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Racial discrimination and the evacuation of international armed conflict territory: The case of Russia and Ukraine.

By

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Declaration of originality

I, **Mbongeni Andile Wilbert Ncube** (**15150870**), hereby declare that:

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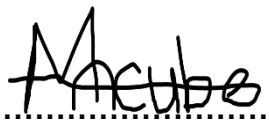

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Summary and Keywords

On 24 February 2022, Russian armed forces, under the instructions of Vladimir Putin, launched a military operation into Ukraine, invading the neighbouring territory and launching full-scale ground operations in regions of Ukraine causing many to flee in a bid to evacuate. Reports also presented strong evidence that Ukrainian officials at border posts regulating evacuation seemingly gave preferential treatment to Europeans, particularly white Europeans, while not allowing black migrants access to trains and effectively not allowing them to evacuate.

The research seeks to address the treatment of black migrants in Ukraine during the war and outline the injustice not from a political stance but from the lens of International Humanitarian Law and the violation of the rules and the rights conferred by International Humanitarian Law. It is essential first to investigate if migrants are protected by International Humanitarian Law, and if they are privy to the right articulated in Article 35 of the Geneva Convention (IV) which affords protected persons the right to leave a territory party to conflict. Additionally, an inquiry will be made to determine whether the right includes protection against discrimination.

Keywords and Phrases: Evacuate, International Armed Conflict, International Humanitarian Law, Right to Leave, Migrants, Non-Discrimination, Racial Discrimination.

Chapter 1 - Introduction

The mini dissertation investigates the protection offered to migrants in international humanitarian law, particularly if migrants have an unfettered right to evacuate a territory and if this right includes protection from racial discrimination.[1] The dissertation responds to the numerous reports from news sources of black migrants not being allowed onboard trains leaving Ukraine.[2]

This chapter serves to introduce this mini dissertation. This chapter introduces the research questions, outlines the research objectives as a starting point, and outlines the structure of the paper in answering the question and achieving the research objectives. This introduction is structured as follows, first, Section 1 provides the background of the study; Section 2 outlines the rationale of the study, Section 3 sets the research questions; Section 4 outlines the research aims, both primary and secondary; Section 5 details the research methodology of the study; and lastly, Section 6 provides for the breakdown of the substantive chapters of the dissertation.

1.1 Background

On 24 February 2022, Russian armed forces, under the instructions of Vladimir Putin, launched a military operation into Ukraine, invading the neighbouring territory and launching full-scale ground operations in regions of Ukraine.[3] The military conducted various airstrikes in Ukraine

[1] James Crawford, *Brownlie's Principles of Public International Law* (8th Edition Oxford University Press 2012) 203.Territory denotes an area of land, sea, or airspace over which a state has sovereign control and jurisdiction.

[2] Mehdi Chebil, ' "Pushed back because we're Black": Africans stranded at Ukraine-Poland border' *France24* (Paris, 28 February 2022) <https://www.france24.com/en/europe/20220228-pushed-back-because-we-re-black-africans-stranded-at-ukraine-poland-border> accessed 14 May 2022.

[3] Amos C Fox, 'Reflections on Russia's 2022 invasion of Ukraine: Combined arms warfare the battalion tactical group and wars in a fishbowl' (*The Association of the United States Army* September 29 2022) <https://www.ausa.org/publications/reflections-russias-2022-invasion-ukraine-combined-arms-warfare-battalion-tactical#:~:text=Russia%20launched%20a%20three%2Dpronged,government%20in%20control%20in%20Kyiv.> accessed 28 March 2023.

targeted at military objectives.[4] Accordingly, one important aspect to determine the application of international humanitarian law is the existence of an armed conflict.[5] Furthermore, to determine the particular rules that apply, it is important to classify the conflict as either a conflict of an international nature (IAC – International armed conflict) or a conflict of a non-international nature (NIAC – Non-international armed conflict).[6] The importance of this application is to determine the substantive law that should apply.[7] McCormack and Dwyer argue that the legal nature of a conflict has significant consequences for "combatants, civilians and victims of alleged war crimes".[8] Article 2, common to the Geneva Conventions, states that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them".[9] The formal declaration of war was not pronounced by President Putin however this declaration is no longer a requirement for the start of an armed conflict.[10] The situation in Ukraine falls under the classification of an international armed conflict as the 'operation' which was prompted by Russian troops entering under the guise of peacekeeping consisting of attacks on military objectives and met with resistance from

[4] 'International Armed Conflict in Ukraine' (RULAC) <https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine> accessed 30 November 2022. The definition of military objectives is set out in Article 52(2) of Additional Protocol 1; For more on the discussion of military objectives see David Turns 'Military objectives' in Rain Livoja and Tim McCormack T (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 146.

[5] Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Pub 2015) 7; also see Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Pub, 2008) 73.

[6] Crowe and Weston-Scheuber (n 5) 11.

[7] Kolb and Hyde (n 5) 73-74.

[8] Caitlin Dwyer and Tim McCormick, 'Conflict Classification' in Rain Livoja and Tim Mc Cormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 50.

[9] Kolb and Hyde (n 5) 7. Kolb and Hyde opine that Common Article 2 is the most important provision acting as the determinant of the material scope of applicability in the context of international armed conflicts.

[10] Leslie C Green, *The Contemporary Law of Armed Conflict* (3rd ed, Juris Pub; 2008) 94. Green argues that the declaration of war is not necessary.

Ukrainian troops.[11] Therefore, "in an international armed conflict, the customary international law of armed conflict, The Four Geneva Conventions, and Additional Protocol 1 applies".[12]

To preserve their lives, civilians and those not engaged in hostilities of the armed conflict fled the country ravaged by armed conflict.[13] The BBC reported that the trains heading towards Ukrainian borders were packed, and long traffic queues had formed on all roads leading out of the country.[14] According to the UNCHR's Operational data portal, on 28 March 2023, approximately 8,173,211 refugees had left Ukraine and had been recorded across Europe.[15] Some of the people fleeing the conflict were migrants, given that Ukraine is a prime destination for migrants, particularly students.[16]

Given that the conflict is classified as an international armed conflict, and the rules of international humanitarian law consequently applied in the situation, one particular right became an issue of question, the right to leave a territory that is a party to a conflict.[17] Despite this right, reporters and journalists reported that during evacuation procedures, Ukrainian officials preferred and prioritised their nationals as opposed to others, essentially denying migrants, particularly black Africans, the right to leave the territory.[18] During this time, the African Union issued a statement in light of reports explicitly stating that the discrimination

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[11] Andrew Roth and Julian Borger, 'Putin Orders Troops into Eastern Ukraine on "Peacekeeping Duties"' *The Guardian* (21 February 2022) <https://www.theguardian.com/world/2022/feb/21/ukraine-putin-decide-recognition-breakaway-states-today> accessed 21 March 2023.

[12] Kolb and Hyde (n 5) 74-76, also see Dino Kritsiotis, 'War and armed conflict: The parameter of enquiry' in Rain Livoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 19.

[13] UNCHR, 'Operational data portal: Ukraine situation' (*UNHCR*) <https://data2.unhcr.org/en/situations/ukraine/location?secret=unhcrrestricted> accessed 14 May 2022.

[14] BBC News, 'How Many Ukrainians are they and where have they gone?' *BBC News* (12 May 2022) <https://www.bbc.com/news/world-60555472> accessed 4 April2023.

[15] UNCHR (n 13).

[16] Human Rights Watch, 'Ukraine: Unequal Treatment for Foreigners Attempting to flee. Pattern of Blocking, Delaying non-Ukrainians' (*Human Rights Watch*, March 4 2022) <https://www.hrw.org/news/2022/03/04/ukraine-unequal-treatment-foreigners-attempting-flee> accessed 14 May 2022.

[17] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Hereafter GC IV) Article 35.

[18] Human Rights Watch, 'Ukraine: Unequal Treatment for Foreigners Attempting to flee. Pattern of Blocking, Delaying Non-Ukrainians' (n 16).

was based on race and urging "all countries to respect international law and show the same empathy and support to all people fleeing war notwithstanding their racial identity".[19] Essentially *prima facie*, it could be argued that there was strong evidence to suggest that the differential treatment was based on nationality and race.

At around the same time as the invasion, UN Secretary-General Antonio Guterres tweeted, "Racism plagues our world. It is abhorrent. It is ugly, and it is everywhere, We must reject and condemn it without reservation, without hesitation, without qualification".[20] The tweet coincided with reports, and social media was abuzz with alleged discrimination against black people attempting to leave Ukraine.[21] The specific focus of this dissertation will be on the interplay between the denial of the right to leave and racial discrimination against migrants, as it seemed apparent that racial discrimination was afoot to the extent of statements from both Filippo Grandi, UN High Commissioner for Refugees and Dmytro Kuleba, pointing out racially charged mistreatment against migrants specifically.[22] In light of this, it is essential to uncover the facts within the context of international humanitarian law and to outline the consequences of this denial of the right to leave as a form of racial discrimination.

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[19] African Union Commission, 'Statement of the African Union on the reported ill-treatment of Africans trying to leave Ukraine' (*African Union* 28 February 2022) <https://au.int/en/pressreleases/20220228/statement-ill-treatment-africans-trying-leave-ukraine> accessed 14 May 2022.

[20] <https://twitter.com/antonioguterres/status/1505876889524707328> accessed 14 May 2022, The words in the tweet were a direct reference to a speech by Antonio Guterres in 2021; Antonio Guterres, 'Remarks to 2021 ECOSOC Meeting on "Reimagining Equality: Eliminating Racism, Xenophobia and Discrimination for All in the Decade of Action for the SDGs', (ECOSOC conference, New York, 18 February 2021) <https://www.un.org/sg/en/content/sg/speeches/2021-02-18/remarks-2021-ecosoc-eliminating-racism-xenophobia-and-discrimination-meeting> accessed 14 May 2022.

[21] Human Rights Watch, 'Ukraine: Unequal Treatment for Foreigners Attempting to flee. Pattern of Blocking, Delaying Non-Ukrainians' (n 15).

[22] Filippo Grandi, 'High Commissioner's message on the International Day for the Elimination of Racial Discrimination Statement by Filippo Grandi, UN High Commissioner for Refugees' (21 March 2022) <https://www.unhcr.org/en-us/news/press/2022/3/62370dc44/high-commissioners-message-international-day-elimination-racial-discrimination.html> accessed 14 May 2022; also see Sarah Ruiz-Grossman, 'Ukraine Acknowledges Racist Treatment Of Africans Fleeing Russian Invasion' *HuffPost* (1 March 2022) <https://www.huffpost.com/entry/ukraine-africans-racist-treatment-evacuation_n_621eb79fe4b0783a8f07ce22> accessed 14 May 2022.

1.2 Rationale/relevance of the study

The research seeks to address the treatment of black migrants in Ukraine during the war and outline the injustice not from a political stance but from the lens of international humanitarian law and the violation of the rules and the rights conferred by international humanitarian law. Reports suggested that many black migrants were not allowed access to leave on trains and busses.[23] Therefore considering these reports of allegations of racial discrimination, it is essential first to investigate if migrants are protected by international humanitarian law, secondly, if this protection includes a right to leave a territory and lastly if this right includes protection against discrimination.

1.3 Research questions

1.3.1 Primary research questions

- Is the racially discriminatory refusal of the right to leave Ukraine a violation of international humanitarian law?

1.3.2 Secondary research questions

- Does International humanitarian law define migrants?
- Does International law define migrants?
- Are migrants if not defined in law privy to protection during international, armed conflict?
- Does Article 35 of the Geneva Convention IV offer migrants a right to leave a territory party to a conflict?

[23] Monika Pronczuk and Ruth Maclean, 'Africans Say Ukrainian Authorities Hindered Them from Fleeing' *The New York Times* (New York 1 March 2022) <https://www.nytimes.com/2022/03/01/world/europe/ukraine-refugee-discrimination.html> accessed 30 November 2022; Rashawn Ray, 'The Russian Invasion of Ukraine Shows Racism Has No Boundaries' (*Brookings*, 3 March 2022) <https://www.brookings.edu/blog/how-we-rise/2022/03/03/the-russian-invasion-of-ukraine-shows-racism-has-no-boundaries/> accessed 30 November 2022.

- Are there any limitations to this right to leave?
- Does the right to leave also include protection against discrimination?

1.4 Research aims

1.4.1 Primary research aim

The primary research objective is to identify if the law of international armed conflict offers the migrants in Ukraine an unrestricted right to leave the territory that includes protection against racial discrimination.

1.4.2 Research objectives

The first objective of the dissertation is to identify and locate migrants in international humanitarian law, to uncover how and if they are catered for as bearers of rights and as protected persons.[24] This objective seeks to examine if and how migrants are defined in international humanitarian law to investigate whether they are protected as a particular group or as civilians.

The second objective aims to identify how and if the right afforded to protected persons in international humanitarian law to leave a territory at the outset and during the conflict includes and covers migrants as protected persons.[25] This objective will also discuss when such a right may be refused and interrogate if it is unrestricted or subject to limitations.

This research's third and last objective is to uncover the general prohibition on discrimination and the protection afforded to protected persons such as migrants against discrimination.[26] The context of this objective is the right to leave and if the prohibition against discrimination applies to this right.

[24] This is discussed in chapter 2.

[25] This is discussed in chapter 3.

[26] This is discussed in chapter 4.

1.5 Research Methodology

The research is doctrinal in nature and is primarily conducted via desktop research/study. The methodology used is a consultation of the relevant sources of international law.[27] The primary sources consulted are international conventions or treaties, customary international law, and general principles of international law.[28] The secondary sources are the works of highly publicised scholars and judicial decisions/judgments.[29]A critical source consulted are the ICRC commentaries which are a secondary source as they are the work of teachers and publicists adding to the dissemination of the knowledge of the law of armed conflict.[30] Having been cited as authoritative by courts and tribunals increases the importance of the commentaries.[31]The commentaries provide guidance in interpreting international humanitarian treaties and are crucial in restating and articulating customary international humanitarian law.[32]

1.5.1 Delimitation of the study

It is generally accepted that due to limited protection by international humanitarian law to migrants, the applicability of international human rights law is uncontested, as the question is not if but how it applies in armed conflict.[33] In this study, the limitations impressed by the word

[27] The Statute of the International Court of Justice, 1945 (Hereafter ICJ Statute) Article 38(1) outlines international law's primary and secondary sources.

[28] Article 38(1)(a)-(c) of the ICJ Statute.

[29] Article 38(1)(d) of the ICJ Statute.

[30] Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) 71 *Current Legal Problems* 119, 125.

[31] Sivakumaran (n 30) 125-126.

[32] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019) 55; Sivakumaran (n 30) 125.Sivakumaran argues that because the commentaries are cited by tribunals and courts, they have become authoritative and weighty even though they are secondary sources.

[33] On the concurrent applicability of international humanitarian and international human rights law see Vincent Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' in Andrew Clapham and Paolo Gaeta (eds), *Oxford Handbook of*

limit the inquiry will be confined to the scope of the right to leave afforded to migrants, particularly and specifically by international humanitarian law. The interplay of international human rights law and international humanitarian law will not be discussed in the study.

1.6 Chapter Breakdown

The purpose of Chapter 2 is to uncover the definition and protection of migrants in international humanitarian law. The first section will outline and uncover if there is a definition of migrants in international humanitarian law. The second section will look at general international law if a definition is not found in international humanitarian law. The third section will also delve into how organisations dealing with humanitarian law and humanitarian issues define migrants if there is no legal definition. The fourth section of this chapter will outline the definition of civilians in international humanitarian law and qualify migrants as civilians that are protected in terms of international humanitarian law.

The purpose of Chapter 3 is to give an overview of the right to leave articulated in Article 35 of Geneva Convention VI. The first section will outline the general nature of the right and its applicability to the situation discussed. Questions asked in this regard l include who may leave and when may they leave. Critical to note is the existence of any limitations to the right to leave. The second subsection will therefore zero in "national interest" as a limitation on the right to leave. Namely, it will outline the scope of a state's national interest in the context of the justification to refuse such a right.

The purpose of Chapter 4 is to investigate the prohibition against discrimination in international humanitarian law and its applicability to the right to leave a territory. The first section focuses on the prohibition against discrimination as it is specifically articulated in international humanitarian law. The second section offers a brief discussion on the prohibition against discrimination given in the context of the general sources of public international law. Although the prohibition against discrimination will be highlighted in the first section under international humanitarian law, the second section seeks to highlight the *erga omnes* status of this prohibition

International Law in Armed Conflict (First edition, Oxford University Press 2014) 700-703 ; On the influence of human rights conventions on humanitarian law see Dietrich Schindler, 'Human Rights and Humanitarian Law', in Michael N Schmitt and Wolff Heintschel von Heinegg, *The Scope and Applicability of International Humanitarian Law* (Ashgate 2012) 395.

against discrimination. Thereafter the third section will discuss the applicability of the prohibition against discrimination to the right to evacuate a territory and determine if non-discrimination applies to the right to leave a territory.

The purpose of Chapter 5 is to consolidate all the findings into a coherent conclusion and answer the main research question which is if the racially discriminatory refusal of the right to leave is a violation of international humanitarian law. This chapter will summarise the findings while revisiting the research questions and linking them to the answers found.

Chapter 2- The Definition and Protection of Migrants in international humanitarian law

2.1 Introduction

The International Organization for Migration estimated that the number of international migrants globally in 2022 was 281 million.[34] Accordingly, migration is an extraordinarily complex phenomenon that has various causes and occurs in various forms.[35] The reasons for migration range across various pull and push factors such as "armed conflict, economic opportunities, political instability, drought, natural disasters and famine".[36] What is a migrant, or who is a migrant? This chapter aims to define migrants and consider if migrants caught in the Russo-Ukrainian conflict are protected by international humanitarian law. The first section of the chapter seeks to uncover the legal definition of migrants in international humanitarian law as *lex specialis*.[37] The second part of the chapter builds from the lack of a definition in international humanitarian law and enquires about the definition in international law as *lex generalis*. The third section uncovers the functional definition of migrants and clarifies that this is not a legal definition but is a definition used to identify migrants for the organisations'

[34] IOM, 'Interactive World Migration Report 2022' (*IOM*) <Interactive World Migration Report 2022 (iom.int)> accessed 7 December 2022.

[35] Stéphanie Le Bihan, 'Addressing the Protection and Assistance Needs of Migrants: The ICRC Approach to Migration' (2017) 99 *International Review of the Red Cross* 99, 100; Also see Vincent Chetail, *International Migration Law* (First edition, Oxford University Press 2019) 8. Chetail opines that the movement of people is triggered by various factors, and this is based on research in various fields of studies such as sociology, anthropology and political science.

[36] IOM, 'Not Just Numbers - An Educational Toolkit about Migration and Asylum in Europe' (*IOM*) 8 <NJN-MANUAL-EN.pdf (iom.int)> accessed 7 December 2022. The manual defines push factors as negative factors driving people out of a country or an area, while pull factors are positive factors that attract people to the destination area.

[37] On international humanitarian law as *lex specialis* in armed conflict see Kolb and Hyde (n 5) 8; the assertion made by Kolb and Hyde is that the Law of Armed Conflict is a branch of public international law but more accurately the branch that comes into play in regulating conduct of warfare; Also see Hilaire McCoubrey, *International Humanitarian Law: (The Regulation of Armed Conflicts)* (Dartmouth 1989) 1. McCoubrey goes further to suggest that precisely "international humanitarian law is the branch of the laws of armed conflict dealing with the protection of the victims of wars such as civilians".

functions. The fourth and last section investigates the protection of migrants as civilians in international humanitarian law.

2.2 Defining Migrants in international humanitarian law

Armed conflict is one of the reasons why people migrate.[38] In various places worldwide, armed conflict has led to people fleeing from their own countries across borders.[39] Given that there is sometimes a cause-and-effect relationship between armed conflict and subsequent migration, it is critical to uncover if migrants are defined and identified as a group of persons under international humanitarian law. Critical in the context of this mini dissertation is the apparent claim that migrants particularly black migrants from Africa faced unequal and racially discriminatory treatment it is crucial to therefore define who migrants are.[40] This section aims to uncover if migrants are legally defined in international humanitarian law.

As a starting point, international humanitarian law as a body of law does not define the term migrant.[41] The term migrant is not additionally used in either of the Four Geneva Conventions or Additional Protocol 1. Some categories of people who "migrate" or move across borders, however, are mentioned.[42] For example, refugees are mentioned in Article 73 of Additional Protocol 1 which states that it relies on definitions of the term from "relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence".[43] Accordingly, Additional Protocol 1 borrows the definition of a refugee from specialised binding instruments.[44] In the case of refugees, the definition would be

[38] Le Bihan (n 35) 100.

[39] Helen Obregón Gieseken, 'The Protection of Migrants under International Humanitarian Law' (2017) 99 *International Review of the Red Cross* 121, 122.

[40] Human Rights Watch, 'Ukraine: Migrants Locked Up Near Front Lines' (*Human Rights Watch* May 6 2022) <https://www.hrw.org/news/2022/05/06/ukraine-migrants-locked-near-front-lines> accessed 4 April 2023.

[41] *Ibid* 124.

[42] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Adopted 8 June 1977), 1125 UNTS 3 (Hereafter AP 1) Article 73.

[43] *Ibid*.

[44] Gieseken (n 39) 124.

from the 1951 Convention Relating to the Status of Refugees.[45] Therefore reference is made to refugees as an example of people who migrate, however, no mention is made of migrants in the broader context.[46]

In this regard, owing to a lack of a definition in international humanitarian law, the next step to take is to uncover if there is a legal definition for migrants in international law.

2.2 Defining Migrants in international law

Given that international humanitarian law as *lex specialis* in armed conflict does not provide a legal definition of the term migrant, it is imperative to turn to international law as *lex generalis*.[47]Accordingly, since migration is characterised by the constant movement of people from one place to another, including across international boundaries and borders; therefore, it has implications between states and finds itself within the domain of international law.[48] The question that can be then asked is how and if migrants are legally defined in international law.

As far as international law is concerned, "there is no universally accepted legal definition for the term migrants".[49] The primary reason for this is that there is no single comprehensive instrument of law that regulates migration.[50] Although there are various binding treaties at the

[45] Convention Relating to the Status of Refugees (Adopted 14 December 1950, entered into force 22 April 1954) UN Doc Resolution 2198 (XXI) Article 1.

[46] The author here is drawing attention to refugees being a subset of the broader term encompassing of migrants; also see Chetail, *International Migration Law* (n 35) 8. Chetail argues that merely distinguishing between migrant workers and refugees fails to capture the reality of migration and is based on a simplistic compartmentalised approach to migration.

[47] *Lex specialis* refers to the law as it applies to specific situations and subject matters while *lex generalis* refers to the law as it applies generally to all subject matters. See Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International law* (Oxford University Press 2009) 168,176.

[48] Vincent Chetail 'The Transnational Movement of Persons Under General International Law - Mapping the Customary Law Foundations of International Migration Law' in Vincent Chetail and Céline Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 1. Chetail argues that the movement of people across borders is "international by nature and creates a triangular relationship between the sending state, receiving state and the migrant".

[49] Gieseken (n 39) 124.

[50] Vincent Chetail, 'Remarks by Vincent Chetail' (2016) 110 *Proceedings of the ASIL Annual Meeting* 201; also see Chetail, 'The Transnational Movement of Persons Under General International Law - Mapping the Customary

international level that deal with aspects of migration, there are none that offer a formal legal definition of the term migrant. For example, as aforementioned, the 1951 Convention on the Status of Refugees.[51] Another example is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[52] Such instruments deal with aspects of migration and define people in particular contexts of migration but do not define migrants as a broader term.[53]

The development of international migration law is an aspect that is currently unfolding in the international arena. A key example is non-binding soft law expressed in The Global Compact for Safe, Orderly Migration, which is the first intergovernmental agreement on all aspects of international migration and anchored in international law and customary international law.[54] Although a definition still needs to be offered in the agreement, it represents a step towards a coherent and unified instrument of law covering international migration.[55] One critical example of this is that the compact dedicates itself to the "developing and application of a statistical definition of an international migrant."[56]

Perhaps one step in defining migrants in international law has been taken by IOM.[57] IOM, through consultation with various stakeholders such as civil society organisations, academia and international organisations, established a glossary of definitions of various commonly

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Law Foundations of International Migration Law' (n 40) 1. Chetail outlines how international migration law is highly fragment is currently still underdeveloped. Also see IOM, 'International Migration Law' (*IOM*) <https://www.iom.int/international-migration-law> accessed 8 December 2022.

[51] See fn 46 for context.

[52] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) UN DOC, A/RES/45/158 (CRMW) Art 2(1).

[53] The author here again draws to the definitions of specific subsets of people who migrate but not a definition of the term migrants. i.e., The international convention on the protection of migrant workers defines migrant workers as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". The definition is only contextual to individuals who move for work purposes.

[54] IOM, 'International Migration Law' (n 50); Chetail, *International Migration Law* (n 35) 8.

[55] See Chetail, *International Migration Law* (n 35) 330.

[56] The Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018) UN Doc, A/RES/73/195 (GCM) Article 17 (b).

[57] It is critical to note the definition given by the IOM, not because of the legal authority but owing to IOM's significance as the United Nations organ directly responsible for migration that collaborations governments and international organisations on migration issues.

associated with migration.[58] According to this definition, "a migrant is a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons".[59] The glossary also gives the definition of an international migrant as "any person who is outside a State of which he or she is a citizen or national…the term includes migrants who intend to move permanently or temporarily..."[60] Critical to note is that the glossary acknowledges the lack of internationally binding definitions and that the glossary was, in many instances, the conflation of various other terms in curating suitable definitions.[61] In essence, the definition of migrants, per the glossary, is not authoritative as this instrument does not qualify as a binding source of public international law. This instrument may thus contribute to the legal construction of the term should it influence a definition adopted in a treaty or if it may generate sufficient state practice and *opinio juris* to equate to customary international law definition.[62]

2.3 The functional definition of migrants by the IFRC, ICRC and the International Red Cross and Red Crescent movement

Without a legal definition of migrants in both international humanitarian law as *lex specialis* and public international law as *lex generalis*, this author will assess whether an operational definition can be employed/ exists that is fit for purpose. This definition will guide in understanding how migrants are defined albeit not legally but for the functions of organisations dealing with international humanitarian law.[63] To find such a definition, this author gives

[58]IOM, 'International Migration Law No. 34 - Glossary on Migration' (IOM) <https://publications.iom.int/books/international-migration-law-ndeg34-glossary-migration> accessed 7 December 2022.

[59] *Ibid* 132.

[60] *Ibid* 112.

[61] *Ibid* 3.

[62] For the threshold and the elements of identifying customary international law see ILC, 'Fifth report on identification of customary international law submitted by Michael Wood, Special Rapporteur' (30 April–1 June 2018 and 2 July–10 August 2018) UN Doc A/CN.4/717.

[63] As an example, see Jacob Kellenberger, 'The Role of the International Committee of the Red Cross' in Andre Clapham and Paolo Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (First edition, Oxford University Press 2014) 20-22. Kellenberger argues that The ICRC is widely considered a reference

regard to definitions formulated by organisations largely involved with the law of armed conflict. Thusly consideration is given to the International Federation of the Red Cross (IFRC), the International Committee of the Red Cross (ICRC) and the International Red Cross and Red Crescent movement.[64]

The IFRC, ICRC and The International Red Cross and Red Crescent Movement utilise the definition developed by the IFRC's policy on migration.[65] It is critical to note that the policy document is not legally binding and does not reflect the law. The value of the policy to this research is that it provides insight as to how the largest organisation dealing with armed conflict defines migrants in their operations. The policy defines migrants as "persons who leave or flee their habitual residence to go to new places, usually abroad, to seek opportunities or safer and better prospects".[66] In addition, under the definition of migrants, the policy includes "labour migrants, stateless migrants, migrants deemed irregular by public authorities, refugees and asylum seekers".[67]

The broad definition was curated to provide inclusive protection to all people in need of assistance or protection who have left or fled their homes for safety or better opportunities.[68] As stated by the IFRC, the definition is deliberately broad to capture without discrimination all humanitarian concerns related to migration.[69]

organisation on IHL and plays a major role in the application and strengthening of international humanitarian law principles.

[64] It is important to consider these organisations as they have a bearing on the application and development of international law for example see H McCoubrey and Nigel D White, *International Law and Armed Conflict* (Dartmouth 1992) 257–259; also see Hans-Peter Gasser, 'Universal Acceptance of International Humanitarian Law — Promotional Activities of the ICRC' (1994) 34 *International Review of the Red Cross* 450.

[65] Le Bihan (n 35) 104; Gieseken (n 39) 125.

[66] IFRC, 'Migration Policy' (*IFRC*) <https://www.ifrc.org/document/migration-policy> accessed 11 December 2022.

[67] *Ibid*.

[68] Le Bihan (n 35) 104.

[69] IFRC (n 66); Le Bihan (n 35) 104. This approach in dealing with migration issues by the IFRC is termed the "vulnerability-based approach" and is strictly humanitarian and "aimed at accounting for each migrant's circumstances and vulnerabilities without discrimination of their legal status".

2.4 The protection of migrants during international armed conflict

The above sections have uncovered that migrants as a category of persons are not authoritatively and legally defined in international humanitarian law and international law. This raises the question of whether they are protected in international humanitarian law considering the lack of a definition for them, specifically in the context of international armed conflict.

A large determinant of protection in international armed conflict is whether the individual concerned is a civilian or a combatant.[70] "The rule that war is fought by combatants and the protection of civilians against the dangers of military operation is the foundation upon which international humanitarian law stands."[71] The protection of civilians is an aspect that is gleaned from customary international law.[72] This rule of customary international law is further codified in numerous texts of the Geneva Conventions and Additional Protocol 1.[73]

This distinction is made by defining civilians as the opposite of combatants.[74] Combatants are defined in the Third Geneva Convention.[75] Article 50 of Additional Protocol 1 defines civilians as the opposite of combatants.[76] The ordinary meaning of the word civilian is "one not on active

[70] Article 50 (1)-(3) of AP 1 for the definition of a civilian and civilian population. This article defines civilians as any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol; see Emily Crawford, 'Combatants' in Rain Livoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 126; Also see Judith Gail Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (M Nijhoff Publishers ; 1993) 2 ;see Sassòli *(*n 32) 20.

[71] Emanuela-Chiara Gillard, 'Protection of civilians in the conduct of hostilities' in Rain Livoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 157.

[72] For practice relating to the protection of civilians see; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law: Volume II , Practice ,Part 1* (Cambridge University Press 2005) 22–99; also see Crowe and Weston-Scheuber (n 5) 70–95.

[73] Crowe and Weston-Scheuber (n 5) 3-4.

[74] Sassòli (n 32) 20; For the status of the principle of distinction as customary international humanitarian law under rule 6 see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law: Volume I, Rules* (Cambridge University Press 2005) 19-24; also see Crowe and Weston-Scheuber (n 5) 70–95.

[75] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Hereafter GC III) Art 4.

[76] Sassòli (n 32) 20; Also see Article 50 (1)-(3) of Additional Protocol 1 for the definition of a civilian and civilian population.

duty in the armed services or not on a police or firefighting force."[77]This is consistent with the drafting history wherein the majority of experts preferred a negative definition of first categorising members of the armed forces and then concluding that those not part of this group are civilians.[78]The commentaries to Article 50 of Additional Protocol 1 advocate for a process of elimination from what is deemed to be a combatant in order to characterise a civilian.[79] Melzer opines that in international armed conflict, "one is either part of the armed forces or a civilian" and that this negative definition bears the status of customary international humanitarian law.[80]

Gieseken argues that "the application of several international humanitarian law rules applies notwithstanding whether the person is a citizen of another state."[81] Gieseken concludes that the application of these rules applies to citizens without qualification of nationality then migrants can be classified as civilians as well.[82] This viewpoint follows the reasoning that a civilian is not defined in regards to any national criteria but in regards to being a non-combatant, therefore migrants are considered civilians as their nationality is immaterial in determining if one is a civilian or not. Accordingly, if migrants are not combatants as defined in international humanitarian law, they qualify as civilians and enjoy the protection that is due to civilian populations and against the effects of hostilities.[83]

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[77] Merriam-Webster Online Dictionary, see "Civilian" <https://www.merriam-webster.com/dictionary/civilian> accessed 20 March 2023; Vienna Convention on the Law of Treaties (adopted 22 May 1969) 1155 UNTS 331 (Hereafter VCLT) Art 31 outlines the general rule of interpretation "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"

[78] ICRC, *Conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts* (Geneva, 24 May - 12 June 1971): Vol 3 (ICRC 1971) 19.

[79] Claude Pilloud et al, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) 610.

[80] Nils Melzer, 'The Principle of Distinction Between Civilians and Combatants' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (First edition, Oxford University Press 2014) 306.

[81] Gieseken (n 39) 128.

[82] *Ibid*.

[83] *Ibid*.

As a rule of customary international law reflected as well in Article 51(3) of Additional Protocol 1, civilians may lose their civilian status if they directly take part in hostilities.[84] Therefore while it is true that even though migrants can be classified as civilians, they could also be classified as combatants if they satisfy the definitional criteria.[85] The discussion of how one may lose their status as a civilian falls outside the scope of this mini dissertation.

In the entire body of international humanitarian law relating to international armed conflict, migrants are not specifically protected as a category of persons.[86] Without protection as a category of persons, migrants are not essentially left out of protection but could be considered civilians who are protected under international humanitarian law.[87]

2.5 Conclusion

The purpose of this chapter was to uncover if migrants are legally defined in international humanitarian law as *lex specialis* or international law as *lex generalis.* Furthermore, the chapter was aimed at uncovering if migrants are protected by international humanitarian law. The findings were that there is no definition of migrants in international humanitarian law, and neither is there a definition in international law as well. Given that international migration, the law is fragmented and still in development, a definition may not yet exist. This dissertation has uncovered that there is an operational definition outlined in the IFRC policy on migration.[88] The definition is a broad definition that is focused on the vulnerability of migrants. And for this dissertation, the focus is on migrants that cross borders, particularly migrants that, before the Russian and Ukrainian war, had moved and left their habitual residences to move to Ukraine, either fleeing home or seeking opportunities.

Although migrants are not mentioned and defined as a specific category of people, the chapter uncovered that they are however protected in so far as they qualify under other categories.

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[84] For discussion see Yoram Dinstein, 'Distinction and Loss of Civilian Protection in International Armed Conflicts' (2008) 84 *International Law Studies* 184 <https://digital-commons.usnwc.edu/ils/vol84/iss1/11> accessed 13 December 2022.

[85] Gieseken (n 39) 131.

[86] *Ibid* 125.

[87] *Ibid*.

[88] IFRC (n 66).

Largely migrants will be protected as civilians and part of the civilian population notwithstanding their nationality. Accordingly, the migrants in Ukraine may fall under the category of civilians if they fit the criteria and consequently are privy to the protection afforded to civilians by international humanitarian law.

Chapter 3 – The Right to evacuate armed conflict territory.

3.1 Introduction

People tend to migrate due to armed conflict in a bid to preserve their lives. When the conflict began thousands of civilians headed to Ukrainian borders in an attempt to leave.[89] Within the first week, millions of people had fled from Ukraine into neighbouring countries.[90] As people fled, reports streamed in from news sites with claims and allegations that certain people, particularly foreign nationals of different races, were not being allowed to leave.[91] These allegations were further propagated by the Nigerian government, which released a statement alleging that they was evidence of their nationals being treated unfairly and not being given access to evacuation trains and busses.[92] In light of this, the question to be asked is are migrants allowed to evacuate Ukraine.[93] It is critical to note that Article 35 of Geneva IV encapsulates the right to leave a territory and the allegation in the context of this mini dissertation is that

[89] Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' (n 33) 700. Chetail opines that armed conflict is the main cause of forced migration.

[90] Rachel Treisman, 'The U.N. Now Projects More than 8 million People Will Flee Ukraine as Refugees' *NPR* (26 April 2022) <https://www.npr.org/2022/04/26/1094796253/ukraine-russia-refugees> accessed 3 January 2023.

[91] Cooper Inveen and George Obulutsa, ' "You're on Your Own": African Students Stuck in Ukraine Seek Refuge or Escape Route' *Reuters* (25 February 2022) <https://www.reuters.com/world/youre-your-own-african-students-stuck-ukraine-seek-refuge-or-escape-route-2022-02-25/> accessed 23 December 2022; Khanyi Mlaba 'African Students Faced Racism Fleeing Ukraine - But Where Are They Now?' (*Global Citizen* 19 December 2022) <https://www.globalcitizen.org/en/content/africans-in-ukraine-does-the-world-still-care/> accessed 23 December 2022; Human Rights Watch, 'Fleeing War in Ukraine: People Waiting to Cross Border Need Humanitarian Assistance' (*Human Rights Watch* 28 February 2022) <https://www.hrw.org/news/2022/02/28/fleeing-war-ukraine> accessed 23 December 2022; Human Rights Watch, 'Ukraine: Unequal Treatment for Foreigners Attempting to Flee' (n 16).

[92] Human Rights Watch , 'Fleeing War in Ukraine: People Waiting to Cross Border Need Humanitarian Assistance' (n 91); Human Rights watch cites the statement by the Nigerian government made on <https://twitter.com/NigeriaGov/status/1498043714341589005> accessed 23 December 2022.

[93] For the context of the discussion the dissertation will utilise the word leave instead of the word evacuate.

access to the right was denied.[94] Since it has been concluded that migrants are protected as civilians in international humanitarian law, the question then is if there is a right to leave a territory are migrants beneficiaries of this right? The purpose of this section is to outline the right to leave by determining who may leave the territory and when may they leave and when may the right be refused.[95] The first section of the chapter will deal with the right to leave and who may leave. The second section will deal with when the right may be exercised in terms of discretion and time frame. The last section will deal will the limitation on this right to leave.

3.2 Migrants and the right to leave armed conflict: Who may leave?

The purpose of this section of the chapter is to discuss who may leave under the right to leave. The first subsection will deal with the meaning of protected persons, the second subsection will deal with the expansion of the right to leave under Article 48 of GC IV and the last subsection will deal with what it means to be in the hands of a party to a conflict in the context of the right to leave.

3.2.1 Protected persons

The purpose of this section is to outline who may leave a territory so essentially to outline if migrants are allowed to leave a territory. The first part of Article 35 outlines that the right to leave is afforded to all 'protected persons'.[96] It is critical to assess, therefore, who qualifies as a protected person. Although the general title of the convention gives a clue as to whom is covered, an investigation must still be conducted as to the classes of persons covered.[97] Geneva

[94] The text to be focused on in Article 35 of GC IV is the first paragraph that reads, "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the state."

[95] Critical to note is that this type of evacuation differs from the type of evacuation envisioned by Article 49. Article 49 outlines evacuations of people as conducted and initiated by an occupying power in the form of individuals or mass transfers and deportation. Article 35 envisions a situation wherein protected persons choose to leave a territory party to a conflict.

[96] The first part of Article 35 of GC IV reads, "*All protected persons* who may desire to leave the territory…"

[97] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4 : Geneva Convention relative to the Protection of Civilian Persons in time of War* (International Committee of the Red Cross, 1

Convention IV defines protected persons in Article 4, therefore to understand the meaning of protected persons in Article 35, Article 4 of GC IV must be consulted as it guides the interpretation of what protected persons are therefore the general rules of treaty interpretation need not be applied.[98] Article 4 of G CIV outlines protected persons to be considered as "those 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".[99] The provision in Article 4 of GC IV, however, goes on to exclude certain nationals in three different categories. Firstly, nationals of a state that is not bound by the convention are excluded, Secondly, nationals of co-belligerent states or nationals of neutral states who have normal diplomatic representation in the State in whose hands they are, are excluded. Thirdly people that are protected by the Geneva Conventions I to III are also excluded.

Article 4 states that the provisions of Part II of the convention have a wider application and is to be read in the context of Article 13.[100] Accordingly, Part II of the Geneva Convention covers all countries' populations in conflict without distinction.[101] However, this expanded definition and a wider consideration of protected persons does not apply to Article 35 of GC IV because the provision is not found in Part II of the Convention.

The ICRC commentary on Article 35 of GC IV also outlines that protected persons are to be understood in the context of Article 4.[102] A critical note in this regard is that the commentary outlines that the negative expression which seems only targeted at non-nationals is meant to express the principle of international law that "no interference is made as it concerns states'

December 2015) <https://www.icrc.org/en/publication/0206-commentary-geneva-conventions-12-august-1949-volume-iv> accessed 11 December 2022.

[98] Article 4 of GC IV is the article that sets out who is to be considered or excluded from the ambit of protected persons.

[99] Critical to note this is only the first paragraph of Article 4 which includes a positive ambit of who is a protected person.

[100] Part II of GC IV focuses on the general protection of the population and spans from Article 13 to Article 26.

[101] Article 13 of GC IV reads that "The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war".

[102] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4 : Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 235.

relations with their nationals".[103] The commentary also outlines that the negative wording includes persons without nationalities as protected persons.[104]

3.2.2 Expansion of the right to leave to protected persons in article 35 by operation of article 48

The right to leave is extended to qualifying protected persons who are non-nationals of the occupied territory by operation of Article 48 of GC IV.[105] Given that the text of the treaty is not contentious it is not necessary to apply the general rules of treaty interpretation. The commentary to Article 48 of GC IV states that the provision applies to nationals of belligerent and neutral countries in cases of occupation.[106] According to Article 48, such a decision to avail themselves is subject to the provisions of Article 35 of GC IV. The reason why this is an extension of Article 35 of GC IV to this group of persons is that Article 48 of GC IV bases itself according to the framework of the right to leave as established by Article 35 of GC IV. This means that while nationals of belligerent and neutral countries are afforded the right to leave by operation of Article 48 of GC IV, to understand the right to leave and the parameters of this right, consideration is to be given to Article 35 of GC IV.[107] Therefore Article 48 of GC IV does not itself establish the right to leave, but it gives non-nationals in occupied territory access to the right to leave established and articulated in Article 35 of GC IV.

3.2.3 "In the hands" of the Party to a conflict

[103] *Ibid* 46. The commentary to Article 4 cites Article 70 as an exception to an occupying state's own nationals being excluded, "nationals of the Occupying Power who sought refuge in the territory of the occupied State before the outbreak of hostilities."

[104] *Ibid* 47.

[105] Pursuant to Article 48 of GC IV "protected persons who are not nationals of the Power whose territory is occupied may avail themselves of the right to leave the territory".

[106] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 118.

[107] *Ibid* 277; The commentary to Article 48 outlines that further details may be found by referencing Article 35's commentary.

Another determinate factor of protected persons is that they must be "in the hands" of the party to a conflict or an occupying power.[108] The ordinary definition of the phrase in hand is to be in "possession or control of something".[109] The drafting history in providing the context refers to "protected persons in the territory" of a state as opposed to 'in the hands of'.[110] The ordinary meaning of the phrase in the context still offers an unclear conclusion so the next step is to consult case law and the commentaries. The interpretation of the term "in the hands of" was also discussed by the ICTY appeals chamber.[111] The ICTY cited that in the hands of has a very broad meaning that goes beyond the "idea of direct authority over a person".[112] The ICTY further suggested by merely being present in a territory a person could be considered as being in the hands of the occupying power or the party to a conflict.[113] According to the commentary, the words 'in the hands' must be assumed in the "general sense", meaning it is not to be understood in the physical sense only but to generally mean "persons in the territory under the control of the power in question".[114] It follows therefore that persons in the hands of a party can be construed as persons within the territory of a party to a conflict.

3.2.4 Conclusion

It follows, therefore, that protected persons in the context of Article 35 of GC IV are those who qualify according to the three-pronged enquiry laid out in Article 4. In considering migrants, they will have access to the right to leave under Article 35 of GC IV provided they qualify as protected persons as set out in Article 4 of GC IV. In the event of occupation and occupied

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[108] Article 4 reads that "Persons protected by the Convention are those 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"*.

[109] Merriam-Webster Online Dictionary, see "In hand" <https://www.merriam-webster.com/dictionary/in%20hand> accessed 20 March 2023; Article 31 of VCLT.

[110] Federal Political Department, *Final record of the diplomatic conference of Geneva of 1949: Vol III* (Berne: Federal Political Department 1949) 100.

[111] *Prosecutor v. Jadranko Prlić,* Case No. IT-04-74-T, Judgement (TC), 29 May 2013.

[112] *Ibid* para 101.

[113] *Ibid*.

[114] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4 : Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 47.

territories, the right to leave is extended to them by Article 48 of GC IV. This still would lead to the enquiry of their status as protected persons.

Firstly, they must fulfil the nationality criteria laid down by Article 4 in that they are not nationals of a co-belligerent / neutral state with normal diplomatic representation of either the state party to a conflict or the occupying state. They must also not be nationals of a state that is not bound by the convention. Secondly, they must be in the hands of the party to a conflict or occupying state, which is not to be understood in the physical sense as the presence of a person in the territory of a party to a conflict or in occupied territory qualifies as being in the hands of the state. Lastly, such persons must not be protected by an of the other 3 Geneva Conventions, namely Geneva Conventions I, II and III.

Article 35 of GC IV is found under section II of the Convention, which is titled "Aliens in the territory of a party to the conflict".[115] The commentary in this section makes mention of the legal status of enemy civilians.[116] The commentary, however, does not make any explicit mention of the exclusivity of this protection to this group of people. It could be construed that the position of Article 35 of GC IV applies to all that qualify as protected persons as per Article 4 of GC IV. Therefore, since nationals of neutral and belligerent states are not in certain instances considered protected persons, they are not privy to the right as it is only afforded to protected persons.

3.3 When may they leave: Discretion and timeframe to leave

Having established that the people who may leave are the people who qualify as protected. Article 35 establishes that "all persons who may so desire to leave may do so" and continues to state that these people could leave "at the outset of or during a conflict".[117] This suggests firstly an element of choice in the exercise of the decision and secondly a timeframe in which

[115] Britannica online law dictionary see "Alien" <https://www.britannica.com/topic/alien-law> accessed 23 March 2023 Alien in national and international law, a foreign-born resident who is not a citizen by virtue of parentage or naturalization and who is still a citizen or subject of another country.

[116] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 118.

[117] The first part of Article 35 of GC IV reads, "All protected persons *who may desire to leave the territory at the* outset of, or during a conflict, shall be entitled to do so ….."

such a choice may be made. This part of the chapter seeks to uncover these two elements, the who and when of exercising the right to leave. The first subsection deals with the nature of the discretion to leave, and the second subsection deals with the time frame within which they can leave.

3.3.1 Discretion to leave

In stating that all protected persons "who may so desire to leave", Article 35 of GC IV suggests that leaving is to be done when a person 'desires to leave' then they may do so. The ordinary meaning of the word desire is "a strong feeling or wish for something to happen or request".[118] The ordinary meaning of the word may is "a possibility a probability or permission".[119] Therefore, in applying these definitions of desire and may the ordinary interpretation of the phrase suggests that if so ever a protected person had a strong wish to leave they have freedom or liberty and will choose to do so. This viewpoint is consistent with the drafting history which outlined that "no person is to be repatriated against his will".[120] The ICRC commentaries follow this line of interpretation by stating that departure will only happen when the protected person has the will to leave.[121] Therefore leaving would only happen if the protected person wished and wanted to. The ICRC commentaries cite that the original draft of the treaty outlined that repatriation could not be done against the wishes of a protected person.[122] Furthermore, the commentary claims that the original idea is implicitly expressed through the text eventually adopted.[123] Concerning the discretion to leave and whether it is conditional or an entitlement. According to commentaries, generally, "a person's wish to return to their own country is recognised."[124] In the case of Article 35, the right to leave is considered to be an entitlement

[118] Merriam-Webster Online Dictionary, see "Desire" <https://www.merriam-webster.com/dictionary/desire> accessed 20 March 2023; Article 31 of VCLT.

[119] Merriam-Webster Online Dictionary, see "May" <https://www.merriam-webster.com/dictionary/may> accessed 20 March 2023; Article 31 of VCLT.

[120] Federal Political Department (n 109) 120.

[121] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 235.

[122] *Ibid.*

[123] *Ibid.*

[124] *Ibid.*

regardless of the destination.[125] The interpretation applied in this regard is that the wording of the text states that it is a right to leave and not to be repatriated.[126] In addition, the text does not establish or outline the destination, but it does outline the entitlement to leave.[127] It follows accordingly that the right to leave, notwithstanding the destination, is an entitlement to which a belligerent state is bound to authorize.[128] It can be concluded that there is a right to leave but not an obligation.[129]

3.3.2 Time frame to leave

As far as concerns the time frame within which they can leave. Article 35 of GC IV outlines that this right to leave may be exercised at particular periods in time.[130] The first period is at the outset of the conflict. As to what is considered the beginning of the armed conflict, specifically international armed conflict, the beginning, or existence of an armed conflict will trigger the application of international humanitarian law.[131] Given that that the right of article 35 of GC IV is contained in GC IV regard must be given to the time frame of applicability of the convention to understand the applicability of the article. Article 6 of GC IV is the provision regulating the beginning and end of the application of GC IV.[132] Article 6 states that the convention applies from the outset. The ordinary meaning of the term outset is "at the beginning

[125] *Ibid.*

[126] James C. Hathaway, 'The Meaning of Repatriation' (1997) 9 *International Journal of Refugee Law* 551,553. Repatriation has come to be understood as a necessarily voluntary return to the State of origin.

[127] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 235.

[128] *Ibid.*

[129] Hans Peter Gasser and Knut Dormann, 'Protection of the civilian population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edition Oxford University Press 2013) 310.

[130] The first part of Article 35 of GC IV reads, "All protected persons who may desire to leave the territory at *the outset of, or during a conflict*, shall be entitled to do so, unless their departure is contrary to the national interests of the State..."

[131] Crowe and Weston-Scheuber (n 5) 1.

[132] Critical to note is that this article regulates the application of the convention and not the beginning and end of the conflict.

or start".[133] However there is no clarity in the ordinary meaning, so the next step is to consult the commentaries. According to the commentary on article 6, the beginning or from the outset means that "from the moment acts of violence occur".[134] Green argues that even without a formal declaration of war, the crossing of international borders and invasion of territory subjects the members of armed forces to the rules of Geneva Convention IV.[135]

To measure the period of what constitutes "during" the armed conflict, it is necessary to outline what constitutes the beginning and what constitutes the end of the conflict. Having uncovered that the beginning of the application is when the violence occurs the question remains when it ends. Article 6 of GC IV outlines that the convention ceases to apply on the "close of military operations". The general definition of close is "to bring an end to a period".[136] Therefore the suggestion is that at the end of the period of military operations however this definition remains vague, and the next step is to consult the commentaries. The close of military operations, according to the ICRC Commentary citing Rapporteur of Committee III, is "when the last shot is fired."[137] The commentary also brings to light the practical idea that when two states are fighting, the end would be marked by either an armistice, a capitulation or a '*debellatio*'.[138] However, In the case of occupied territory, the article outlines that the convention ceases application one year "after the close of military operations".[139] Green opines that cessation can

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[133] Merriam-Webster Online Dictionary, see "Outset" <https://www.merriam-webster.com/dictionary/outset> accessed 20 March 2023; Article 31 of VCLT.

[134] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 61.The convention will apply to protected persons from the moment when acts of violence occur, provided that these individuals fulfil the requirements of Article 4.

[135] Green (n 10)120.

[136] Merriam-Webster Online Dictionary, see "Close" <https://www.merriam-webster.com/dictionary/close> accessed 20 March 2023.

[137] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4 : Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 60 , Citing Final Record of the Diplomatic Conference of Geneva of 1949, ' Vol. II-A, p. 815.

[138] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 62.The commentary explains that "debellatio" means "the end of an armed conflict which results in the occupation of the whole of the enemy's territory and the cessation of all hostilities without a legal instrument of any kind."

[139] Article 6 reads "in the case of occupied territory, the application of the present Convention *shall cease one year after the general close of military operations*".

be done in various ways or for various reasons however the "most conclusive form of cessation is signalled by a peace treaty".[140]

It follows, therefore, that the application of the provisions of the convention, including Article 35 and 48, will be from the moment there is a use of force, and the cessation of the application will be at the end of the conflict when the fighting has ceased. In occupied territories, the ultimate cessation will only occur a year after the fighting has ceased. Concerning protected persons, they are entitled to the right to leave from the moment the fighting begins until the fighting ceases. In occupied territories, they may leave from the moment the fighting begins until a year after the fighting stops.

3.4 Limitation on the right to evacuate armed conflict territory

Given that there is a right to leave a territory, the question to ask, therefore, is if this right is absolute? Perhaps at the core of the limitation of the right to leave is the state's sovereign right to regulate migration and border flow through its migration law.[141] This sovereign right to refuse and accept entry is a way states maintain their sovereign security.[142] Accordingly in this context, it could be concluded that Ukraine has the sovereign right to control border flows. On the other hand, the right to leave is a right that protected persons in the context of Article 35 of GC IV have? A balance must be achieved. This section discusses therefore the nature of the limitation of the right to leave.

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[140] Green (n 10) 104-105.

[141] Catherine Dauvergne, 'Irregular migration, state sovereignty and the rule of law' in Vincent Chetail and Céline Bauloz, *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 92.Dauvergne comments on migration control as being the last bastion of sovereignty; Stephanie Grant, 'The legal Protection of stranded migrants' in Ryszard Cholewinski, Euan Macdonald and Richard Perruchoud (eds), *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press 2007) 38; Richard Perruchoud, 'State Sovereignty and Freedom of Movement' in Brian R Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press 2012) <https://doi.org/10.1017/CBO9781139084598> accessed 23 March 2023

[142] Aristide Zolberg, 'Changing Sovereignty Games and International Migration' (1994) 2 *Indiana Journal of Global Legal Studies* 153, 161 <https://www.repository.law.indiana.edu/ijgls/vol2/iss1/10> accessed 23 March 2023.

According to Article 35 of GC IV, this right is subject to a substantive limitation in that their departure may be refused if it is contrary to the national interests of the state. A question then must be asked as to what the ambit of national interest is. Article 35 does not provide a guide to its interpretation therefore the general rules of interpretation must be exercised. The ordinary meaning of national interests is "the interest of a nation as a whole held to be an independent entity separate from the interests of subordinate areas or groups and also of other nations or supranational groups".[143] But as to the parameters of this ordinary meaning, there is still more to be uncovered thereby it is necessary to consult the commentary. The commentary outlines that the notion of "national interests" was to the drafts' initial suggestion of "security consideration".[144] The reason for this was that national interest is a broader notion in comparison to security consideration.[145] Chetail argues that the notion of national interest offers wide discretion to states in interpreting and deciding the bounds of the meaning of the term.[146] The notion can span across various spheres of interests, for example, economic concerns and even the national practice of reserving men capable of taking up arms and also refusing the departure of people considered dangerous to the state's interests.[147]

Therefore, in line with Article 35 of GC IV, the limitation is that protected persons may be denied the right to leave if their departure is contrary to the national interests of the state.[148] As to what is deemed state interest, there is a wide discretion that is left to states to determine.

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[143] Merriam webster see 'National interests' <https://www.merriam-webster.com/dictionary/national%20interests>accessed 23 March 2023; Article 31 of VCLT.

[144] Jean Pictet (ed) '*Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War'* (n 97) 236.

[145] *Ibid.*

[146] Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' (n 33); This is consistent with the views outlined by the commentary Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 86) 236.

[147] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 236.

[148] Pamela Anne Hylton, 'The Right to Leave' in Andrew Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (First edition, Oxford University Press 2015) 1176. Hylton opines that it is critical to note however that this right is to be exercised only in the most extreme circumstances.

3.5 Conclusion

At the onset of the Russian invasion of Ukraine, the Geneva Conventions came into effect. Given this and according to Article 6 of GC IV, the provisions of GC IV came into effect. Consequently, protected persons, as defined by Article 4 of GC IV, were entitled to the right to leave the territory party to the conflict. Migrants qualify for the right to leave provided they meet the "nationality criteria" in Article 4. In meeting this criterion, they would be considered protected persons to whom the convention applies and who enjoy the right in Article 35 of GC IV. If a migrant does not qualify as a protected person enjoying the right outlined in Article 35 of GC IV, they would still be able to avail themselves of this right under Article 48 of GC IV, if they were in occupied Ukrainian territories. In leaving, migrants are entitled to elect whether they want to leave the territory. Accordingly, from the moment that the fighting began the right became available to all protected persons or non-nationals of occupied territories who wished to leave, and this included migrants.

It is critical to note that while there is an entitlement to leave, this right is not absolute. The right is subject to limitations in that states may choose to deny this right to leave in line with protecting their national interests. As to what is deemed national interests, that is left to the discretion of the states.

In the context of reports from Ukraine, there is strong evidence to suggest that the refusal to leave was done based on race with black people not being allowed to leave.[149] In the face of this apparent racial discrimination, it is critical to then investigate the implications of racial discrimination with regards to the right to leave.

[149] Chebil (n 2); Ray (n 23). The news reports cite allegations of Black people without European passports being pushed off trains.

Chapter 4 - The prohibition against racial discrimination in international humanitarian law

4.1 Introduction

The next step in this mini dissertation is to turn to the right to leave and protection against racial discrimination. The context of this question are allegations that migrants of African descent were not allowed to leave and were forced to stay in Ukraine.[150] Having ascertained so far that there is a right to leave if migrants qualify as protected persons, it is critical to then discuss if there is protection against racial discrimination in the accessing of this right. The first section of this mini dissertation is aimed at identifying the prohibition against discrimination in international humanitarian law as *lex specialis.* The second section is aimed at briefly discussing the obligation to protect against racial discrimination in international law. In finality, the third section is aimed at discussing d whether there is protection against racial discrimination in the application of article 35 of GC IV.

4.2 Prohibition against racial discrimination in international humanitarian law

The purpose of this section in the chapter is to discuss the prohibition against discrimination in international humanitarian law as *lex specialis* in armed conflict. Rule 88 of the ICRC study on customary international humanitarian law encapsulates the rule of non-discrimination in international humanitarian. law.[151] The rule which is titled 'Non-discrimination', "prohibits adverse distinction in the application of international humanitarian law on the prohibited

[150] Relief Web, 'Ukraine: UN Experts Concerned by Reports of Discrimination against People of African Descent at Border - Ukraine' (*Relief Web* 3 March 2022) <https://reliefweb.int/report/ukraine/ukraine-un-experts-concerned-reports-discrimination-against-people-african-descent> accessed 21 March 2023.

[151] Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law: Volume 1, Rules* (n 74) 308; also see Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *International Review of the* Red *Cross* 206.

grounds including race".[152] Therefore reference to non-discrimination is termed the prohibition of adverse distinction in international humanitarian law. The principle is also established by state practice as a rule of customary international law.[153] The ICRC study on customary international law is a secondary source of international law.[154] However, it is critical to also note that the study reflects customary international humanitarian law.[155] Sivakumaran and Milanovic opine that the study and the rules "have accumulated authority in the international legal system".[156] Accordingly, it is also important to note that the practice of this principle is found in treaties, national practice, and national legislation.[157]

Rule 88 of the ICRC study on customary international humanitarian law prohibits adverse distinction based on qualified grounds.[158] The phrasing of this supposes that in some instances distinctions that are not adverse are maybe permissible and in other cases quite obligatory.[159] The principle of non-discrimination is therefore not absolute; some distinctions are sometimes "legitimate and obligatory".[160] As a glaring example, the adverse distinction is not permitted on the grounds of sex however "it is common for women to be treated "regard due to their

[152] Rule 88 reads "Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited".

[153] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules* (n 74) 305.

[154] The study is an example of the work of highly publicised jurists as set out in Article 38(1)(d) of the ICJ statute see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules* (n 74) xvi-xvii on the mandate on the consultation of experts and on the status of the study as the work of scholarship.

[155] *Ibid*) xvi.

[156] Marko Milanovic and Sandesh Sivakumaran, 'Assessing the Authority of the ICRC Customary IHL Study: How Does IHL Develop?' (2022) 104 *International Review of the Red Cross* 1897.

[157] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume II, Practice, Part 2* (Cambridge University Press 2005) 2024–2043.

[158] These grounds as expressed in rule 88 are "race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited."

[159] Jean Pictet, 'The Medical Profession and International Humanitarian Law' (1985) 25 *International Review of the Red Cross* (1961 - 1997) 191, 197.The argument made in this regard is that the only permissible distinctions are those that are necessary to remedy inequalities that are based on "degrees of suffering, distress, or weakness".

[160] Jean Pictet, *Humanitarian Law, and the Protection of War Victims* (Brill Archive 1975) 41.

sex".[161] It accordingly means that the principle of non-discrimination needs to be qualified.[162] This means that there must be a justification for any distinctions to prove that the distinction is necessary and legitimate for the application of humanitarian law principles to remedy inequalities and foster balance.[163] Accordingly, the idea is to foster equal treatment through distinction; as the application of equal treatment without taking into account and remedying present and inherent inequalities may lead to further inequality.[164] A critical aspect to note is that distinctions are allowed if they are not adverse and if they are done in the application of the principles of international humanitarian law.[165]

4.3 Prohibition against racial discrimination in international law

From a definitional point of view, discrimination includes two elements an aspect of differentiating and an aspect of treatment.[166] However, in noting these two points, it is essential to outline and qualify the elements so that a difference is drawn between discrimination and differential which is based on "technical or reasonable inequalities in law".[167] Therefore discrimination would be a differential treatment based on an identified distinction that is illegal or leads to inequalities in the face of the law. In the case of defining racial discrimination, it would be defined as illegal and unjustifiable differential treatment based on race.[168] One of the most widely accepted instruments addressing racial discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[169] The

[161] Jean Pictet, 'The Medical Profession and International Humanitarian Law' (n 159) 197-198; For the protection of women and beneficial treatment of women during armed conflict see Françoise Krill, 'The Protection of Women in International Humanitarian Law' (1985) 25 *International Review of the Red Cross* (1961 - 1997) 337.

[162] Jean Pictet, 'The Medical Profession and International Humanitarian Law' (n 159) 197; also see EW Vierdag, *The Concept of Discrimination in International Law : With Special Reference to Human Rights* (Springer Netherlands 1973) 56 <http://link.springer.com/10.1007/978-94-010-2430-3> accessed 5 January 2023.

[163] Vierdag (n 162) 136.

[164] Krill (n 161) 339–340.

[165] *Ibid* 339.

[166] Vierdag (n 162) 51.

[167] *Ibid.*

[168] *Ibid 87*- 90.Vierdag discusses in detail racial discrimination on the grounds of race.

[169] International Convention on the Elimination of All Forms of Racial Discrimination GA Res 2106 (XX), 21 December 1965, 660 UNTS 195 (Hereafter CERD); also see Gay McDougall, 'The International Convention on

convention defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[170]

The prohibition against racial discrimination has, on more than one occasion, been cited by the International Court of Justice (ICJ) as one of the examples of an *erga omnes* obligation.[171] *Erga omnes* obligations give rise to "obligations in the international community that all states have towards each other and that all states have an interest in protecting."[172] "Concerning obligation *erga omnes*, it is generally accepted that these arise from peremptory norms of international law (*jus cogens*)".[173] Peremptory norms or *jus cogens* are "norms accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[174] It should, however, be noted that "not all *erga*

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the Elimination of All Forms of Racial Discrimination' (2021) 1 *United Nations Audio-Visual Library of International Law* 1.

[170] Article 1 (a) of CERD.

[171] *Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v Spain, Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3*; also see E De Wet, '*Jus Cogens* and Obligations *Erga Omnes*' in Dinah Shelton (ed),The *Oxford Handbook on International Human Rights Law* (Oxford University Press 2013) 553-554.

[172] *Ibid*, for discussion see Yoram Dinstein, 'The *Erga Omnes* Applicability of Human Rights' (1992) 30 *Archiv des Völkerrechts* 16, 16.

[173] Dire Tladi, 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*): Making Wine from Water or More Water than Wine' (2020) 89 *Nordic Journal of International Law* 244, 252; Tladi cites the Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) (with commentaries), Report of the International Law Commission, Seventy-First Session, General Assembly Official Records, Supp No 10 (A/74/10) Draft Conclusion 17 para 1.

[174] Article 53 of VCLT.

omnes obligations arise from jus *cogens*".[175] However, concerning the protection against racial discrimination, this is a "*jus cogens* norm that gives rise to an *erga omnes* obligation".[176]

The protection against racial discrimination is also found and expressed in international law through treaty law.[177] As previously described one of the most important treaties in this regard is the International Convention on the Elimination of All Forms of Racial Discrimination. This treaty is "the centrepiece of the international regime for the protection and enforcement of the right against racial discrimination".[178] The Convention acts to "define and elaborate the principle of non-discrimination through a single international treaty and thereby represent the expression of this principle found in other various instruments." [179] The treaty expressing the principle of non-discrimination on race is heralded as "universal in reach, comprehensive in scope and legally binding".[180] CERD accordingly "codifies the principle of non-discrimination which is a customary rule of international law" (It is also *jus cogens* and *erga omnes* as previously discussed).[181]

Various regional treaties include the principle of non-discrimination. The African Charter on Human and People's Rights prohibits distinction through the right to freedom from discrimination based on listed grounds including race.[182] The European Convention also

[175] Tladi (n 173) citing Draft Conclusions on Peremptory Norms of General International Law Draft Conclusion para 3.

[176] De Wet (n 158) 54. De Wet makes the assertion that the Inter-American Commission on Human Rights outlined the importance of non-discrimination in international law affords it *jus cogens* and that it is critical to note there is no consensus on prohibiting discrimination on any other motive but racial discrimination.

[177] The author here refers primarily to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

[178] McDougall (n 169) 1.

[179] *ibid* 1; McDougal states that non-discrimination is "enshrined in the universal declaration of human rights and Article 1 of the UN Charter"; however, it was felt that this principle needed to be reflected in an international instrument that defined and outlined the obligations stemming from it.

[180] Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *The American Journal of International Law* 283, 283.

[181] McDougall (n 169) 6; also see Ingrid Detter de Lupis Frankopan, *The Law of War* (Third edition, Ashgate 2013) 198. Detter de Lupis Frankopan argues that the contents of Common Article 3 constitute *jus cogens*.

[182] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) Article 2.

includes a prohibition of discrimination based on listed grounds including race.[183] The prohibition of discrimination is expressed as equality before the law by the American Declaration on the rights and duties of Man.[184]

It follows therefore that the prohibition against discrimination and in particular racial discrimination is an inherent part of international law. It is customary international law with *jus cogens* status and that gives rise to *erga omnes* obligations.[185] The prohibition against racial discrimination is further codified in various treaties both at international and regional levels. Therefore, the principle of non-discrimination is expressed in international humanitarian law similarly to how it is expressed in international law. As a prohibition against discrimination but with allowance for distinction so long as it does not lead to inequalities before the law. Although it may carry different names such as the prohibition against discrimination or non-discrimination or prohibition against adverse distinction, the sentiment reflected is the same.

4.4 Applicability of the prohibition against discrimination to the right to evacuate armed conflict territory

Concerning the right to leave/evacuate armed conflict territory the question is does it also entail protection from racial discrimination. The first thing to note is that Article 35 of GC IV as part of the corpus of international humanitarian law is subject to Rule 88 of the ICRC study on customary international humanitarian law which prohibits adverse distinction in the application of international humanitarian law in its entirety. Therefore, by Article 35 of GC IV being a part of the corpus of international humanitarian law, it is subject to the prohibition against adverse

[183] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) ETS 5 Article 14.

[184] American Declaration of the Rights and Duties of Man, OAS Res XX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) Article II.

[185] For extensive discussion on Common Article 3 as *erga omnes* see Martha M Bradley, '*Jus Cogens'* Preferred Sister: Obligation *Erga Omnes* and the International Court of Justice – Fifty Years after the Barcelona Traction Case' in Dire Tladi, *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill Nijhoff 2021) 216–221.

distinction established by the customary principle encapsulated in Rule 88 of the ICRC study on customary international humanitarian law.

On the second tier, Article 35 of GC IV is subject to Article 27 of GC IV which provides for the treatment of protected persons without adverse distinctions.[186] According to the ICRC commentary on Article 27 of GC IV encapsulate the principle of non-discrimination in the treatment of protected persons.[187] Furthermore, the commentary outlines that the entitlement that protected persons have to this equal treatment is a result of "a principle common to all the Geneva Conventions", namely the principle of non-discrimination or alternatively termed the prohibition of adverse distinction which is encapsulated by Common Article 3.[188]

The protection against racial discrimination applies accordingly to Article 35 of GC IV in two ways. Firstly, directly by the principle of non-discrimination as it applies to the application of the entire corpus of international humanitarian law. Secondly, under Article 27 of GC IV which outlines that protected persons are to be treated equally, therefore since Article 35 affords the right to leave to protected persons (as defined by Article 4 of GC IV) it is subject to the principle of non-discrimination as expressed in Article 27 of GC IV. So, in one way or another, the principle of non-discrimination applies to Article 35 of GC IV. The commentary outlines that the qualified character of the wording allows for distinction so long as it does not lead to an adverse distinction.[189] This means it is possible to draw a distinction when it comes to the

[186] Paragraph 3 of Article 27 reads "Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."

[187] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 61.

[188] Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949, Volume.4: Geneva Convention relative to the Protection of Civilian Persons in time of War* (n 97) 61, also see Gasser and Dormann (n 129) Gasser and Dormann cite that in the Nicaragua case the ICJ recognised that Common Article 3 codifies fundamental provisions of international humanitarian law that apply to all types of conflict and not merely those of a non-international nature; also see Kolb and Hyde (n 5) 69 . Kolb and Hyde argue that there has been a "progressive merger of international and non-international armed conflict" particularly concerning rules that deal with both "protection of persons and means and methods of warfare". The argument is that these rules now apply to both forms of conflict.

[189] *ibid*.

application of Article 35 of GC IV if it does not lead to adverse inequality and promotes equal treatment.[190]

4.5 Conclusion

The expression of the principle is that there is a prohibition against adverse distinction. The prohibition against racial discrimination is an integral part of international law. The prohibition cannot be derogated from as it is both *jus cogens* and *erga omnes*. This principle applies to the right to leave in 3 ways. Firstly, by operation of customary international law rule of non-distinction (Rule 88 of the ICRC study on customary international humanitarian law) which applies to the entire body of international humanitarian law. Secondly by operation of Article 27 of GC IV subjects Geneva Convention IV to the principle of equality and prohibition against adverse distinction. This accordingly means that in the application of Article 35, no adverse distinction may result based on race. This means that in the case of Russia and Ukraine the allowance of the exercise of the right to leave must not have been conducted with prejudice and discrimination based on race.

[190] R Charli Carpenter, '"Women and Children First": Gender, Norms, and Humanitarian Evacuation in the Balkans 1991-95' (2003) 57 (4) *International Organization* 661, 667; The argument furthered is based on the operational evacuation of women and children first in the Balkans as they represented the most vulnerable group.

Chapter 5 - Conclusion

The central research question addressed in this dissertation concerns whether the racially discriminatory refusal to afford migrants the right to leave/evacuate a territory is a violation of international law with the conflict in Ukraine as the context.

Chapter 2 showed that migrants are not legally defined in international humanitarian law as *lex specialis* in armed conflict and neither are they defined in international law. However, a functional definition of migrants is used by organisations dealing with armed conflict. Given that migrants are not defined in international humanitarian the next point of inquiry was to discuss their protection considering the lack of definition. In answering this the discussion led to the answer that the migrants in Ukraine are protected as civilians if they qualify as such.

Chapter 3 discussed the right to leave and three main elements of the right to leave namely who may leave, when may they leave and what are the limitations. Accordingly, the chapter uncovered that those afforded the right to leave are protected persons as defined by Article 4 and non-nationals in occupied territory by operation of Article 48 of GC IV. The chapter uncovered that these people may leave at the beginning of a conflict which is to be understood as the moment acts of violence occurred and the close of military operations or a year after in occupies territories. Lastly, the chapter uncovered that a state's national interest is a limitation that may be imposed on the right to leave however this may not be done arbitrarily. In limiting the right to leave a state has a wide discretion to do so with considerations such as state security and economic impact in mind. It follows accordingly that if the migrants in Ukraine qualified as protected persons, they had the right to leave the territory from when the conflict began to when it ends, in occupied territories the right to leave is extended until a year after the close of military operations. Their right may be limited by the state's national interests but not arbitrarily so.

Given that the evidence suggested that the refusal of the right to leave was done based arbitrarily on the race of the migrants. Chapter 4 investigated the concept of the prohibition against racial discrimination. The chapter identified that the prohibition against discrimination exists firstly as a rule of customary international law and secondly in international law as *jus cogens* creating an *erga omnes* obligation. The next step was to apply the prohibition against racial discrimination to the right to leave. Accordingly, the chapter concluded by identifying that the right to leave contained in Article 35 is subject to the customary international

humanitarian law rule prohibiting discrimination encapsulated in Rule 88 of the ICRC study on customary international humanitarian law and subject to Article 27 of GC IV which prohibits discrimination in the treatment of protected persons. Therefore, the right to leave includes protection against discrimination. Accordingly, the refusal to allow migrants to leave Ukraine qualifies as racial discrimination as the application of the right to leave is subject to the prohibition against discrimination.

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