogated from. Certain rights, including the right to life, the prohibition of torture or cruel or degrading treatment, prohibition of slavery and the prohibition of retroactive criminal laws, are so-called 'non-derogable rights' and must be applied in all circumstances.³⁶ In addition, certain human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁷ and the African Charter on Human and Peoples' Rights³⁸ do not contain a derogation clause. They do, however, allow for restrictions or limitations to most human rights under certain circumstances.³⁹ As for refugee law, unlike most human rights law instruments, the 1951 Refugee Convention⁴⁰ does not contain a clause which would allow states to suspend or derogate from Convention rights in time of emergency.⁴¹

³⁴ ICCPR, Art. 4(2); ECHR, Art. 15(2) and ACHR, Art. 27(2) require, as conditions of validity of the derogations: (a) the existence of a public emergency threatening the life of the nation; (b) proportionality to the exigencies of the situation; (c) consistency with other international obligations; and (d) notification of the state of emergency to other state parties and the relevant supervisory bodies. In addition, Art. 4(2) of ICCPR requires an official proclamation of a state of emergency. Finally, ICCPR, Art. 4(2) and ACHR, Art. 27(2) both require that the derogation does not involve 'discrimination on the ground of race, colour, sex, language, religion, or social origin'.

³⁵ Olson, 'Practical challenges of implementing complementarity', 2009, 444.

³⁶ ECHR, Art. 15(2); ICCPR, Art. 4(2); ACHR, Art. 27(2).

³⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, 993 UNTS 3.

³⁸ African [Banjul] Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, 1520 UNTS 217.

³⁹ The ICESCR contains a general limitation clause. Article 4 provides that: 'The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

In addition, most human rights instruments allow for restrictions or limitations on the enjoyment of specific human rights, for reasons of national security, public order, public health or morals, or the rights and freedoms of others. See, for instance, ICCR, Art. 12 (freedom of movement), ICESCR, Art. 8 (right of trade unions), African Charter, Art. 8 (freedom of conscience).

⁴⁰ Convention relating to the Status of Refugees (Refugee Convention), Geneva, 28 July 1951, 189 UNTS 137, modified by the Protocol relating to the Status of Refugees, 4 October 1967, 606 UNTS 267.

⁴¹ Hathaway, *The Rights of Refugees under International Law*, 2005, p. 261.

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It does, however, provide for certain provisional measures to be taken against specific individuals ‘in time of war or other grave exceptional circumstances’.⁴² An antithetic interpretation of Article 9 leads to the conclusion that ‘the Convention is to be applied not only in normal peace time, but also in time of war or national emergency’.⁴³ In contrast, as a body of law specifically designed to apply in situations of emergency, no derogation to the rules of international humanitarian law is ever allowed.⁴⁴

The three branches of international law also differ in terms of their passive scope of application. International humanitarian law is designed primarily to protect victims of war, i.e. persons who do not or are no longer taking part in hostilities and who find themselves in the hands of the enemy. International human rights law, on the other hand, governs the relationship between a state and its own nationals or individuals who are under its territorial jurisdiction.⁴⁵ International refugee law seeks to provide protection and assistance to persons who, owing to well-founded fear of persecution, have fled across international borders and do not enjoy the protection of their country of origin.⁴⁶ It therefore regulates the relationship between the asylum state and the refugee.

⁴² Article 9 states that ‘in time of war or other grave exceptional circumstances’, a contracting state may take ‘provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interest of national security.’

⁴³ Grahl-Madsen, *Commentary on the Refugee Convention*, 1997, p. 42.

⁴⁴ With the exception of Article 5 of the Fourth Geneva Convention, which provides that a person in the territory of a party to an armed conflict ‘definitely suspected of or engaged in activities hostile to the security of the State’ may see their rights and privileges under the Fourth Convention withdrawn by the party concerned. Similarly, spies, saboteurs or any person detained as ‘a person under definite suspicion of active hostilities to the security of the occupying power’ may, where absolute military security so requires, be regarded as having forfeited rights of communication under the Fourth Convention.

⁴⁵ Vinuesa, ‘Interface, correspondence and convergence’, 1998, 71.

⁴⁶ Article 1A(2) of the Refugee Convention. Regional refugee instruments have elected a broader definition of the term ‘refugee’, which also includes armed conflict and internal disturbances as a ground for refugee protection. The 1969 OAU Convention thus states that ‘The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’ (OAU Convention Governing Specific Aspects of the Refugee Problems in Africa, Addis Ababa, 10 September 1969, 1001 UNTS 45). Similarly, the Cartagena Declaration on Refugees cites ‘generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’ as grounds for refugee protection (Cartagena

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With regard to the active personal scope of application, it is widely accepted that international humanitarian law is binding on all parties to an armed conflict, states and non-state actors alike.⁴⁷ Thus, as soon as a situation of internal violence reaches a certain threshold, it qualifies as a non-international armed conflict and all actors involved, including rebels and other armed groups, become consequently bound by the rules of international humanitarian law, at least those obligations contained in Common Article 3 of the Geneva Conventions. In *Nicaragua*, the International Court of Justice (ICJ) indeed expressly recognized that the acts of the *contras* towards the Nicaraguan government were governed by the law applicable to conflicts ‘not of an international character’.⁴⁸ The provisions of Protocol II have similarly been recognized as applicable to all parties to an internal armed conflict.⁴⁹

In contrast, international human rights law – and, by analogy, refugee law – has traditionally been regarded as imposing obligations on governments only.⁵⁰ However, there is a growing body of opinion which considers that armed opposition groups have human rights obligations; particularly if they exercise governmental functions.⁵¹ The issue remains nonetheless widely controversial. Whatever the outcome of this debate, it should be borne in mind that the statutes of the international tribunals for the former Yugoslavia⁵² and Rwanda,⁵³ as well as that of the International Criminal Court (ICC),⁵⁴ provide for the individual criminal responsibility

Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Serv.L/V/II.66/doc.10, rev. 1, 190–3).

⁴⁷ For a detailed discussion on the binding force of Common Article 3 and Protocol II for non-state actors, see Zegveld, *Accountability of Armed Opposition Groups in International Law*, 2002, p. 9; Moir, *The Law of Internal Armed Conflict*, 2002, pp. 52, 96; Cassese, ‘The status of rebels’, 1981, 416.

⁴⁸ *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, para. 219.

⁴⁹ Zegveld, *Accountability of Armed Opposition Groups in International Law*, p. 11.

⁵⁰ Cohen and Deng, *Masses in Flight*, 1998, pp. 74–5. See also Lindsay Moir, who considers that: ‘Human rights obligations are binding on governments only, and the law has not yet reached the stage whereby, during internal armed conflict, insurgents are bound to observe the human rights of government forces, let alone of opposing insurgents’ (*Law of Internal Armed Conflict*, p. 194).

⁵¹ For a detailed discussion on human rights obligations of non-state actors, see Clapham, ‘Human rights obligations of non-state actors in conflict situations’, 2006, 491.

⁵² Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), UN Doc. S/25704, adopted by Security Council on 25 May 1993, UN Doc. S/RES/827 (1993).

⁵³ Statute of the International Criminal Tribunal for Rwanda (ICTR), adopted by Security Council on 8 November 1995, UN Doc. S/RES/955 (1994).

⁵⁴ Rome Statute of the International Criminal Court (ICC), Rome, 17 July 1998, 2187 UNTS 3.