

The protection of migrants under international humanitarian law

Helen Obregón Gieseken*

Helen Obregón Gieseken is Legal Adviser in the Legal Division of the International Committee of the Red Cross, based in Geneva.

Abstract

The movement of migrants across international borders may result in grave humanitarian consequences and protection and assistance needs for those involved. Although many reach their destinations safely, others may find themselves in a country experiencing armed conflict – either because they live there or are travelling through there – and may endure great difficulties and be particularly vulnerable. In these situations, as civilians, migrants are protected under international humanitarian law (IHL) against the effects of hostilities and when in the hands of a party to the conflict. This article will provide an overview of the protection afforded by IHL to migrants as civilians in international and non-international armed conflicts. It will then examine more closely certain particularly relevant rules for the issue of migration, notably those related to the movement of migrants, family unity, and missing and dead migrants. In this way, this article will show that IHL provides important legal protections for migrants finding themselves in situations of armed conflict.

Keywords: legal framework, international humanitarian law, international human rights law, international refugee law, migrants, refugees, stateless persons.

⋮⋮⋮⋮⋮

* The views expressed here are those of the author and do not necessarily reflect the position of the International Committee of the Red Cross. The author would like to thank Lindsey Cameron, Stéphanie Le Bihan, Tilman Rodenhäuser, Tristan Ferraro and Elem Khairullin for their valuable comments on earlier drafts of this article.

Introduction

Armed conflicts in various parts of the world, including Afghanistan, the Central African Republic, the Democratic Republic of the Congo, Somalia, South Sudan and Syria, continue to cause immeasurable hardship for entire populations, prompting increasing numbers of people to flee within countries or across international borders. By the end of 2015, the number of refugees, asylum-seekers and internally displaced persons forcibly displaced worldwide due to armed conflicts, other situations of violence, persecution or human rights violations reached an unprecedented 65.3 million.¹ In 2015, the number of migrants² – a term covering a broad set of persons, including refugees as a specific legal category under international refugee law – reached 244 million worldwide.³ Among the migrants who have left their countries of origin or of habitual residence (whether forcibly or voluntarily), many can subsequently find themselves in a third country experiencing armed conflict. In these situations, migrants, like the rest of the civilian population, endure great difficulties. They may be affected by the hostilities, lose contact with their families, go missing or die, often with no record of their fate or whereabouts. As foreigners, they tend to have additional vulnerabilities, encountering problems in accessing basic services or being subjected to restrictions of personal liberty. They may also be at risk of being sent back to their countries of origin or to other countries, potentially in violation of international law.

The migration discourse today focuses primarily on the movement of migrants in the Mediterranean, the Americas and beyond, towards European or North American land borders and shores. In these discussions, the plight of migrants in their country of origin, along the migration routes and in third countries where they reside (temporarily or permanently) is often largely forgotten and their protection and assistance needs not adequately addressed.⁴ Notably, migrants who live in – or are crossing through – countries affected by armed conflict may be particularly vulnerable. This article primarily seeks to address the case of migrants caught in situations of armed conflict and how they are protected under international humanitarian law (IHL), rather than migrants in countries of destination. However, several IHL rules are also pertinent for migrants who have fled for reasons related to an armed conflict and who find themselves in a destination country that is at peace. This article will thus also

1 Office of the United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2015*, Geneva, 20 June 2016, pp. 3, 16–18, available at: s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf (all internet references were accessed in June 2017).

2 The definition used in this article for the term “migrants” will be explained below in the section “Who Are ‘Migrants’, and How Does IHL Address Their Protection?”.

3 United Nations (UN), Department of Economic and Social Affairs, Population Division, *International Migration Report 2015*, ST/ESA/SER.A/384, New York, 2016, available at www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015.pdf.

4 For further discussion on the protection and assistance needs of migrants caught in situations of armed conflict, see Stéphanie Le Bihan, “Addressing the Protection and Assistance Needs of Migrants: The ICRC Approach to Migration”, in this issue of the *Review*.

briefly refer to some of these rules, such as the obligations of parties related to the re-establishment of family links and to accounting for the dead and the missing. These may continue to apply to migrants who no longer find themselves in a country in conflict, or beyond the end of an armed conflict.

In all situations, migrants are protected by different bodies of international law within their respective scopes of application, in particular international human rights law (IHRL) and, in the case of refugees and asylum-seekers, international refugee law. These bodies of international law remain applicable in situations of armed conflict.⁵ Migrants are also protected by the domestic law of the State they are in. When migrants live, or are in transit, in the territory of a State in which there is an armed conflict,⁶ they are also protected by IHL. While only applicable in armed conflicts, certain rules of IHL should already be considered in peacetime, and some remain applicable even after the end of an armed conflict. The latter is the case for situations that are the direct consequence of, or are directly related to, an armed conflict or occupation and whose effects extend beyond the conclusion of these.⁷ As a result, even if an armed conflict has come to an end or a migrant is no longer on the territory of a country experiencing armed conflict, they may continue to enjoy protection under certain rules of IHL.⁸

- 5 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, para. 106; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, para. 216. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 299–305; UN Office of the High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict*, New York and Geneva, 2011, available at: www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf.
- 6 For the meaning of international and non-international armed conflicts under IHL, see Articles 2 and 3 common to the four Geneva Conventions; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 1(4); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., 2016 (ICRC Commentary on GC I), commentary on common Arts 2 and 3, available at: ihl-databases.icrc.org/ihl/full/GCI-commentary; ICRC, “How Is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, Opinion Paper, March 2008, available at: www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31IC/11/5.1.2, October 2011 (ICRC Challenges Report 2011), pp. 7–11, available at: www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32IC/15/11, October 2015 (ICRC Challenges Report 2015), pp. 7–16, available at: www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.
- 7 Anna Petrig, “Search for Missing Persons”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, 1st ed., Oxford University Press, Oxford, 2015, p. 269; Eric David, *Principes de droit des conflits armés*, 5th ed., Bruylant, Brussels, 2012, p. 262; Marion Haroff-Tavel, “Do Wars Ever End? The Work of the International Committee of the Red Cross When the Guns Fall Silent”, *International Review of the Red Cross*, Vol. 85, No. 851, 2003, pp. 476–477.
- 8 For instance, parties will remain bound by obligations relating to the re-establishment of family links if migrants fled to another country – or internally – for reasons related to the armed conflict, as well as by their obligations related to accounting for the dead and the missing.

This article will explore how IHL protects migrants in situations of armed conflict. Although other branches of international law will be mentioned where relevant, a detailed analysis of these and their interplay with IHL are outside the scope of this article.⁹ In the first part, the article will provide an overview of how the term “migrant” is used and address general issues relating to the protection of migrants in armed conflicts. It will also examine the IHL principle of non-discrimination, which provides an overall framework for considering the protection of migrants. The second part will survey the different categories of persons that migrants can fall under in IHL as well as in other bodies of international law, and the rules applicable to migrants in international armed conflicts. The third part will look at these issues in the context of non-international armed conflicts. Finally, the fourth part will consider select IHL issues that are particularly topical for migration, notably those related to the movement of migrants as well as to family unity and the rules concerning the missing and dead. Given the large number of relevant rules, this last section will not aim to be exhaustive, either in the themes that it covers or in the way it addresses them.

General considerations on the protection of migrants in armed conflicts

Who are “migrants”, and how does IHL address their protection?

In international law, there is no universally accepted definition of the term “migrant”, although some categories are defined in specialized international instruments.¹⁰ Furthermore, various organizations define a migrant as “any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence”.¹¹ The

- 9 For an analysis of the interplay between IHL, IHRL and international refugee law, see, for instance, Emanuela-Chiara Gillard, “Humanitarian Law, Human Rights and Refugee Law – Three Pillars”, statement at the International Association of Refugee Law Judges world conference, Stockholm, 21–23 April 2005, available at: www.icrc.org/eng/resources/documents/statement/6t7g86.htm; Stephane Jaquemet, “The Cross-Fertilization of International Humanitarian Law and International Refugee Law”, *International Review of the Red Cross*, Vol. 83, No. 843, 2001; Vincent Chetail, “Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law and International Human Rights Law”, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014; David James Cantor, “Laws of Unintended Consequence? Nationality, Allegiance and the Removal of Refugees during Wartime”, in David James Cantor and Jean-François Durieux (eds), *Refugee from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014.
- 10 The term “migrant worker”, for instance, is defined in Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158, 18 December 1990.
- 11 OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, Geneva, 2014, Ch. I, para. 10, available at: www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf. The International Organization for Migration (IOM) proposes a similar, albeit more detailed, definition: see IOM, “Glossary on Migration”, 2nd ed., in *International Migration Law*, Vol. 25, Geneva, 2011, pp. 61–62, available at: publications.iom.int/system/files/pdf/iml25_1.pdf. UNHCR, however, refers to refugees and migrants separately: see, for instance, UNHCR, *UNHCR Viewpoint: “Refugee” or “Migrant” – Which Is Right?*, July 2016, available at: www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html.

International Committee of the Red Cross (ICRC), and the International Red Cross and Red Crescent Movement (the Movement) as a whole, use a broad description as provided for in the IFRC Policy on Migration, which covers “persons who leave or flee their habitual residence ... to seek opportunities or safer and better prospects”.¹² This article will rely on this understanding of migrants, as an “umbrella category” for different categories of persons. It will also refer to specific legal categories, including refugees¹³ and stateless persons, when addressing the special protection to which they are entitled under IHL (and other bodies of international law).

When it comes to the protection of migrants under IHL, an important starting point is that this body of law does not contain specific rules about migration or about the protection of migrants as a category of persons. This does not, however, mean that migrants are left outside the scope of IHL or that they are neglected by it. As civilians, migrants are covered by the rules providing general protection to the civilian population in both international and non-international armed conflicts. In international armed conflicts, migrants are also protected as aliens in the hands of a party to the conflict or occupying power provided that they are “protected persons”¹⁴ and may enjoy protection as “refugees”.¹⁵ To determine how migrants are protected under IHL, the second and third parts of this article will look at the distinction between “civilians” and members of the armed forces or members of an organized armed group in international and non-international armed conflicts respectively. As most migrants are considered civilians, the focus of this article will be on their protection under IHL as civilians.¹⁶ It will also examine who is considered a “protected person”, a “refugee” and/or a “stateless person” in international armed conflicts, and how migrants fit into these categories.

- 12 The Policy on Migration also recognizes that certain categories of persons, such as refugees and asylum-seekers, enjoy special protection under international and domestic law. See International Federation of Red Cross and Red Crescent Societies, “Policy on Migration”, November 2009, available at: www.ifrc.org/PageFiles/89395/Migration%20Policy_EN.pdf. For the reasons behind the use of this definition by the ICRC and its approach to the issue of migration, see S. Le Bihan, above note 4.
- 13 While the protection under IHL of migrants as a broad category of individuals has not been the subject of study, the question of whether and how refugees (and internally displaced persons) are protected has been widely discussed. See, notably, David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014; Mélanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law*, Cambridge University Press, Cambridge, 2012, pp. 156–184; François Bugnion, “Refugees, Internally Displaced Persons, and International Humanitarian Law”, *Fordham International Law Journal*, Vol. 28, No. 5, 2004; S. Jaquet, above note 9, pp. 651–673; Karen Hulme, “Armed Conflict and the Displaced”, *International Journal of Refugee Law*, Vol. 17, No. 1, 2005; Jean-Philippe Lavoyer, “Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC”, *International Review of the Red Cross*, Vol. 26, No. 305, 1995; Françoise Krill, “ICRC’s Action in Aid of Refugees”, *International Review of the Red Cross*, Vol. 23, No. 265, 1988; Yoram Dinstein, “Refugees and the Law of Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 12, 1982.
- 14 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 4; AP I, Art. 73.
- 15 As will be seen, IHL contains specific protections for “refugees”, and the meaning of this term will be explained in the second part of this article. See GC IV, Arts 44, 70(2); AP I, Art. 73.
- 16 For more information on the protection of migrants considered combatants for the purposes of an international armed conflict in IHL, see the second part of this article.

The principle of non-discrimination

International humanitarian law confers protection on migrants as civilians, irrespective of their migratory status, and adverse distinctions cannot be made on the basis of that status. Under this body of law, certain distinctions can nevertheless be made, for instance based on nationality. As migrants may be more vulnerable to discrimination than nationals of a State due to their origin, ethnicity, race or nationality, it is important to briefly consider the principle of non-adverse distinction under IHL, which is found in many specific provisions of the Geneva Conventions and their Additional Protocols.¹⁷ This is IHL's approach to the principle of non-discrimination in international human rights law.¹⁸ Unlike general non-discrimination provisions in IHRL,¹⁹ IHL does not expressly require equal treatment for all individuals.²⁰

Under IHL, the principle of non-adverse distinction prohibits certain distinctions while allowing – and even requiring – in some circumstances that individuals be treated differently to ensure humane treatment.²¹ For instance, IHL contains several provisions that justify differential treatment based on a person's state of health, age, sex or rank.²² Meanwhile, parties to international and non-international armed conflicts are required to treat civilians and persons *hors de combat* humanely without “adverse distinction”. The prohibited “adverse” distinctions under IHL are based on several non-exhaustive criteria, which will

17 See, notably, common Art. 3; Geneva Convention I, Art. 12; Geneva Convention II, Art. 12; Geneva Convention III (GC III), Art. 16; GC IV, Arts 13, 27(3); AP I, Arts 9(1), 69(1), 70(1), 75(1); AP II, Arts 2(1), 4(1), 18(2).

18 For an overview of the principle of non-discrimination in IHRL, see, notably, Manfred Nowak (ed.), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl am Rhein, 2005, commentary on Arts 2, 26; Daniel Moeckli, “Equality and Non-discrimination”, in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, 2nd ed., Oxford University Press, Oxford, 2013.

19 See, for instance, Universal Declaration of Human Rights, UN Doc. 217 A (III), 10 December 1948 (UDHR), Art. 7; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (ICCPR), Art. 26; American Convention on Human Rights, 22 November 1969 (ACHR), Art. 24; African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 ILM 58, 27 June 1981 (ACHPR), Art. 3; Arab Charter on Human Rights, 15 September 1994, Art. 11; Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Arts 20–21. Certain IHRL provisions have an accessory character, notably ICCPR, Art. 2; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950 (ECHR), Art. 14; ACHR, Art. 1; ACHPR, Art. 2; Arab Charter on Human Rights, Art. 3.

20 This must be considered against the backdrop of the Geneva Conventions, which are premised on the protection of different categories of persons depending on their status, including considerations of nationality. The Additional Protocols also provide for the possibility of making certain distinctions based on nationality: see, for example, AP I, Art. 78(1); AP II, Art. 17(2). See also Gabor Rona and Robert J. McGuire, “The Principle of Non-Discrimination”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, p. 195.

21 ICRC Commentary on GC I, above note 6, paras 574–575: common Article 3 “does not prohibit non-adverse distinctions, i.e. distinctions that are justified by the substantively different situations and needs of persons protected”. See also Jelena Pejic, “Non-discrimination and Armed Conflict,” *International Review of the Red Cross*, Vol. 83, No. 841, 2001, p. 186.

22 See, for instance, GC IV, Arts 27(2)–(3), 68(4); AP I, Arts 76, 77–78; AP II, Arts 4(3), 6(4).

determine the exact scope of the principle.²³ The scope will also depend on the persons covered.²⁴ Under customary IHL, adverse distinctions based on race, colour, sex, language, religion or belief, political or other opinion, or national or social origin, as well as wealth, birth or other status, or any other similar criteria, are prohibited.²⁵

Although “nationality” is not the only basis for potential discrimination against migrants, and it can often be rooted rather in a migrant’s origin or race and the fact that they may be in an irregular situation, it remains an important ground. Where not explicitly provided in a rule, nationality should arguably be interpreted as an impermissible criterion for adverse distinction under IHL, except where IHL expressly provides otherwise.²⁶ When considering this, it is important to recognize that, during the Diplomatic Conference, nationality was not “regarded as implicitly included” in Article 27 of Geneva Convention IV (GC IV).²⁷ The rationale behind this was that the rules of GC IV relating to “protected persons” allow for differences based on a person’s nationality, notably on the measures of control and security that may be necessary as a result of an international armed conflict.²⁸ Nevertheless, “the absolute obligation of humane treatment contained in Article 27(1) of GC IV exists independently” of the fact that differential treatment

23 The criteria provided by the Geneva Conventions and the Additional Protocols under which adverse distinction is prohibited are not exhaustive, as can be seen from the wording of the relevant provisions and the commentaries to these provisions. See, for example, common Art. 3 (“or any other similar criteria”); GC IV, Arts 13 (“or on any other similar criteria”), 27 (“in particular”); AP I, Arts 9, 75 (“or on any other similar criteria”); AP II, Art. 2 (“or on any other similar criteria”).

24 Common Article 3 applies to persons taking no active part in the hostilities, Article 13 of GC IV to the whole of the populations of the countries in conflict, Article 27 of GC IV to protected persons in the territories of parties to the conflict and in occupied territories, Article 2 of AP II to all persons affected by an AP II armed conflict, and Article 4 of AP II to all persons who do not take a direct part or who have ceased to take part in hostilities whether or not their liberty has been restricted.

25 ICRC Customary Law Study, above note 5, Rule 88.

26 While Article 13 of GC IV explicitly lists nationality, this is not the case in common Article 3 or Article 27 of GC IV. Meanwhile, the Additional Protocols refer to “national origin”.

27 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, pp. 640–641, 643: the delegate of the ICRC noted that nationality was omitted “because internment or measures restricting personal liberty were applied to enemy aliens precisely on grounds of nationality”. However, others (representatives of Afghanistan, the Netherlands and Mexico) advocated for the inclusion of nationality as a prohibited criterion. The representative of Norway noted that “a form of words should be found forbidding all distinction based on nationality, except in cases covered by the present Convention or other treaties”. See also Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (ICRC Commentary on GC IV), p. 206; G. Rona and R. J. McGuire, above note 20, p. 200.

28 In international armed conflicts, the notion of “protected persons” under IHL covers a special category of civilians which includes persons “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. See GC IV, Art. 4.

is allowed for enemy nationals on certain issues.²⁹ Parties to the conflict must treat all protected persons humanely, regardless of their nationality. Under Article 3 common to the four Geneva Conventions, nationality is not explicitly listed as a prohibited criterion for adverse distinction.³⁰ This was based on the consideration that the State is at liberty to decide whether it treats aliens involved in a non-international armed conflict differently to its own nationals or not.³¹ While justified, this rationale does not affect the essential premise that all persons who have not participated or are no longer participating in hostilities must be treated humanely without any adverse distinctions.³² As noted in the updated Commentary to Geneva Convention I, nationality must “be understood as falling within the concept of ‘other similar criteria’ under common Article 3”.³³ Finally, the Additional Protocols refer to “national origin” as an impermissible criterion for adverse distinction.³⁴ While this term refers to a persons’ ethnic group and not to his or her formal nationality, nationality should at least be regarded as an “other status” or as a status based “on any similar criteria” for the purposes of Article 75 of Additional Protocol I (AP I).³⁵ Given that the prohibited criteria should be considered as uniform throughout the Additional Protocols, nationality should be seen as an impermissible criterion for the purposes of those Protocols.³⁶

How are migrants covered by IHL in international armed conflicts?

Overview of the protection of migrants in international armed conflicts

In international armed conflicts, migrants enjoy protection, first and foremost, under the general rules of IHL covering the civilian population. In addition, if

29 ICRC Commentary on GC I, above note 6, p. 200; ICRC Commentary on GC IV, above note 27, p. 40: “It will be seen that the idea of nationality has not been included in Article 27. That does not in any way mean that people of a given nationality may be treated in an arbitrary manner; everyone whatever his nationality is entitled to humane treatment.” See also Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 ICRC Commentary on GC I), p. 56; Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 (ICRC Commentary on GC III), p. 41.

30 For an explanation of why it was not included, see ICRC Commentary on GC I, above note 6, paras 571–572.

31 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, p. 94.

32 ICRC Commentary on GC I, above note 6, para. 572. See also 1952 ICRC Commentary on GC I, above note 29, p. 56; ICRC Commentary on GC III, above note 29, p. 41; ICRC Commentary on GC IV, above note 27, p. 40.

33 ICRC Commentary on GC I, above note 6, para. 572. See also 1952 ICRC Commentary on GC I, above note 29, p. 56; ICRC Commentary on GC III, above note 29, p. 41.

34 AP I, Arts 9, 75; AP II, Arts 2, 4. See also Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, with the collaboration of Martin Eaton, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden, 2013, p. 722: the criteria in Article 2 apply to other articles where the term “adverse distinction” is used.

35 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 515–516, commenting on AP I, Art. 75.

36 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 112.

they are considered protected persons, they also benefit from the protections for aliens in the hands of a party to the conflict or occupying power. Furthermore, certain migrants are specifically protected as “refugees”. When looking at who is a refugee for the purposes of IHL, it is important to note that there are different understandings of who is covered by this term, depending on the applicable rules, and what it means for their protection.³⁷ Indeed, a migrant may be considered a refugee for the purposes of Articles 44 or 70(2) of GC IV. If covered by Article 44, he or she is also a protected person under GC IV. Meanwhile, if a migrant is a refugee for the purposes of Article 70, he or she is not a protected person (unless AP I applies and the individual meets the criteria to be considered a refugee). Finally, a migrant may also be a refugee under Article 73 of AP I, in which case he or she would be a protected person for the purposes of GC IV. Although AP I extends protected person status to all those considered refugees, thus increasing protection, the term “refugee” in this instrument has a narrower meaning than under GC IV. The protection of migrants as refugees, and the meaning of the term “refugees” for the purposes of GC IV and AP I, will be further discussed in the sections on “Migrants as Protected Refugees” and “Specific Protection of Migrants as Refugees” below.

Protection of migrants as part of the civilian population

In international armed conflicts, the protection that IHL provides to migrants will depend on whether they are civilians or combatants. Members of the armed forces (other than medical personnel and chaplains) are combatants.³⁸ All persons who are not members of the armed forces of a party to the conflict are civilians.³⁹ As previously mentioned, although some migrants may be considered combatants in some circumstances, most are civilians.

A number of IHL rules that apply in international armed conflicts protect the entire civilian population, no matter whether a person is a citizen of another State, including a national of an “enemy” State or of a State engaged in an armed conflict with the country in which the person finds him or herself. Since these rules apply to all civilians regardless of their nationality, they also apply to

37 According to Article 44 of GC IV, refugees are protected persons “who do not, in fact, enjoy the protection of any government”. Meanwhile, Article 70 of GC IV covers “[n]ationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State”. Finally, in Article 73 of AP I, refugees (or stateless persons) are “persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence”.

38 The conditions for combatant and prisoner of war (PoW) status are found in GC III, Article 4. Participants in a *levée en masse* fall within these conditions and are not considered civilians. See also AP I, Arts 43, 44; ICRC Customary Law Study, above note 5, Rule 3; ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, 2009 (ICRC Interpretative Guidance), pp. 21–26, 30–35.

39 AP I, Art. 50: “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol”. ICRC Commentary on GC IV, above note 27, paras 1913–1917; ICRC Customary Law Study, above note 5, Rule 5; ICRC Interpretative Guidance, above note 38, pp. 20–21, 26–30, 36.

migrants. Migrants who are civilians under IHL are thus protected against the effects of hostilities. For instance, indiscriminate attacks and attacks directed against civilians are prohibited.⁴⁰ It is also prohibited to use starvation of civilians as a method of warfare.⁴¹ The rules protecting migrants from the effects of hostilities also contribute to preventing and minimizing the displacement of migrants for reasons related to the conflict.⁴² Civilians – including migrants – are protected unless they take a direct part in hostilities; however, even if they do participate, they do not lose their civilian status, and they lose protection against attack only for such a time as they continue to participate.⁴³

If migrants fall into enemy hands, their exact protection will depend on their status.⁴⁴ As civilians, migrants are covered by the general rules for the protection of the civilian population contained in GC IV and in AP I. Part II of GC IV,⁴⁵ for the “whole of the populations of the countries in conflict”, extends to all migrants who do not have combatant or prisoner of war (PoW) status.⁴⁶ It introduces minimum safeguards for all civilians, irrespective of their nationality, against “the sufferings caused by war”.⁴⁷

Where applicable, beyond the general rules protecting the civilian population, migrants are also protected by the provisions relating to missing and dead persons in Part II, Section III of AP I, as well as those relating to relief in favour of the civilian population and to the treatment of persons when in the power of a party to the conflict, which are contained in Part IV, Sections II and III⁴⁸ of AP I respectively. Importantly, GC IV and AP I contain rules on the reunion of dispersed families and the search for missing and dead persons.⁴⁹ Given their relevance for the many migrants that become separated from their families, go missing or die during armed conflicts, as well as for their families, these rules will be further explored in the fourth part of this article. GC IV and AP I also include specific provisions governing humanitarian relief, which recognize that the civilian population in need is entitled

40 AP I, Arts 51(2), 51(4)–(5).

41 *Ibid.*, Art 54.

42 The fourth part of this article will examine other IHL rules relating more specifically to the movement of migrants.

43 *Ibid.*, Part IV, Section I, notably Arts 48, 51, 57, 58; ICRC Customary Law Study, above note 5, Ch. 1.

44 The application of the provisions conferring the relevant status, rights and protections of individuals once in enemy hands in international armed conflicts will be determined by their precise personal scope of application, notably whether a migrant is a “protected person” under Article 4 of GC IV. ICRC Commentary on GC IV, above note 27, p. 50.

45 This extends not only to protected persons but to all persons in a territory belonging to or occupied by a party to the conflict. See GC IV, Arts 4(3), 13; ICRC Commentary on GC IV, above note 27, p. 118; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 495, 498.

46 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), paras 1908–1909, 1913, 1917; ICRC Commentary on GC IV, above note 27, p. 46.

47 GC IV, Art. 13; ICRC Customary Law Study, above note 5, Rule 88.

48 These rules are not limited to protected persons; they also cover nationals of an adverse party in occupied or domestic territory as well as a party’s nationals. However, the exact scope of application of each article in this section will need to be examined in order to determine if it is applicable to a party’s own nationals. For further analysis of the scope of application of Part IV, Section III of AP I (Arts 72–79), see M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 495, 498–500.

49 GC IV, Arts 25–26; AP I, Art. 74; ICRC Customary Law Study, above note 5, Rule 105.

to receive assistance.⁵⁰ They regulate the conditions for providing humanitarian assistance and require that parties to the armed conflict and all States concerned allow and facilitate relief operations for civilians, subject to their right of control, and the distribution of relief as rapidly as possible, once accepted in principle.⁵¹ Finally, AP I contains a number of rules, in particular the fundamental guarantees contained in Article 75, that are especially important as they provide minimum protection for all migrants who are in the power of a party to the conflict and do not benefit from more favourable treatment under the Geneva Conventions or under AP I.⁵² Today, the fundamental rules and principles of IHL concerning the treatment of civilians in the hands of the enemy, which are critical for the protection of migrants, are rules of customary international law.⁵³

While the majority of migrants are considered civilians under IHL, they may instead, depending on their status under the Geneva Conventions and AP I,⁵⁴ be combatants and, once in enemy hands, enjoy protection as PoWs. For instance, migrants are combatants if they are members of the armed forces of a State involved in an international armed conflict or members of other militias belonging to a party to the conflict fulfilling the conditions set out in Article 4(A) (2) of Geneva Convention III (GC III).⁵⁵ As such, once they fall into the hands of a State party to the international armed conflict in which they are involved, they are entitled to PoW status should they fulfil the conditions set by IHL.⁵⁶ As previously mentioned, this article will focus on the protection of migrants as civilians and will not enter into further detail about the protection of migrants as combatants or PoWs.

50 AP I, Arts 68–71, building on GC IV, Art. 23; ICRC Customary Law Study, above note 5, Rules 55, 56.

51 ICRC, “Q&A and Lexicon on Humanitarian Access”, June 2014, available at: www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm; ICRC Challenges Report 2015, above note 6, pp. 26–30.

52 AP I, Art. 75; ICRC Commentary on APs, above note 46, p. 850; ICRC Customary Law Study, above note 5, Section V, “Treatment of Civilians and Persons Hors de Combat”.

53 ICRC Customary Law Study, above note 5, Rules 87–105.

54 The protection of migrants once in enemy hands will depend on their status under Article 4 of GC III and Article 43 of AP I. For more on the protection of migrants as combatants or PoWs, see S. Jaquemet, above note 9, pp. 651–673; Y. Dinstein, above note 13, pp. 94–109; Françoise J. Hampson, “The Scope of the Obligation Not to Return Fighters under the Law of Armed Conflict”, in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014; Reuven (Ruvi) Ziegler, “Non-Refoulement between ‘Common Article 1’ and ‘Common Article 3’”, in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, Brill Nijhoff, Leiden, 2014.

55 GC III, Art. 4; AP I, Art. 43.

56 Persons not meeting the criteria for combatant privilege and PoW status under IHL, and who do not enjoy protection under GC III, are entitled to protection under GC IV if they fulfil the criteria of Article 4 of GC IV, subject to certain derogations. For a general overview of the protection of “unprivileged combatants”, see Knut Dörmann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, *International Review of the Red Cross*, Vol. 85 No. 849, 2003; Laura M. Olson, “Status and Treatment of Those Who Do Not Fulfil the Conditions for Status as Prisoners of War”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, pp. 922–924.

Special protection of migrants as protected persons under GC IV

In international armed conflicts, in addition to the general rules covering the civilian population, migrants may benefit from the more detailed and protective regime found in Parts I and III of GC IV if they qualify as “protected persons”.⁵⁷ Many migrants, as aliens present in the territory of a party to the conflict or in occupied territory, will be protected persons if they meet the nationality requirement of Article 4.⁵⁸ However, some migrants are excluded: nationals of the party/power by which they are being held; nationals of a co-belligerent State or a neutral State with normal diplomatic relations (except in the case of occupied territories, where nationals of a neutral State are always protected persons); and persons who enjoy protection under one of the three other Geneva Conventions.⁵⁹ In this way, the nationality criteria of GC IV Article 4 may leave out some migrants who do not in fact enjoy the protection of any State.⁶⁰ For instance, nationals of an occupying power who find themselves in the territory of the occupied State are not protected.⁶¹ This has led to questions about the adequacy of the definition of “protected persons”. According to some views, “all civilians who do not owe allegiance to, or receive diplomatic protection from, their State of nationality should be recognized as ‘protected persons’” under Article 4 of GC IV.⁶² The International Criminal Tribunal for the former Yugoslavia (ICTY) has held that the crucial factor for determining protection is not the formal link of nationality but rather “the lack of both allegiance to a State and diplomatic protection by this State”.⁶³ However, this interpretation has been met with criticism.⁶⁴

Under GC IV, the rules applicable to protected persons, including migrants, depend on the situation in which they find themselves. All protected migrants are

57 This may be subject to certain derogations: see GC IV, Arts 4(1), 5. For the definition of “protected persons” in Article 4 of GC IV, see above note 28.

58 As will be seen in the sections below on stateless persons and refugees, where AP I is applicable, persons falling within the meaning of these terms will be considered protected persons under Article 4 of GC IV based on Article 73 of AP I.

59 GC IV, Arts 4(2), 4(4). Although nationals of a State that has not ratified GC IV are also excluded, the Geneva Conventions are universally ratified. See also ICRC Commentary on GC IV, above note 27, p. 47; ICRC Commentary on APs, above note 46, p. 848, paras 2947–2948.

60 However, see sections below on refugees regarding the effects of Article 73 of AP I as well as on the protection provided for refugees under Article 70(2) of GC IV.

61 ICRC Commentary on GC IV, above note 27, p. 46: the only provision in GC IV explicitly applying to the nationals of a State party to an international armed conflict is Article 70(2) of GC IV. Although individuals may be considered refugees under this article, they are not covered by Article 4 of GC IV (unless AP I applies and the criteria of Article 73 of this Protocol are met). See sections below on refugees.

62 M. Jacques, above note 13, pp. 163–164, 42–48, 160; Elizabeth Salmón, “Who Is a Protected Civilian?”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, pp. 1142–1145.

63 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, paras 163–169.

64 Marco Sassòli and Laura M. Olson, “The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case”, *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 743–747; Jean-François Quéguiner, “Dix ans après la création du Tribunal pénal international pour l’ex-Yougoslavie: Évaluation de l’apport de sa jurisprudence au droit international humanitaire”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 302–303.

covered by Section I common to the territories of the parties to the conflict and to occupied territories. They are entitled to respect for their lives, their dignity, their family rights, and their political, religious and other convictions. They must not be subjected to torture, cruel or degrading treatment or corporal punishment, and must be protected against all acts of violence or reprisals. Section II of GC IV provides additional protection to migrants in the territory of a party to the conflict. Importantly, this section provides that if migrants remain in the country – either by choice or due to detention – their situation will continue to be regulated by the provisions concerning aliens in time of peace.⁶⁵ This includes domestic law as well as IHRL and international refugee law, as applicable. In any case, migrants must be granted a number of rights related to their conditions of living (e.g., the right to receive individual or collective relief, medical attention on an equal footing with nationals, freedom of religion).⁶⁶ Among the relevant provisions in Section II are those relating to the movement of migrants, notably the principle of *non-refoulement* and the right to leave the territory.⁶⁷ Section II also regulates the measures of control and security that may be taken against protected persons if deemed “necessary as a result of the war”.⁶⁸ According to the Commentary on GC IV, these measures may include restrictions on freedom of movement⁶⁹ or assigned residence and internment, at the most severe.⁷⁰

Migrants in occupied territory are further protected by the rules in Section III of GC IV. As a starting point, the occupying power must respect the laws in force in the occupied territory before the occupation began.⁷¹ As inhabitants of occupied territory, migrants are protected from arbitrary behaviour by the occupying power. For instance, measures of control must be necessary for imperative reasons of security.⁷² Other provisions of relevance for the protection of migrants are those on the movement of protected persons⁷³ as well as on food and medical supplies, relief actions, penal legislation and procedure.

Migrants as protected stateless persons

Stateless migrants also qualify as protected persons under Article 4 of GC IV, as “owing to its negative form the definition covers persons without any nationality”.⁷⁴ GC IV does not define stateless persons; what matters is that a person does not have a nationality. This understanding of “stateless persons” is broader than the definition

65 GC IV, Art. 38; ICRC Commentary on GC IV, above note 27, p. 244.

66 GC IV, Art. 38.

67 See the section on “Rules Governing the Movement of Migrants”, below.

68 GC IV, Arts 27, 41–43. See also Art. 37.

69 See, notably, *ibid.*, Art 49(5); ICRC Commentary on GC IV, above note 27, pp. 282–283.

70 ICRC Commentary on GC IV, above note 27, p. 207.

71 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 187 CTS 227, 1 Bevans 631, The Hague, 18 October 1907 (entered into force 26 January 1910) (1907 Hague Regulations), Annex, Art. 43.

72 GC IV, Art. 78.

73 See the section on “Rules Governing the Movement of Migrants”, below.

74 ICRC Commentary on GC IV, above note 27, pp. 46, 47; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 502.

in the 1954 Convention relating to the Status of Stateless Persons, which was subsequently adopted. The 1954 Convention excludes, for instance, persons already receiving protection or assistance from United Nations (UN) organs different to the Office of the UN High Commissioner for Refugees (UNHCR).⁷⁵

Where AP I applies, “stateless persons” are those covered by “the relevant international instruments”, notably the 1954 Convention, or “the national legislation of the State of refuge or State of residence”.⁷⁶ If persons became stateless before the beginning of hostilities, AP I explicitly includes them in the category of protected persons under GC IV, and they will receive protection as such “in all circumstances and without any adverse distinction.”⁷⁷ Nonetheless, regardless of whether AP I applies, stateless persons (including those who became stateless after the outbreak of hostilities) are in any case already considered protected persons under GC IV, as seen above.⁷⁸ The temporal restriction contained in AP I thus does not have any practical consequences for stateless persons.⁷⁹ Where both GC IV and AP I apply, protected person status extends to “persons who, ‘before or after’ the beginning of hostilities are considered as stateless persons” under relevant international instruments and national legislation.⁸⁰

Migrants as protected refugees

As seen above, many refugees may fall under the definition of “protected persons” in Article 4 of GC IV and benefit from the full range of protections (including Article 44 of GC IV⁸¹). However, there may be some individuals who do not enjoy protection from their State of origin, but who are also not “protected persons” under IHL.⁸² This lacuna resulted in the adoption of Article 73 of AP I.⁸³ In addition to stateless persons as seen above, this provision grants refugees, as

75 According to Article 1(1), a stateless person is “a person who is not considered as a national by any State under the operation of its law”. Although this definition seems wide, its second paragraph excludes certain individuals. See Convention relating to the Status of Stateless Persons, 360 UNTS 117, 28 September 1954 (entered into force 6 June 1960).

76 AP I, Art. 73; see also ICRC Commentary on APs, above note 46, paras 2957–2958.

77 AP I, Art. 73; see also ICRC Commentary on APs, above note 46, paras 2974, 2976; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 502.

78 ICRC Commentary on APs, above note 46, paras 2978–2979; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 504.

79 ICRC Commentary on APs, above note 46, paras 2955, 2978–2980.

80 *Ibid.*, para. 2980.

81 This article provides specific protection to migrants considered “refugees”. See the section on “Specific Protection of Migrants as Refugees”, below.

82 ICRC Commentary on GC IV, above note 27, p. 47; ICRC Commentary on APs, above note 46, p. 848, paras 2947–2948. Refugees who are nationals of the occupying power are not considered protected persons. Despite not enjoying the wider protections of GC IV, they enjoy specific protection under Article 70(2) of GC IV. See the section on “Specific Protection of Migrants as Refugees”, below.

83 At the 1972 Conference of Government Experts that considered the draft protocols, UNHCR and the ICRC expressed the view that GC IV did not provide the necessary protection for all refugees and recommended that all refugees and stateless persons be considered protected persons for the purposes of GC IV. See ICRC, *Report on the Work of the Conference: Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Second Session (Geneva, 3 May–3 June 1972)*, Geneva, 1972, Vol. 1, para. 3.125, and Vol. 2, p. 82.

defined under AP I, protected person status, irrespective of their nationality and of the party into whose power they have fallen.⁸⁴ Refugees are those who (1) are considered as such “under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence”, (2) “before the beginning of hostilities”. These two criteria must be met cumulatively for a migrant to be considered a refugee, qualifying as a protected person for the purposes of GC IV. This is in contrast to Articles 44 and 70(2) of GC IV, which have a broader understanding of the term “refugee” than that found in AP I, as will be seen below.⁸⁵

According to the first criterion in Article 73 of AP I, the definition of a “refugee” is based on binding instruments, such as the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention), and non-binding resolutions and declarations that have been “accepted by the Parties concerned”, such as the Cartagena Declaration on Refugees.⁸⁶ Importantly, the decision of a State to grant refugee status is binding upon all parties to the conflict and they must treat refugees as protected persons, even if they have not accepted the international instrument on which the refugee status determination was based.⁸⁷ They must also respect this decision if it was based on domestic law. In addition, if a State has recognized the competence of UNHCR with regard to persons that the organization considers as refugees based on its mandate, a refugee status determination carried out by UNHCR will also be binding on all parties to the conflict.⁸⁸ The second criterion of Article 73 limits the personal scope to those considered refugees “before the beginning of hostilities”.⁸⁹ This leaves an important gap in protection for those who became refugees after the outbreak of hostilities and are not protected persons under GC IV. This has led to the criticism that the temporal criterion introduces “an arbitrary and unnecessary distinction, in direct contradiction to the humanitarian principles of protection of the Geneva Conventions”.⁹⁰

84 ICRC Commentary on APs, above note 46, para. 2981; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 505.

85 See the section on “Specific Protection of Migrants as Refugees”, below.

86 ICRC Commentary on APs, above note 46, paras 2952, 2959–2973. See also Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954); Cartagena Declaration on Refugees, 22 November 1984 (Cartagena Declaration). For further details on the different definitions of a “refugee” under international refugee law, see, for instance, Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., Oxford University Press, Oxford, 2007, pp. 15–50.

87 ICRC Commentary on APs, above note 46, paras 2952–2953.

88 *Ibid.*, para. 2969. The definition of a “refugee” within UNHCR’s mandate is based on the UNHCR Statute, which contains a definition almost identical to that of the 1951 Refugee Convention and has throughout the years been extended by resolutions of the UN General Assembly, the Economic and Social Council and UNHCR’s Executive Committee to include persons “outside their country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order”. See UNHCR, *Resettlement Handbook*, July 2011, pp. 80–81, available at: www.unhcr.org/46f7c0ee2.pdf.

89 ICRC Commentary on APs, above note 46, para 2956.

90 M. Jacques, above note 13, p. 162.

In sum, where AP I applies, migrants meeting the “refugee” criteria under Article 73 are explicitly recognized as protected persons for the purposes of GC IV “in all circumstances and without any adverse distinction”.⁹¹ They are entitled to all the protections contained in Parts I and III of GC IV.⁹² This is especially relevant for refugees who are nationals of the occupying power, as it significantly improves their protection beyond merely Article 70(2) of GC IV.⁹³ They may not, for instance, be prosecuted or convicted for acts committed or opinions expressed before the occupation, except with respect to breaches of the laws and customs of war.⁹⁴

Specific protection of migrants as refugees

As discussed above, refugees may be considered protected persons under GC IV in some circumstances, and – provided they meet its definition of “refugee” – they will always be considered protected persons where AP I applies.⁹⁵ They are entitled to the full range of protections provided by GC IV and AP I.⁹⁶ Refugees also enjoy special protection under two provisions applying specifically to them: Article 44 of GC IV for protected refugees in the territory of a party to the conflict, and Article 70(2) of GC IV for refugees (not considered protected persons) in occupied territory. The term “refugee” is not defined in GC IV. According to the Commentary on Article 44, it should be given a broader meaning than in international refugee law, which is “too technical and too limited in scope”.⁹⁷ The key consideration for being considered a refugee under GC IV, and for being protected either by Article 44 or Article 70(2), is that the individual in question does not “enjoy the protection of any government”.⁹⁸ All migrants fitting this criterion will be considered refugees. Individuals benefiting from complementary forms of protection and those not falling under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees could nevertheless be

91 GC IV, Art. 73; ICRC Commentary on APs, above note 46, para 2976. See the section on “Special Protection of Migrants as Protected Persons under GC IV”, above.

92 The explicit reference to Part III of GC IV in Article 73 of AP I is to ensure that each of the provisions of GC IV is “interpreted in the most favourable light for refugees” (e.g., refugees are protected by Article 4(2) of GC IV even if they are not enemy nationals). See ICRC Commentary on APs, above note 46, para. 2982.

93 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 505; ICRC Commentary on APs, above note 46, para. 2985.

94 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 505.

95 Stateless persons, as seen above, will always be considered protected persons, based on GC IV and/or AP I.

96 ICRC Commentary on APs, above note 46, pp. 847, 850, paras 2944, 2956.

97 ICRC Commentary on GC IV, above note 27, pp. 263–264. It is worth noting that the 1967 Protocol relating to the Status of Refugees contains a broader refugee definition than that contained in the 1951 Refugee Convention, which is that referred to in the Commentary (as the former instrument had not yet been adopted). However, the 1967 Protocol definition contains certain limitations and it is argued that the refugee definition for the purposes of GC IV should be considered to be broader than that contained in the Protocol. See Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967), Art. 1.

98 ICRC Commentary on GC IV, above note 27, p. 264. See also ICRC Commentary on APs, above note 46, para. 2942. This criterion should not be confused with “absence of normal diplomatic relations” in Article 4 of GC IV; “it is only the rupturing of the presumed and enduring *de facto* relationship of allegiance between a State and its nationals that qualifies the person as a ‘refugee’”. D. J. Cantor, above note 9, pp. 357–358.

considered refugees for the purposes of GC IV.⁹⁹ GC IV would also cover individuals meeting the Refugee Convention inclusion criteria (even if the opposite is not necessarily true).¹⁰⁰ Unlike for Article 73 of AP I, Article 44 of GC IV does not require that refugees be recognized as such before the beginning of hostilities. Thus, for instance, a person who deserted into the adversary's territory during hostilities would be protected by Article 44 of GC IV in the same way as a person who had been granted asylum before the beginning of the armed conflict.

Refugees who are formally enemy aliens when their country of origin is involved in an armed conflict with their country of asylum no longer have a link of allegiance with their State of origin and are thus not automatically a potential threat to their host State. As enemy nationals on the territory of a party to the conflict, however, they are nevertheless particularly vulnerable to measures of control and security. Article 44 of GC IV recognizes this by adjusting the nationality criteria for the purposes of Article 4 and inviting parties to consider other factors evidencing the "spiritual affinity" or "ideological allegiance" of a protected person.¹⁰¹ Although authorized measures of control may still be imposed if refugees represent a danger to the security of the State,¹⁰² Article 44 requires that, when deciding upon such measures, refugees not be treated as enemy aliens solely on the basis of their nationality. According to the Commentary, beyond measures of control, Article 44 should be applied "in the broadest humanitarian spirit, in order that the maximum use may be made of the resources it offers for the protection of refugees".¹⁰³

As nationals of the occupying power, refugees finding themselves in a territory occupied by the State from which they fled are not protected persons, unless they are considered refugees under Article 73 of AP I as seen in the section "Migrants as Protected Refugees", above. As a result, these migrants do not benefit from the additional protection provided to protected persons by Parts I and III of GC IV.¹⁰⁴ They only enjoy the protection provided to the civilian population¹⁰⁵ as well as specific protection under Article 70(2) of GC IV, which was developed in response to the precarious position refugees may find themselves in. Although described slightly differently, the term "refugee" for the purposes of Article 70(2) is to be given a similar meaning to that under Article 44 of GC IV.¹⁰⁶ Unlike Article 44, to benefit from protection under Article 70(2), all persons – whether already recognized as refugees or not – must have reached the occupied territory "before the outbreak of hostilities".¹⁰⁷ Article 70(2)

99 V. Chetail, above note 9, p. 707.

100 D. J. Cantor, above note 9, pp. 365–366.

101 ICRC Commentary on GC IV, above note 27, p. 264.

102 GC IV, Art. 44; ICRC Commentary on GC IV, above note 27, pp. 264–265; M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 503.

103 ICRC Commentary on GC IV, above note 27, p. 265.

104 See the section on "Special Protection of Migrants as Protected Persons under GC IV", above.

105 See the section on "Protection of Migrants as Part of the Civilian Population", above.

106 ICRC Commentary on GC IV, above note 27, p. 350. See also D. J. Cantor, above note 9, p. 365.

107 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 504.

prohibits the occupying power from arresting, prosecuting, convicting or deporting refugees from the occupied territory. The exceptions to this are if they committed offences against their country of origin after the outbreak of hostilities, or committed ordinary criminal offences before the outbreak of hostilities that would have justified extradition in time of peace under the law of the occupied State.¹⁰⁸ Article 70(2) seeks to guarantee that refugees are not punished merely for having sought asylum or for acts resulting in their departure, and that the right of asylum previously enjoyed by them “continue[s] to be respected by their home country”.¹⁰⁹

Conclusions on the protection of migrants in international armed conflicts

As seen above, all migrants are protected against the effects of hostilities and must be treated humanely under the general rules covering the civilian population. When considered protected persons, all migrants, including refugees and stateless persons, are also entitled to the full spectrum of protection provided by GC IV. Finally, migrants considered “refugees” under GC IV benefit from specific protection under Article 44 of GC IV when in the territory of a party to the conflict or Article 70(2) of GC IV when in territory occupied by their country of origin.

How are migrants covered by IHL in non-international armed conflicts?

In non-international armed conflicts, there is no combatant, PoW or protected person status. All persons who are not, or are no longer, directly participating in hostilities are protected under the relevant provisions of IHL (i.e., common Article 3, and Additional Protocol II (AP II) in certain kinds of non-international armed conflicts).¹¹⁰ According to the Commentary on common Article 3, “[p]ersons taking no active part in the hostilities”¹¹¹ protected under this article are, firstly, civilians, including “former members of armed forces who have been demobilized or disengaged”, and secondly, “non-combatant members of the armed forces” (i.e., medical and religious personnel).¹¹² A third category are

108 ICRC Commentary on GC IV, above note 27, pp. 350–352.

109 *Ibid.*, p. 351.

110 There are also rules of IHL related to means and methods of warfare that protect persons during the time when they are actively participating in hostilities. As noted in the Commentary to AP II, the Protocol covers all persons affected by an armed conflict, which includes persons who do not or no longer take part in hostilities as well as those “who must, within the meaning of the Protocol, conform to certain rules of conduct with respect to the adversary and the civilian population” See ICRC Commentary on APs, above note 46, para. 4485.

111 For an explanation of the notion of “direct” participation in hostilities in the Additional Protocols, which refers to the same concept as “active” participation in hostilities in common Article 3, see ICRC Interpretative Guidance, above note 38.

112 ICRC Commentary on GC I, above note 6, paras 521–522.

“members of the armed forces who have laid down their arms and those placed *hors de combat*”.¹¹³ As noted in the Commentary to AP II, the Protocol covers “all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons”.¹¹⁴

Common Article 3 and AP II do not contain specific references to migrants (or to refugees or stateless persons), but such individuals are protected as persons not or no longer participating in hostilities. They must “in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”.¹¹⁵ According to the Commentary on AP II, although security measures may be taken, these “are without prejudice to the guarantees on the treatment of individuals”.¹¹⁶ Migrants are entitled to the fundamental guarantees set out in common Article 3, including the prohibitions on violence to life and person, outrages upon personal dignity and the passing of sentences without a fair trial. Where applicable, AP II contains more specific rules on these prohibitions as well as additional provisions on humane treatment for all persons who do not take a direct part in hostilities, including those subject to a deprivation of liberty.¹¹⁷ Migrants are also protected by the rules of customary international law applicable in non-international armed conflict, which include the fundamental guarantees of humane treatment.¹¹⁸

Despite the lack of combatant or PoW status in non-international armed conflicts, the distinction between civilians and members of the armed forces of a State and of organized armed groups remains essential to determine who is protected against the effects of hostilities.¹¹⁹ For the purposes of the conduct of hostilities, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians.¹²⁰ The armed forces of a State are its regular armed forces as well as other organized armed groups or units that are under a command responsible to the State party.¹²¹ Meanwhile, the armed forces of a non-State party to the conflict are organized armed groups and consist only of individuals with a continuous combat function.¹²² In non-

113 Common Art. 3(1).

114 ICRC Commentary on APs, above note 46, para. 4489.

115 Common Art. 3; AP II, Arts 2, 4; ICRC Commentary on GC I, above note 6, paras 519, 527, 528; ICRC Customary Law Study, above note 5, Rule 87.

116 ICRC Commentary on APs, above note 46, para. 4489.

117 AP II, Arts 4–5.

118 ICRC Customary Law Study, above note 5, Rules 87–105.

119 Although AP II has a narrower scope of application than common Article 3 and uses different terms, both instruments share the same generic categorization of persons. See ICRC Interpretive Guidance, above note 38, p. 29; see also AP II, Arts 1(1), 13(1), 13(3).

120 ICRC Challenges Report 2011, above note 6, p. 43; ICRC Interpretive Guidance, above note 38, p. 27. See also ICRC Commentary on GC IV, above note 27, p. 40: “Article 3 [on the treatment of persons in enemy hands] has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians – that is to people who do not bear arms”.

121 ICRC Commentary on GC I, above note 6, paras 530, 532–533; ICRC Commentary on APs, above note 46, para. 4462.

122 ICRC Interpretive Guidance, above note 38, pp. 27–36; ICRC Challenges Report 2011, above note 6, p. 43; ICRC Commentary on GC I, above note 6, para. 534.

international armed conflicts, nationality is not relevant as there is no combatant, PoW or protected person status.

As civilians, migrants enjoy general protection against the effects of hostilities, unless and for such a time as they take a direct part in hostilities or if they assume a continuous combat function on behalf of a party to the armed conflict.¹²³ They are also covered by the rules protecting the civilian population in Part IV of AP II, including the prohibitions on direct attacks against civilians, acts or threats of violence the primary purpose of which is to spread terror among the civilian population, and the use of starvation as a method of combat.¹²⁴ Migrants are also protected against forced displacement.¹²⁵ In addition, AP II provides that relief actions for the civilian population in need be undertaken subject to the consent of the high contracting party concerned.¹²⁶ Finally, although AP I contains additional – and more detailed – provisions on the protection of civilians in international armed conflicts, customary IHL has extended the applicability of many of these rules to non-international armed conflicts.¹²⁷

Select IHL issues of relevance in the context of migration

As seen, IHL provides important protections in armed conflicts for migrants; some of these are particularly relevant and will be the focus of this part of the article. The first section will examine rules imposing limits on, or permitting, the movement of migrants in international and non-international armed conflicts. It will recall the main features of the principle of *non-refoulement* under IHL and consider other rules that prevent, or are relevant to, the movement of migrants. The second section will explore the rules relating to respect for family life, the maintenance or re-establishment of family links, and the clarification of the fate and whereabouts of missing and dead migrants.

Rules governing the movement of migrants

The main aim of IHL is to avoid the infliction of suffering, which includes preventing and minimizing the forced displacement of civilians, either across international borders or within a country, because of armed conflicts. It does so through the rules providing protection against the effects of hostilities and the express prohibition of forced displacement. When civilians are nevertheless displaced, IHL requires that they be protected and assisted.

123 AP II, Art. 13(1), 13(3); ICRC Interpretive Guidance, above note 38, p. 27.

124 AP II, Arts 13(2), 14.

125 AP II, Art. 17. See the section on “Rules Governing the Movement of Migrants”, below.

126 AP II, Art. 18; ICRC Customary Law Study, above note 5, Rule 55. For further details on the requirement of consent, see ICRC Commentary on GC I, above note 6, paras 830–831.

127 ICRC Customary Law Study, above note 5; see, in particular, Section I (Rules 11–24) and Section III (Rules 53, 55 and 56).

With regard to the movement of migrants, be it their own voluntary movement or that carried out by the parties to the conflict, IHL contains several rules that impose specific and additional limitations and allowances. The lawfulness of such movements will depend on their compliance with IHL rules, including the principle of *non-refoulement*. In general terms, this principle prohibits the transfer of persons from one authority to another in any manner whatsoever if there are substantial grounds for believing that the person would be in danger of suffering a violation of certain fundamental rights.¹²⁸ This is recognized, in particular, for torture or cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or persecution.¹²⁹ The principle of *non-refoulement* is found, with varying scopes, in IHL, IHRL and international refugee law.¹³⁰ The core of this principle is also part of customary international law.¹³¹

Protected persons in the territory of a party to an international armed conflict

As protected persons, migrants, first and foremost, have the right to leave the affected territory at the outset of, or during, a conflict, unless their departure is contrary to the national interests of the State.¹³² Departures may only take place if they are voluntary – which is important, as migrants may choose to stay – and can take place either to a protected person’s own country or to other countries.¹³³ The exercise of the right to leave must be carried out in satisfactory conditions with regard to safety, hygiene, sanitation and food.¹³⁴ Departure decisions by the State, including negative ones, must be made in accordance with certain safeguards.¹³⁵ Secondly, applicable national law and international law will continue to govern the treatment of aliens in times of peace, except for special measures.¹³⁶ As a result, a party to the conflict may only deport migrants based on the legal grounds available in peacetime, subject to

128 Laurent Gisel, “The Principle of *Non-Refoulement* in Relation to Transfers”, in *Detention in Armed Conflicts*, Proceedings of the 15th Bruges Colloquium, 16–17 October 2014, College of Europe and ICRC, *Collegium*, No. 45, Autumn 2015, p. 116. See also ICRC, “Note on Migration and the Principle of *Non-Refoulement*”, in this issue of the *Review*.

129 L. Gisel, above note 128, pp. 116.

130 ICRC Commentary on GC I, above note 6, para. 709 and references in fn. 635.

131 ICRC Commentary on GC I, above note 6, para. 709 and references in fn. 636.

132 GC IV, Art. 35(1).

133 ICRC Commentary on GC IV, above note 27, p. 235.

134 GC IV, Art. 36; ICRC Customary Law Study, above note 5, Rule 131. See also ICRC Commentary on GC IV, above note 27, p. 266: “expulsion, if it does take place, must be carried out under humane conditions, the persons concerned being treated with due respect and without brutality”.

135 GC IV, Art. 35(1)–(3). See ICRC Commentary on GC IV, above note 27, p. 238: for instance, the protecting power must be informed of a negative decision, except if the individual does not want their home country to know.

136 GC IV, Art. 38.

specific IHL provisions on the removal of protected persons.¹³⁷ This requires taking into account the interaction of IHL with other bodies of international law, including IHRL rules on the expulsion of aliens.¹³⁸ Thirdly, under customary IHL, civilians have a right to voluntarily return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.¹³⁹ This right does not, however, extend to lawfully expelled migrants; it only covers those who have been displaced, either voluntarily or involuntarily.¹⁴⁰

Beyond these rules, Article 45 of GC IV provides important restrictions on the right of a party to the conflict to transfer protected migrants. The limitations prescribed are absolute and do not allow for derogations or exceptions.¹⁴¹ As noted in the Commentary, however, limitations must not interfere with the right of protected persons under Article 35 of GC IV to leave the territory at the outbreak of, or during, a conflict.¹⁴² An important first limitation on the right to transfer protected persons is the principle of *non-refoulement*, which finds expression, even prior to the 1951 Refugee Convention, in Article 45 of GC IV.¹⁴³ In the ICRC's view, the scope of the principle of *non-refoulement* extends to any type of transfer, such as expulsion, deportation, extradition or return, regardless of its formal designation.¹⁴⁴ According to Article 45(4) of GC IV, a protected person in the territory of a party to the conflict shall in no circumstances "be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".¹⁴⁵ Although the

137 David James Cantor, "Forced Displacement, the Law of International Armed Conflict and State Authority", 19 July 2011, p. 19, available at: ssrn.com/abstract=2297405; Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff, The Hague, 1995, pp. 135–142. See also ICRC Commentary on GC IV, above note 27, p. 266: deportation of aliens on an individual basis may take place when State security demands such action. "However, practice and theory both make this right a limited one: the mass deportation, at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted. ... Persons threatened with deportation must be able to present their defence without any difficulty being placed in their way and must be granted a reasonable time limit before the deportation order is carried out, if it is confirmed; in such cases the protecting power must be notified."

138 J.-M. Henckaerts, above note 137, pp. 8–49, 137–138.

139 ICRC Customary Law Study, above note 5, Rule 132. In treaty law, Article 49(2) of GC IV for protected persons in occupied territory provides that persons who have been evacuated must be transferred back to their homes as soon as hostilities in the area in question have ceased.

140 *Ibid.*, Rule 132.

141 ICRC Commentary on GC IV, above note 27, pp. 266, 269. The principle of *non-refoulement* in IHRL is equally absolute. For the exceptions in international refugee law, which need to be narrowly interpreted, see 1951 Refugee Convention, Art. 33(2); Andreas Zimmermann and Philipp Wenholz, "Article 33(2)", in Andreas Zimmermann (ed.), *The 1951 Convention on the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford, 2011, para. 2.

142 ICRC Commentary on GC IV, above note 27, p. 267.

143 For a more detailed analysis of the principle of *non-refoulement*, see Cordula Droege, "Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges", *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion", in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003; Emanuela-Chiara Gillard, "There's No Place Like Home: States' Obligations in Relation to Transfers of Persons", *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

144 ICRC, above note 128, p. 2, fn. 1.

145 GC IV, Art. 45(4).

term “persecution” is not defined in IHL, it refers, at a minimum, to serious violations of human rights (right to life, freedom and security) on such grounds as ethnicity, nationality, religion or political opinion.¹⁴⁶

A second restriction on the transfer of aliens in the territory of a party to the conflict, which is broader than other expressions of the principle of *non-refoulement*, is found in Article 45(3).¹⁴⁷ It prohibits transfers not only in the case of specific grounds normally invoked under IHRL and international refugee law, such as torture or persecution, but also in all cases where the receiving State cannot or will not treat aliens in accordance with the protections granted by GC IV.¹⁴⁸ Logically, given that the receiving State is itself required to comply with Article 45 of GC IV, this means that an onward transfer to a third State in violation of GC IV would also be prohibited (secondary *refoulement*).¹⁴⁹ Thus, a transfer may not take place unless the transferring power is satisfied that the receiving power is willing and able to apply GC IV, including the *non-refoulement* obligation. If protected persons are transferred, the transferring State continues to be responsible and must “take effective measures to correct the situation” or “request the return of the protected persons” if the receiving State does not fulfil its responsibilities under the Conventions.¹⁵⁰ The transferring State also has a duty to ensure respect by the receiving State based on common Article 1, which in turn bolsters the obligations of the latter.¹⁵¹ Grounded on this, if the transferring State believes that the receiving State is not willing or able to fulfil its responsibilities under the Conventions, it must not transfer individuals as this may encourage, aid or assist in IHL violations.¹⁵² Furthermore, it “must do everything reasonably in its power to prevent and bring such violations to an end” by monitoring the fate of transferred individuals and, if necessary, exercising its influence to ensure that the receiving State respects the Conventions.¹⁵³

Protected persons in occupied territory

In situations of occupation, Article 48 of GC IV provides that “protected persons who are not nationals of the Power whose territory is occupied” have the right to

146 1951 Refugee Convention, Art. 1; *UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, re-edited, Geneva, January 1992, paras 51–53. See also E.-C. Gillard, above note 143, pp. 723–724 and 727.

147 GC IV, Art. 45(3); see also GC III, Art. 12 for prisoners of war.

148 ICRC Commentary on GC IV, above note 27, pp. 268–269; C. Droège, above note 143, p. 675.

149 Vincent Chetail, “The Transfer and Deportation of Civilians”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, pp. 1199–1200.

150 C. Droège, above note 143, p. 698.

151 ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Synthesis Report from Regional Consultation of Government Experts*, Geneva, November 2013, p. 24 (some experts viewed transfer obligations “as part of a State’s obligations under common Article 1 to take appropriate measures to ensure that other States respect IHL”). See also C. Droège, above note 143, p. 699. For a more general view of the obligations under common Article 1, see Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014.

152 ICRC Commentary on GC I, above note 6, para. 154.

153 *Ibid.*, paras 154, 168.

leave the territory subject to the conditions of Article 35 of GC IV. The wording of this article explicitly refers to the right to leave the territory, including for protected refugees, and it is not restricted to repatriation.¹⁵⁴ Although the principle of *non-refoulement* is not expressly found in treaty law applicable to occupied territory, the IHRL and international refugee law principle will protect migrants, as relevant, in situations of armed conflict. Moreover, Article 49 of GC IV prohibits individual and mass forcible transfers and deportations of protected persons, regardless of the destination or purpose of the transfer, except where the security of the civilians involved or imperative military reasons require evacuations.¹⁵⁵ This prohibition suffers no exception and applies broadly to the forced displacement of protected migrants, both within or outside the bounds of national territory. It establishes a clear and absolute prohibition, although it only covers “forced” transfers and deportations so that protected persons who wish to leave are not barred from doing so.¹⁵⁶

Even where a permissible evacuation takes place on the basis of Article 49 (2), it cannot result in displacement outside the bounds of the occupied territory “except where for material reasons it is impossible to avoid”.¹⁵⁷ Evacuations – whether permissible or not – must in any case be temporary and meet “to the greatest practicable extent” certain requirements on the treatment of displaced persons, including avoiding the separation of families.¹⁵⁸ Whether persons are forcibly transferred or deported in violation of GC IV or are lawfully evacuated, they must be transferred back to their homes as soon as hostilities in the area in question have ceased.¹⁵⁹ As evacuations may take place to third States in exceptional circumstances, the right to return applies both to displacement inside and outside the occupied territory (whether in the same country or across a border).¹⁶⁰ Finally, under Article 70(2) of GC IV, refugees who find themselves in a territory occupied by their country of origin are entitled to special protection

154 GC IV, Art. 35; see also ICRC Commentary on APs, above note 46, commentary on AP I, Art. 73, para. 2982, which further confirms this.

155 GC IV, Art. 49; ICRC Customary Law Study, above note 5, Rule 129(A) and commentary. Concerning the implicit prohibition on deportations in the 1907 Hague Regulations, see J.-M. Henckaerts, above note 137, pp. 151–152. For more detailed analyses of the protection provided by IHL against forced displacement, see, for example, V. Chetail, above note 149, pp. 1185–1214; M. Jacques, above note 13, pp. 19–37, 49–71, 177–208; Jan Willms, “Without Order, Anything Goes? The Prohibition of Forced Displacement in Non-International Armed Conflict”, *International Review of the Red Cross*, Vol. 91, No. 875, 2009; K. Hulme, above note 13, pp. 91–116; D. J. Cantor, above note 137, pp. 1–23; Emanuela-Chiara Gillard, “The Role of International Humanitarian Law in the Protection of Internally Displaced Persons”, *Refugee Law Quarterly*, Vol. 24, No. 3, 2005; J.-M. Henckaerts, above note 137, pp. 143–178.

156 ICRC Commentary on GC IV, above note 27, p. 279. See also V. Chetail, above note 149, p. 1190; J.-M. Henckaerts, above note 137, p. 145.

157 GC IV, Art. 49(2).

158 *Ibid.*, Art. 49(2)–(3); ICRC Customary Law Study, above note 5, Rule 131; ICRC Commentary on GC IV, above note 27, pp. 280, 281. See also M. Jacques, above note 13, pp. 33–34.

159 GC IV, Art. 49(2); ICRC Customary Law Study, above note 5, Rule 132.

160 E.-C. Gillard, above note 155, p. 42; ICRC Customary Law Study, above note 5, Rule 132; ICRC Commentary on GC IV, above note 27, p. 281.

against deportation from the occupied territory, except on certain limited grounds.¹⁶¹

Non-international armed conflicts

Common Article 3 and AP II do not contain an explicit prohibition of *non-refoulement*.¹⁶² The ICRC's position is that by virtue of the "categorical prohibitions" contained in common Article 3, which bind all parties to the conflict, the "transfer of persons to places or authorities where there are substantial grounds for believing that they will be in danger of being subjected to violence to life and person, such as murder or torture and other forms of ill-treatment", would also be prohibited.¹⁶³ The finding that IHL prohibits *refoulement* in non-international armed conflicts is based on and supported by arguments under IHL and is further reinforced by relevant IHRL.¹⁶⁴ Firstly, similar to the rationale underlying the GC IV *non-refoulement* provision, the law applicable in non-international armed conflicts "should not be circumvented by transferring persons where they would be in danger of being subjected to violations of common Article 3 upon transfer".¹⁶⁵ This is also the logic motivating the reasoning of the UN Human Rights Committee and international jurisprudence on the principle of *non-refoulement*. Secondly, Article 5(4) of AP II requires authorities that "release persons deprived of their liberty to take necessary measures to ensure their safety". Arguably, this should also be required for transfers, which entail that the transferring authority hand over control over individuals.¹⁶⁶ Thirdly, although not explicitly stated, it is considered that returns based on Article 118 of GC III must not result in *refoulement* and that this logic should also apply to non-international armed conflicts.¹⁶⁷ Finally, the *non-refoulement* obligation is further bolstered by the duty of States to respect and ensure respect for IHL as enshrined in common Article 1.¹⁶⁸

The transfer of persons should not circumvent IHL applicable in non-international armed conflicts.¹⁶⁹ This would arguably cover the fundamental guarantees contained in common Article 3, including humane treatment and the

161 The exception covers refugees who committed offences after the outbreak of hostilities. It also covers those who committed offences under common law before the outbreak of hostilities which would have justified extradition in time of peace according to the law of the occupied State. See GC IV, Art. 70(2); see also the section on "Special Protection of Migrants as Refugees", above.

162 As mentioned previously, the continued applicability of the principle of *non-refoulement* under IHRL and/or international refugee law as well as customary international law would need to be considered.

163 ICRC Commentary on GC I, above note 6, para 710. For another view, see F. J. Hampson, above note 54, p. 385.

164 ICRC Commentary on GC I, above note 6, paras 710–712.

165 L. Gisel, above note 128, p. 118; ICRC Commentary on GC I, above note 6, para. 710.

166 L. Gisel, above note 128, p. 119.

167 *Ibid.*

168 ICRC, above note 151, p. 24. For an analysis of the obligation of non-belligerent States under common Article 1 relating to the transfer of detainees to States parties to a non-international armed conflict, see R. Ziegler, above note 54, pp. 386–408.

169 ICRC Commentary on GC I, above note 6, para. 710.

prohibitions against hostage-taking and against passing sentences without affording all judicial guarantees.¹⁷⁰ The latter, however, would likely be restricted to trials which are manifestly unfair, taking into account narrower interpretations by human rights bodies.¹⁷¹ Under IHL, all parties to the conflict, including international organizations and non-State organized armed groups, must abide by the principle of *non-refoulement*.¹⁷² This is relevant when comparing the protection of migrants under other bodies of international law. Furthermore, it is the ICRC's view that the principle of *non-refoulement* applies, irrespective of the crossing of a border, if control over a person is transferred from one authority to another.¹⁷³

Another relevant rule for the movement of migrants is the prohibition in Article 17(1) of AP II against parties ordering the displacement of the civilian population “for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand”.¹⁷⁴ This is also a rule of customary international law.¹⁷⁵ As in international armed conflicts, this rule is absolute, though it only covers “forced” displacement – whether within the country or across international borders – and should not be construed as preventing voluntary movement.¹⁷⁶ If displacement takes place, “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition” and that members of the same family are not separated.¹⁷⁷ As noted in the commentaries to the Additional Protocols and to customary IHL Rule 132, these conditions should be applied to the displacement itself.¹⁷⁸ Civilians also have the “right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist”, even if the displacement took place voluntarily.¹⁷⁹ Finally, “all appropriate steps shall be taken to facilitate the reunion of families temporarily separated”.¹⁸⁰

Final considerations

As seen in this section, IHL contains relevant rules for the movement of migrants in international and non-international armed conflicts. When persons are displaced, whether voluntarily or involuntarily, in connection with an armed conflict, some rules will continue to apply beyond the end of the armed conflict until they have

170 *Ibid.*, para. 710.

171 *Ibid.*, para. 710 and case law references.

172 *Ibid.*, para. 713.

173 *Ibid.*, para. 713.

174 For further detail, see references in above note 155 on the prohibition of forced displacement.

175 ICRC Customary Law Study, above note 5, Rule 129(B).

176 ICRC Commentary on APs, above note 46, para. 4851. See also M. Jacques, above note 13, p. 64.

177 AP II, Art. 17(1); ICRC Customary Law Study, above note 5, Rule 132.

178 ICRC Commentary on APs, above note 46, para. 4856; ICRC Customary Law Study, above note 5, Rule 131.

179 ICRC Customary Law Study, above note 5, Rule 132.

180 AP II, Art. 4(3)(b); ICRC Customary Law Study, above note 5, commentary on Rule 132. See also the section on “Rules on Family Unity and Missing and Dead Migrants”, below.

been able to return in safety to their homes or places of habitual residence, if they wish to do so.¹⁸¹ However, it is possible that the right of return of migrants that have been displaced from a country that is not their own may be limited, particularly if their status within that country was irregular.¹⁸² In any case, States continue to have obligations towards migrants based on domestic law as well as under IHRL and international refugee law, as applicable.¹⁸³ Importantly, IHL, IHRL and international refugee law provide complementary protection, including against *refoulement*, to migrants in situations of armed conflict. An important question when considering the protection of migrants under IHL – including the rules regulating their movement – is how this body of law interacts with other relevant branches of international law.¹⁸⁴ For instance, how do the rights to freedom of movement¹⁸⁵ and to leave any country, including one's own,¹⁸⁶ as well as the rules concerning the expulsion of aliens¹⁸⁷ in IHRL, interact with IHL? Linked with this, how does international refugee law interact with IHL and IHRL?¹⁸⁸ Notably, how do the rules relating to the return of refugees to their country of origin at the end of hostilities interact?¹⁸⁹

Rules on family unity and missing and dead migrants

In situations of armed conflict, many migrants may go missing or die, including because of separation from their families or detention. This is often a direct consequence of IHL violations. In the case of migrants, communication between

181 See, notably, ICRC Customary Law Study, above note 5, Rule 132.

182 The rules of IHRL (and those found in domestic law) relating to the right to return to one's own country, for instance, will need to be considered.

183 See above note 5.

184 For a more detailed analysis of the interplay between these bodies of law in relation to forced migration, see V. Chetail, above note 9, pp. 701–734. Specifically on the interplay concerning the principle of *non-refoulement*, see C. Droegge, above note 143, p. 676 and references.

185 ICCPR, Art. 12(1); Arab Charter on Human Rights, Art. 26(1); ACHR, Art. 22(1); ECHR, Art. 2(1); ACHPR, Art. 12(1).

186 UDHR, Art. 13; ICCPR, Art. 12; ACHPR, Art. 12(2); Arab Charter on Human Rights, Arts 4(2), 27.

187 ACHR, Art. 22(9); Arab Charter on Human Rights, Art. 26(2); ACHPR, Art. 12(5); Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms Other than Those Already Included in the Convention and in the First Protocol Thereto, 16 September 1963, ETS 46 (ECHR Protocol 4), Art. 4; Human Rights Committee, General Comment 15/27 of 22 July 1986, para. 10 (on the implicit prohibition in Article 13 of the ICCPR); Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, 1 October 2004, para. 26; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, A/RES/45/158, 18 December 1990, Art. 22(1).

188 See, for instance, 1951 Refugee Convention, Article 26, on freedom of movement, and Article 28, under which States parties do not have to deliver travel documents to refugees wishing to leave their asylum State when “compelling reasons of national security or public order otherwise require”. In addition, Article 32 (1) of the Refugee Convention concerns the expulsion of refugees lawfully in the territory of a State, which is only permissible on grounds of national security or public order. See also the exceptions to *non-refoulement* in Article 33(2) of the 1951 Refugee Convention.

189 See, notably, GC IV, Art. 134; ICRC Customary Law Study, above note 5, Rule 128; UDHR, Art. 13; ICCPR, Art. 12(4); ECHR Protocol 4, Art. 3(2); ACHR, Art. 22(5); Arab Charter on Human Rights, Art. 27(a); ACHPR, Art. 12(2). On voluntary repatriation of refugees under international refugee law, see Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969, Art. 5; Cartagena Declaration, para. 12.

family members – often living in different countries – may be especially challenging as they may speak different languages from that of the country they are in and information must be transmitted across borders and through the authorities of different States. This also complicates the collection of proper data for the identification of dead migrants. A further difficulty is that migrants may not wish to re-establish contact with their families out of fear of deportation or reprisals against their families in countries of origin. Finally, if the necessary measures are not taken to identify human remains and to transmit relevant information to families, dead migrants are likely to be reported missing.

Despite practical challenges, IHL provides important rules concerning respect for family life, the maintenance or re-establishment of family links, the clarification of the fate and whereabouts of missing persons, and the search for, collection and identification of the dead that are pertinent for migrants.¹⁹⁰ These primarily aim to prevent persons from going missing and to clarify their fate and whereabouts when they do, in order to provide their family members with any available information on their fate.¹⁹¹ However, the obligation to account for missing and dead persons is one of means and not of results. Parties to the conflict must use their best efforts to inform families of the fate of their relatives, and when information is available they must provide it to the families.¹⁹² The rules of IHL relating to the re-establishment of family links, the reunion of families and accounting for the dead and the missing may continue to apply beyond the end of an armed conflict. If a person went missing in connection with an armed conflict, these rules remain applicable until the fulfilment of the parties' obligations.¹⁹³ Parties continue to be bound by their duty to take all feasible measures to account for persons reported missing and to provide family members with any information they have on their fate. This is also the case for obligations related to dead persons, notably on search, collection and accounting. Furthermore, parties remain bound by their duty to facilitate the tracing efforts of members of dispersed families so that they can restore family links and, if possible, reunite these families.

International armed conflicts

In international armed conflicts, several IHL rules seek to prevent persons from going missing, including by recording their information when they are

190 See, for instance, GC IV, Arts 26, 27(1) (protected persons), 49(3) (occupied territory), 82(2), 116 (internees); AP I, Arts 32–34, 74, 75(5), 77(4); AP II, Arts 4(3)(b), 8; ICRC Customary Law Study, above note 5, Rules 105, 109, 112, 116, 117, 123, 125, 131.

191 AP I, Art. 32; ICRC Customary Law Study, above note 5, commentary on Rule 117. Regarding dead persons, see ICRC Commentary on APs, above note 46, paras 1203, 1216.

192 ICRC Customary Law Study, above note 5, Rules 116, 117; ICRC Commentary on APs, above note 46, para. 1216. See also Heike Spieker, "Maintenance and Re-establishment of Family Links and Transmission of Information", in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 7, p. 1120.

193 On Articles 33, 34 and 74 of AP I, see ICRC Commentary on APs, above note 46, paras 149, 1239.

detained.¹⁹⁴ Parties to the conflict also have an obligation to enable all persons on their territory, or in a territory occupied by them, to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them.¹⁹⁵ This obligation applies irrespective of the location of families.¹⁹⁶ If migrants are dispersed in connection with an armed conflict, parties must facilitate enquiries made by their relatives with the aim of restoring family links and, if possible, reunification.¹⁹⁷ Importantly, Article 74 of AP I develops Article 26 of GC IV, including by imposing the obligation on parties to the conflict to facilitate the reunion of dispersed families in “every possible way” also on third States party to the Protocol.¹⁹⁸ According to the Commentary, “[t]his is quite logical, since it often happens during armed conflict that nationals of a country involved in a conflict seek refuge or are taken to neutral countries”.¹⁹⁹ Even if AP I does not apply, it could be argued that third States may have obligations related to facilitating family reunification stemming from their duty to ensure respect for IHL under common Article 1.²⁰⁰ This would not, however, necessarily result in an obligation for third States to grant an entry permit.²⁰¹ This is relevant as the families of migrants are often not in the territory of a State party to the conflict.

When persons are reported missing, parties must also take all feasible measures to account for and transmit information on them.²⁰² Building on GC IV, Article 33 of AP I and customary international law extend the obligation to search for missing persons to all other persons not covered by the Conventions, including nationals of States not party to the conflict and persons whose nationality is contested.²⁰³ Although AP I does not extend to the nationals of a party to the conflict, records should be kept in line with the general principle in Article 32 that all activities “shall be prompted mainly by the right of families to know the fate of their relatives”.²⁰⁴ When considering the transmission of information to countries of origin, situations where migrants do not wish to

194 See, for instance, GC IV, Arts 24(3) (for the whole of civilian populations), 43(2) (protected persons in territory of a party), 50(2) (occupied territory), 105–106 (internees), 136–138, 140 (protected persons); AP I, Arts 33(2), 78(3); ICRC Customary Law Study, above note 5, Rule 123.

195 GC IV, Art. 25 (for the whole of civilian populations). See also Arts 106–107, 112, 125 (internees); ICRC Customary Law Study, above note 5, Rules 105, 125, 126.

196 H. Spieker, above note 192, p. 1100.

197 GC IV, Art. 26 (for the whole of civilian populations); AP I, Art. 74; ICRC Customary Law Study, above note 5, Rule 105. See also Rule 131: “In case of displacement, all possible measures must be taken in order that ... members of the same family are not separated.”

198 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 507–508.

199 ICRC Commentary on APs, above note 46, para. 2998.

200 For a more detailed overview of the obligations under common Article 1, see K. Dörmann and J. Serralvo, above note 151, pp. 707–736.

201 H. Spieker, above note 192, p. 1121.

202 See, for instance, GC IV, Arts 136–141 (for protected persons); AP I, Art. 33(1)–(3) (for “persons who have been reported missing by an adverse Party” – wider personal scope than GC IV); ICRC Customary Law Study, above note 5, Rule 117. On the scope of Article 33 of AP I, see M. Bothe, K. J. Partsch and W. A. Solf, above note 34, pp. 198–199. See also A. Petrig, above note 7, pp. 260, 270.

203 ICRC Customary Law Study, above note 5, Rule 117; ICRC Commentary on APs, above note 46, paras 1222, 1256–1259.

204 ICRC Commentary on APs, above note 46, para. 1259.

restore family links²⁰⁵ or where this could be prejudicial to them or their relatives²⁰⁶ must be taken into account. As noted in the Commentary to Article 32 of AP I, the right of families to know the fate of their relatives should be balanced with other concerns – for instance, if a prisoner does not wish to communicate with his family.²⁰⁷ For protected persons under GC IV, the obligation of the National Information Bureau to transmit information is waived if detrimental to the person concerned or to his or her relatives.²⁰⁸ Parties to the conflict also have an obligation to search for, recover and identify the dead, including migrants, to ensure that their human remains are appropriately handled and to notify families.²⁰⁹ AP I extends the personal scope of the obligations in GC IV to respect remains and to respect, maintain and mark graves to persons who died for reasons related to occupation, persons who died in detention as a result of occupation or hostilities, or persons who are not nationals of the country in which they died as a result of hostilities.²¹⁰ It also covers other unregulated issues, including the protection and return of human remains.²¹¹

Non-international armed conflicts

In non-international armed conflicts, there are a number of rules that are relevant for preventing persons from going missing or becoming separated, as well as for re-establishing family links and reuniting families.²¹² Underpinning all obligations is the right to respect for family life, which is recognized as a rule of customary IHL.²¹³ Among the pertinent rules, parties must take all appropriate steps to facilitate the reunion of families temporarily separated, including through the identification of children, the establishment of information bureaux and the use of the Central Tracing Agency.²¹⁴ In addition, there are rules relating to the exchange of contact between family members.²¹⁵ Parties must also take all feasible steps to account for persons reported missing and to inform families of their fate.²¹⁶ They must search for and collect the dead, record all available information prior to disposal of bodies with a view to their identification, and ensure that human remains are appropriately handled.²¹⁷ The essence of this rule

205 Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, p. 12.

206 A. Petrig, above note 7, p. 268.

207 ICRC Commentary on APs, above note 46, paras 1218–1219.

208 GC IV, Arts 137(2), 140; ICRC Commentary on GC IV, above note 27, pp. 531–532.

209 GC IV, Arts 16(2) (whole of the populations), 129(2), 130–131 (internees); AP I, Arts 17, 33, 34; ICRC Customary Law Study, above note 5, Rules 112, 116. See also ICRC Customary Law Study, above note 5, Rules 113–115.

210 M. Bothe, K. J. Partsch and W. A. Solf, above note 34, p. 202.

211 *Ibid.*, pp. 203–204.

212 See, for instance, AP II, Arts 4(3)(b), 5(2)(b); ICRC Customary Law Study, above note 5, Rules 98, 105, 119–120, 123, 132 (preventing family separation in case of displacement).

213 ICRC Customary Law Study, above note 5, Rule 105.

214 AP II, Arts 4(3)(b); ICRC Commentary on APs, above note 46, paras 4553–4554.

215 AP II, Art. 5(2)(b); ICRC Customary Law Study, above note 5, Rules 105, 125, 126.

216 ICRC Commentary on APs, above note 46, Rules 105, 117.

217 AP II, Art. 8; ICRC Customary Law Study, above note 5, Rules 112, 116. See also Rules 113, 115.

is that authorities inform families, as far as possible, about the fate of their relatives and, as noted in the Commentary, on the location of their graves when appropriate.²¹⁸

Conclusion

One of the primary aims of IHL when it comes to the protection of migrants in situations of armed conflict is to prevent the forced movement of persons either internally or externally. This has been one of the main focuses of existing literature on the protection of refugees (and internally displaced persons) under IHL. This article sought to explore the many rules of IHL that protect migrants not only from displacement, but more generally when they find themselves in situations of armed conflict – whether because they live in or are transiting through countries experiencing armed conflict. These rules primarily seek to protect migrants from the effects of hostilities and to ensure that they are treated humanely when in enemy hands. In the first place, IHL protects migrants under the general rules for the civilian population. In addition, they are entitled to special protection in international armed conflicts as protected persons. As refugees, they enjoy special protection under Articles 44 and 70(2) of GC IV. As such, IHL includes important rules for the protection of migrants finding themselves in situations of armed conflict. However, as migrants also continue to enjoy protection under domestic law and under other applicable bodies of international law in international and non-international armed conflicts, the interaction of IHL with other international obligations should be further considered. In particular, the complementary protection provided by IHRL and international refugee law to migrants in situations of armed conflicts and the interplay of these rules with IHL would merit further research. As mentioned above, for instance, it would be important to reflect on how the right to freedom of movement in IHRL and the rules relating to the return of refugees in international refugee law interact with IHL rules relating to the movement of persons.

Although briefly addressed, the potential obligations of third States, either during or after an armed conflict, based on common Article 1 should also be further considered to gain a more comprehensive understanding of the protection of migrants under IHL. For instance, to what extent, if any, is there a duty for third States to endeavour to ensure that parties to an armed conflict comply with their obligations to re-establish family links for migrants displaced in relation to the conflict or to account for missing and dead migrants? If a party to an armed conflict is attempting to restore family links and requires the assistance of a third State to do so, to what extent can the refusal of the latter be seen as contributing to the commission of a violation of IHL? Finally, as part of their duty to prevent violations of IHL, should third States reach out to parties to an armed conflict to

218 ICRC Commentary on APs, above note 46, para. 4657.

try to facilitate the carrying out of their obligations? Although this article does not address this issue in detail, determining the existence and scope of the potential obligations of third States remains important, for instance to account for missing and dead migrants during or at the end of an armed conflict or to facilitate the voluntary return of migrants, as appropriate.