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Journeys of Resilience: Migrant Protection in the Realm of Humanitarian Law

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Abstract

This article delves into the plight of migrants entangled in armed conflict zones and their protection under International Humanitarian Law (IHL). Unlike discussions focused on migrants in destination countries, this study sheds light on the challenges faced by migrants navigating conflict-affected regions and the legal frameworks that safeguard their rights. While primarily centered on IHL, the article briefly touches upon the interaction of other international legal frameworks, such as International Human Rights Law (IHRL) and international refugee law, in protecting migrants. Through a comprehensive examination of IHL principles and their applicability to migrants in armed conflict scenarios, this research underscores the imperative of elucidating the intricate dynamics between IHL, IHRL, and the responsibilities of third States to ensure the comprehensive safeguarding of migrants amidst the chaos of armed conflict.



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1. Introduction

Tragic armed conflicts in various regions across the globe are causing unimaginable suffering to entire populations, forcing more and more people to flee their homes and seek safety elsewhere (Allansson et al., 2017). By the close of 2015, the staggering tally of forcibly displaced individuals worldwide due to armed conflicts, violence, persecution, or human rights abuses had soared to an unprecedented 65.3 million. According to one figure, as mentioned by Šantić & Spasovski (2016), “the global migrant population, encompassing refugees as a distinct legal category within international refugee law, reached 244 million in 2015”. Among these migrants, many find themselves ensnared in armed conflicts upon reaching third countries, facing a myriad of challenges akin to those endured by the local civilian populace. Hindered by their status as foreigners, migrants often encounter obstacles in accessing essential services and may be subject to constraints on personal freedom, alongside the looming threat of repatriation to their countries of origin, potentially contravening international legal frameworks. Significantly, most discussions about migration focus on people making their way from the Americas and the Mediterranean to the borders of Europe or North America, ignoring the hardships that migrants face in their home countries, on migration routes, and in third countries where they end up living (Stokholm, 2016).

Migrants navigating countries embroiled in armed conflict are particularly vulnerable, yet their protection and assistance needs often go unaddressed. This article aims to illuminate the predicament of migrants ensnared in armed conflict zones and their safeguarding under “International Humanitarian Law” (IHL), steering clear of discussions concerning migrants in destination countries. However, pertinent IHL principles also extend to migrants who have fled conflict-affected regions and sought refuge in peaceful nations. This article will briefly touch upon such rules, including obligations about family reunification and the identification of deceased and missing migrants. Regardless of their location, migrants benefit from various international legal frameworks, including “International Human Rights Law” (IHRL) and international refugee law, which retain applicability even in conflict settings. Additionally, migrants are afforded protection under the domestic laws of host states, with IHL offering supplemental safeguards for migrants residing in or transiting through conflict-affected territories. While IHL operates exclusively in armed conflict scenarios, certain provisions merit consideration during peacetime and persist beyond conflict cessation.

In situations directly linked to armed conflicts or occupations, where the repercussions persist beyond the conflict's conclusion, migrants may still benefit from protection under specific provisions of international humanitarian law (IHL). Even after the cessation of hostilities or when migrants have left conflict-affected territories, certain IHL regulations continue to apply. This article aims to explore the protective mechanisms afforded to migrants within armed conflict scenarios, with a focus on IHL. While other branches of international law may be referenced, their detailed examination and interaction with IHL fall outside this article's scope.

2. Understanding Migrants and International Humanitarian Law Protection

Although various international agreements define certain types of migrants, there is no generally accepted meaning of the term "migrant" in the field of international law (Goldenziel, 2016). Several groups also define migrants as those who leave their home country in search of better opportunities or safety, regardless of their citizenship, nationality, or permanent residence.

It is important to note that there are no rules under IHL that address migration or the protection of migrants specifically (Ruzzetta, 2023). Nonetheless, neither is International Humanitarian Law (IHL) silent on the subject of migration. In times of war, whether global or local, migrants should enjoy the same protections accorded to civilian populations. A warring faction or an occupying power may recognize "migrants as refugees or protected persons" if they fulfill certain requirements during international armed conflicts (Yastrebova, 2019).

To clarify the safeguarding of migrants according to (IHL), the following sections of this article will examine the distinction between civilians and combatants in both international and non-international armed situations. This study will largely focus on the protection of migrants as civilians under IHL, considering that the majority of migrants belong to the civilian category. Furthermore, this study will examine the specific standards used to designate individuals as "protected persons," "refugees," and/or "stateless persons" during international armed conflicts. It will shed light on how migrants fit into these categories.

2.1 Migrant Protection in International Armed Conflicts under IHL

In international armed conflicts, migrants enjoy protection, primarily under the general rules of International Humanitarian Law (IHL) that safeguard civilian populations (Gieseken, 2017). Additionally, if they meet the criteria as "protected persons," migrants benefit from protections provided to aliens under the authority of a party to the conflict or an occupying power. Moreover, certain migrants are specifically recognized and protected as "refugees." However, the determination of who qualifies as a refugee under IHL can vary depending on the specific rules applicable and their implications for protection. A migrant may be considered a refugee under different provisions, such as "Articles 44 or 70(2) of the Fourth Geneva Convention (GC IV)" (Gil-Bazo, 2015). If classified as a refugee under Article 44, they are also granted protected person status under GC IV. Conversely, if a migrant falls under the definition of refugee outlined in Article 70, they are not automatically considered a protected person unless "Additional Protocol I (AP I)" applies, and the individual satisfies the criteria for refugee status (Lambert, 2014). Additionally, migrants may be considered refugees under "Article 73 of AP I," in which case they are recognized as protected persons under GC IV. It's worth noting that while AP I broadens the scope of protected persons to include all those recognized as refugees, the definition of "refugee" in this protocol is narrower compared to GC IV.

2.2 Migrant Protection as Integral to the Civilian Population

The level of protection provided to migrants in international armed conflicts is determined by their categorization as either civilians or combatants, according to IHL. Combatants generally consist of persons who are part of the armed forces, except medical staff and chaplains. On the other hand, civilians refer to all individuals who are not associated with the armed forces of a

particular side (Schmitt, 2004). Although some migrants may take on fighting responsibilities in particular situations, the bulk are considered civilians. Various provisions of (IHL) protect all civilians, regardless of their nationality, in international armed conflicts. Therefore, migrants, being civilians protected by (IHL), are safeguarded from the negative consequences of armed conflicts (Matthews, 2013). Restrictions on indiscriminate attacks and assaults aimed at civilians protect migrants in areas affected by armed conflict. In addition, the use of famine as a tactic in battle is explicitly forbidden, providing additional protection for migrants from any damage. These precautionary measures not only guarantee the safety of migrants but also serve to alleviate and forestall their forced relocation resulting from conflict-related causes. Despite migrants participating in acts of aggression, they still maintain their civilian status and the resulting safeguards against being targeted, only temporarily losing this status during their active involvement in hostilities.

If migrants are apprehended by hostile forces, the level of safeguard they receive depends on their status. Migrants, as non-military individuals, are protected by the overall rules that ensure the safety of civilian populations as stated in the “Fourth Geneva Convention” (GC IV) and “Additional Protocol I” (Leaning, 2011). Part II of GC IV, which applies to "the entire populations of the countries involved in the conflict," includes all migrants who do not have combatant or prisoner of war (PoW) status. It establishes basic protections for all individuals, regardless of their ethnicity, to prevent the hardships caused by conflict. In addition to the general rules safeguarding the civilian population, migrants are also safeguarded by the provisions concerning missing and deceased individuals in Part II, Section III of Additional Protocol I (AP I). Furthermore, Leaning (2011) discussed, “they are protected by the provisions regarding assistance for the civilian population and the treatment of individuals under the control of a party to the conflict, which are outlined in Part IV, Sections II and III of AP I respectively.”

2.3 Shielding Stateless Migrants: Upholding Their Protection

As per Article 4 of GC IV, refugees who don't have a passport are protected. This includes people who are not from any country (Yastrebova, 2019). People who don't have a nationality are considered stateless according to GC IV, which doesn't give a clear definition. More people fit this description of "stateless persons" than there were in the “1954 Convention on the Status of Stateless Persons.” Some people are currently getting help or security from UN groups other than the Office of the “UN High Commissioner for Refugees” who are not covered by the 1954 Convention (Nwotite, 2020). When Additional Protocol I (AP I) is applicable, the term "stateless persons" is defined by referring to international documents like the “1954 Convention” or the national laws of the State where they seek shelter or reside (Yastrebova, 2019). According to AP I, those who become stateless before the start of hostilities are specifically considered protected persons under GC IV. This means that they are entitled to protection "in all circumstances and without any unfavorable discrimination." Nevertheless, even in situations where the principle of Additional Protocol I does not apply, stateless individuals, including those who become stateless after the start of conflicts, are nevertheless regarded as protected individuals according to the Fourth Geneva Convention.

As further elaborated by Yastrebova (2019), “the temporal constraints specified in AP I do not have practical implications for stateless individuals, as they are already safeguarded by GC

IV.” When both” GC IV (Fourth Geneva Convention) and AP I (Additional Protocol I)” are relevant, individuals who are considered stateless by international conventions and national laws are included in the category of protected persons. It doesn't matter when their statelessness occurred (Ferreira et al., nd).

3. Migrant Protections in Non-International Armed Conflicts

In non-international armed conflicts, the legal designations of combatant, PoWs, or protected person statuses are not applicable (Arinze-Umobi & Nwotite, 2021). Nonetheless, as further discussed by Arinze-Umobi & Nwotite (2021), “individuals who are not currently engaged in combat or have stopped participating are protected by the applicable regulations of International Humanitarian Law (IHL), including common Article 3 and Additional Protocol II (AP II) in certain forms of non-international armed conflicts.” The Commentary on Common Article 3 states that, “individuals covered by this provision encompass civilians, including former members of armed forces who have been demobilized or disengaged, as well as non-combatant members of armed forces such as medical and religious personnel” (Muggah & O'Donnell, 2015). Another category includes those who are part of the armed forces and have either voluntarily given up their weapons or are unable to use them due to physical or mental limitations.

The Commentary to AP II states that the Protocol provides coverage to all individuals residing in the conflict-affected country, regardless of their nationality. This includes refugees and stateless individuals. Although migrants, refugees, and stateless persons are not directly mentioned in common Article 3 and AP II, they are granted protection as individuals who do not participate in hostilities (Ferreira et al., nd). Individuals have the right to receive fair and compassionate treatment, free from any form of bias or prejudice, including but not limited to race, religion, gender, or any other determining factor. While it is important to consider security measures, these efforts mustn't undermine the assurances of humane treatment as described in the Commentary on AP II. Migrants have the right to the basic protections stated in Common Article 3, which include the prohibition of aggression toward their lives and bodies, actions that diminish their personal dignity, and the imposition of sanctions without a fair trial (Mavronicola, 2015). In addition, when relevant, (AP II) provides more precise regulations about these prohibitions, as well as further measures regarding the humane treatment of those who are not currently participating in hostilities, including those who are detained.

In addition, migrants have the right to be protected under the regulations of customary international law that are relevant in non-international armed conflicts. These regulations encompass crucial guarantees of compassionate treatment. While combatant or PoW status does not apply in these conflicts, it is nonetheless crucial to distinguish between civilians and those belonging to armed forces or organized armed organizations. This differentiation helps define who is safeguarded from the consequences of hostilities (Fabijanić Gagro, 2014).

Persons who are not directly engaged in the conduct of hostilities and who are not members of the armed forces or organized armed organizations linked to a warring party are referred to as civilians. Both the regular military forces and other organized armed formations that function under the authority of the state are considered part of the state armed forces. In contrast, non-state armed forces consist solely of individuals whose primary responsibility is to engage in

continuous warfare. As elaborated by Landefeld (2023), “given the lack of official classifications for enemy fighters, prisoners of war, and protected persons in non-international armed conflicts, nationality does not constitute a major factor in these types of wars.” As a general rule, civilians, including migrants, are shielded from the effects of war unless they take part in the fighting themselves or consistently fight for one side in the conflict.

In addition, migrants are protected by the regulations that ensure the safety of non-military individuals as described in Part IV of AP II. These regulations include bans on direct assaults on civilians, actions intended to create fear among civilians, and the utilization of famine as a strategy in warfare. They are additionally safeguarded from coerced displacement (Arowolo, 2021). Furthermore, although Additional Protocol I (AP I) provides more comprehensive and specific restrictions regarding the safeguarding of civilians in international armed conflicts, customary International Humanitarian Law has broadened the scope of many of these provisions to also apply to non-international armed conflicts.

4. Key IHL Issues in the Context of Migration

The fundamental objective of IHL is to mitigate suffering, encompassing efforts to prevent and minimize the forced displacement of civilians resulting from armed conflicts, whether within a country's borders or across international boundaries. IHL achieves this goal by establishing regulations to shield civilians from the adverse impacts of hostilities and by expressly prohibiting forced displacement (Waszink, 2011). In instances where civilians are displaced despite these provisions, IHL mandates their protection and assistance.

Regarding the movement of migrants, whether initiated voluntarily or orchestrated by conflict parties, IHL introduces specific rules that impose additional restrictions and permissions. The legitimacy of these movements depends on their compliance with norms set by IHL, including the principle of non-refoulement (Lursmanashvili, 2021). This concept typically forbids the transfer of individuals from one governing body to another if there are substantial reasons to assume that the person would encounter severe infringements of basic rights. More precisely, this refers to the dangers of torture, cruel, inhuman, or humiliating treatment, arbitrary denial of life, or persecution. The principle of non-refoulement is reflected in multiple international legal frameworks, “such as International Humanitarian Law (IHL), International Human Rights Law (IHRL), and international refugee law” (Arowolo, 2021). Furthermore, the fundamental nature of this principle establishes it as a part of customary international law.

5. Protected Persons Within a Party's Territory in International Armed Conflicts

As individuals with protected status, migrants have the fundamental entitlement to leave the afflicted area at the beginning or during a conflict, unless this departure goes against the national interests of the State (Andrijasevic, 2010). Voluntary departures must be facilitated, granting migrants the autonomy to decide whether to stay or leave, and can take place either to their own country or other countries. Ensuring appropriate conditions for safety, hygiene, sanitation, and food is vital when exercising this right. Decisions made by the state regarding departures, even if they are negative, must follow specified safeguards.

In times of peace, the treatment of aliens is regulated by relevant national and international laws, with certain allowances for unique circumstances. Therefore, parties involved in the war can only expel migrants using legal reasons that are applicable during times of peace, by the requirements of International Humanitarian Law regarding the removal of those under protection. As highlighted by Fernández-Sánchez (2010), “It is important to take into account the relationship between International Humanitarian Law (IHL) and other international legal frameworks, such as the norms of International Human Rights Law (IHRL) regarding the expulsion of aliens.”

In addition, as stated by Ojeda (2014), citizens have the right to return to their homes or regular places of residence once the causes of their displacement subside, according to customary International Humanitarian Law. Except for persons who have been forcibly or voluntarily displaced, this right does not apply to migrants who have been legitimately removed.

As discussed by Gil-Bazo (2015), “Article 45 of the GC IV imposes crucial restrictions on the right of conflict parties to transfer protected migrants. These limitations are absolute, allowing no derogations or exceptions.” Crucially, they mustn't hinder the right of protected individuals, as stated in Article 35 of the Fourth Geneva Convention, to leave the area at the beginning or during a conflict. The concept of non-refoulement, as stated in Article 45 of GC IV, imposes a major restriction on the freedom to move individuals who are under protection (Gil-Bazo, 2015). This principle, acknowledged before to the 1951 Refugee Convention, applies to many types of transfer, including expulsion, deportation, extradition, or return, irrespective of their formal classification. As per the provisions of Article 45(4) of GC IV, it is strictly prohibited to transfer a protected individual who is located within the territory of a party involved in a war to a country where they may be subjected to persecution based on their political or religious views (Gieseken, 2017).

6. Protected Individuals in Occupied Territories

During times of occupation, Article 48 of the GC IV provides the right for "protected persons who are not nationals of the occupying Power" to leave the area, as long as they meet the requirements specified in Article 35 of GC IV (Koutroulis, 2012). This provision specifically guarantees the freedom to exit the country, including for refugees under protection, without any limitations on their return to their home country. While the principle of non-refoulement is not specifically stated in the treaties that apply to occupied territory, migrants in armed conflict situations are nevertheless protected by relevant principles in IHRL and international refugee law.

Furthermore, according to Article 49 of GC IV, it is forbidden to forcibly transfer or deport protected individuals, whether individually or in large numbers, regardless of the purpose or destination of the transfer. The only exceptions to this rule are situations where the safety of civilians or important military reasons require evacuations (Koutroulis, 2012). This prohibition is unconditional and includes the coerced relocation of safeguarded migrants, regardless of whether it occurs inside or outside of national boundaries. Importantly, this policy only applies to transfers and deportations that are done against a person's will, guaranteeing that those who are under protection are not hindered from leaving if they wish to do so. According to Kontorovich (2017), “even if evacuations are allowed under Article 49(2), they

should not result in people being forced to leave the occupied zone, unless it is absolutely necessary due to practical limitations”. Regardless of their legality, evacuations must be temporary and follow specific guidelines for the care of displaced individuals, including measures to ensure the preservation of family unity to the highest possible degree. In addition, if individuals are subjected to illegal transfers or legal evacuations that violate the Fourth Geneva Convention, they must be swiftly returned to their homes once the fighting in the region ends. The right to return extends to both internal and external displacement, whether it occurs within or outside the occupied region. This includes migrations within the same country or across borders. According to Lambert (2014), “Article 70(2) of GC IV, refugees who are in a territory that is occupied by their own country have the right to be protected from being sent back to the occupied region. However, there are some exceptions to this protection, but they are restricted.”

7. Family Unity and Missing Migrants: Key Rules and Obligations

During times of armed conflict, a significant number of migrants may go missing or die, frequently due to violations of IHL (Gaggioli, 2018). The situation is worsened by communication difficulties among family members, who may live in various countries and speak different languages. The transfer of information across international boundaries and between different government agencies creates additional challenges, making it difficult to accurately identify deceased migrants.

In addition, migrants may be reluctant to reunite with their family due to concerns about being deported or facing retaliation against their loved ones in their home countries (Rodriguez et al., 2021). The failure to establish essential protocols for identifying human remains and promptly communicating pertinent information to families frequently results in deceased migrants being erroneously reported as missing. Although there are practical challenges, International Humanitarian Law (IHL) establishes important regulations concerning the protection of family life, the reestablishment of family connections, and the clarification of the fate of missing persons, which are relevant for migrants.

The main objective of these rules is to prevent individuals from becoming missing and to provide clear information about their destiny and location if they do go missing. This way, families can have access to any accessible information about their status. Nevertheless, the responsibility to provide an explanation for individuals who are absent or deceased is based on the exertion of effort rather than the assurance of definite results. The parties involved in the war must make every effort to inform families about the fate of their relatives and offer any accessible information properly.

Furthermore, the principles of International Humanitarian Law (IHL) regarding the restoration of family connections, the reunion of families, and the identification of missing and deceased individuals may continue to be in effect even after the end of hostilities (Sarkin & Martinez, 2022). If an individual becomes unaccounted for as a result of armed conflict, these requirements continue to be relevant until the parties fulfill their responsibilities. Parties must continue making every possible effort to find and provide families with information on missing persons, as stated by Mowbray (2004). This encompasses responsibilities about deceased individuals, such as the undertaking of searches, the gathering of relevant items, and the

meticulous recording of all attempts made. In addition, parties must assist in the efforts to locate scattered family members to establish family connections and, whenever feasible, bring families back together.

8. Conclusion

In conclusion, safeguarding migrants in the context of armed conflict is a vital component of International Humanitarian Law (IHL), with the primary objective of averting their coerced relocation, whether within their own country or across borders. The current body of literature has mostly concentrated on the protection of refugees and internally displaced persons under International Humanitarian Law (IHL). This emphasizes the need to also examine the various regulations that safeguard migrants in armed conflict contexts in a more comprehensive manner. Throughout this article, the author has examined the many measures of International Humanitarian Law (IHL) that aim to protect migrants from the hardships of armed conflict and guarantee their humane treatment while in the custody of opposing forces. International Humanitarian Law (IHL) includes crucial regulations that protect migrants, ranging from general safeguards for civilians to specific measures for individuals classified as protected people in international armed conflicts, such as refugees covered by the Geneva Conventions. However, it is crucial to acknowledge that migrants are still entitled to legal protection under national and international laws. This requires a thorough analysis of how International Humanitarian Law (IHL), International Human Rights Law (IHRL), and international refugee law interact with each other. Additional research is necessary to clarify the relationship between the right to freedom of movement and the norms guiding the repatriation of refugees, and how they intersect with the regulations of IHL regarding the mobility of individuals in armed conflicts. Furthermore, it is necessary to closely examine the potential responsibilities of third States in maintaining the standards of IHL. When considering the responsibilities outlined in Common Article 1, we need to examine the level of obligation that third States have in terms of assisting with the restoration of family connections, addressing the situation of missing and deceased migrants, and preventing violations of International Humanitarian Law by interacting with disputing parties. It is crucial to clearly define the extent of these possible responsibilities to guarantee thorough safeguarding of migrants in both the midst and aftermath of armed conflicts.

In essence, while this article has provided an overview of the protection afforded to migrants under IHL, further exploration is needed to elucidate the intricate dynamics between IHL, IHRL, and the responsibilities of third States in safeguarding the rights and well-being of migrants amidst the tumult of armed conflict. Such endeavors are vital for advancing a more comprehensive understanding of the protection of migrants in the context of armed conflicts and for fostering a robust framework for their safeguarding in times of crisis.

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