



The legal framework for migrants and refugees

An introduction for Red Cross and
Red Crescent Staff and Volunteers

The International Federation of Red Cross and Red Crescent Societies (IFRC) is the world's largest volunteer-based humanitarian network. With our 190 member National Red Cross and Red Crescent Societies worldwide, we are in every community reaching 160.7 million people annually through long-term services and development programmes, as well as 110 million people through disaster response and early recovery programmes. We act before, during and after disasters and health emergencies to meet the needs and improve the lives of vulnerable people. We do so with impartiality as to nationality, race, gender, religious beliefs, class and political opinions.

Guided by *Strategy 2020* – our collective plan of action to tackle the major humanitarian and development challenges of this decade – we are committed to saving lives and changing minds.

Our strength lies in our volunteer network, our community-based expertise and our independence and neutrality. We work to improve humanitarian standards, as partners in development, and in response to disasters. We persuade decision-makers to act at all times in the interests of vulnerable people. The result: we enable healthy and safe communities, reduce vulnerabilities, strengthen resilience and foster a culture of peace around the world.

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John Engedal Nissen / IFRC

FOREWORD

The International Federation of Red Cross and Red Crescent Societies (IFRC), consisting of 190 National Red Cross and Red Crescent Societies worldwide, has a long-standing commitment to providing assistance and protection to vulnerable individuals in the context of migration and displacement.

As noted in the IFRC Policy on Migration (2009), the approach of the Red Cross and Red Crescent Movement to migration and displacement is strictly humanitarian. It focuses on the needs, vulnerabilities and potential of people, irrespective of their status. At the same time, the Movement also recognises that to address the vulnerability of people on the move adequately, it is important that specific legal instruments protecting certain groups of people, such as asylum seekers, refugees, victims of trafficking or children, be enforced.

Developed with legal advice from Freshfields Bruckhaus Deringer, this leaflet provides Red Cross and Red Crescent staff and volunteers with a basic introduction to the legal framework applicable to migrants and refugees. In particular, this leaflet aims to explain why a person fleeing persecution, armed conflict or massive violations of human rights in his or her country may be recognised as a refugee in some regions or countries but not in others.

To this end, the first section of this leaflet focuses on the legal framework applicable to migrants in general; the second section explores the international and regional frameworks applicable to refugees; and the third and fourth sections provide an overview of the legal frameworks for the protection of victims of trafficking and smuggling as well as of children. These different legal frameworks are not mutually exclusive but rather mutually reinforcing. An individual may possess overlapping legal statuses at any one time, or his or her status may evolve along his or her migratory route. For example, a refugee may also be a migrant worker, and he or she may also become a victim of trafficking. In such cases, all applicable legal instruments should be taken into account to guarantee the highest level of protection.

We hope that this leaflet makes a valuable contribution to the Massive Open Online Course (MOOC) on the International Red Cross and Red Crescent's approach to migration.

Tiziana Bonzon
IFRC Migration & Displacement Lead

The legal framework for migrants and refugees

I. MIGRANTS

1.1 The protection of migrants under international human rights law

What are the main human rights of migrants?

The ICCPR and the ICESCR prescribe a broad range of rights that are applicable to everyone (with very limited exceptions), including migrants. These include the right to life; the prohibition against torture and cruel, inhuman and degrading treatment (which includes an obligation for States not to return a person to another State where he or she would be in danger of facing such treatment); the prohibition against slavery and servitude; the right to liberty and security of person; the prohibition against arbitrary arrest and detention; the prohibition against discrimination; freedom of religion; freedom of thought and expression; and the right to education and the right to work. Only in very limited circumstances can these fundamental human rights be restricted or derogated from.

The international obligations of States to protect migrants derive from international agreements to which those States are party, as well as customary international law, which is binding on all States.

All migrants are entitled to the respect, protection and full enjoyment of their human rights under the core international human rights treaties, regardless of legal status or circumstances. A State is responsible for guaranteeing the human rights of everyone within its jurisdiction. A State will have jurisdiction if it has legal or effective *de facto* control over territory or persons, including where those persons act outside the State's territory.

Migrants enjoy rights in their State of origin, in transit and in their host communities. All people, irrespective of their legal status, enjoy basic fundamental rights under international human rights law. Alongside these fundamental rights, specific categories of persons crossing international borders, such as migrant workers, refugees, asylum-seekers, victims of trafficking, and children, are entitled to additional specific rights under international, regional and national legal instruments. These instruments were developed to respond to the particular vulnerabilities experienced by those categories of people.

The main pillars of the international human rights regime are the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹ and the *International Covenant on Civil and Political Rights* (ICCPR).² States are obliged to afford the rights enshrined in these two instruments to anyone in their territory or under their jurisdiction, without discrimination between citizens and aliens. Some exceptions apply, such as the right to take part in the conduct of public affairs and the right to vote and to be elected.

¹ United Nations General Assembly (UNGA), *International Covenant on Civil and Political Rights*, 16 December 1966, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

² UNGA, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

Other human rights treaties may also be relevant to migrants. For instance, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)³ is relevant in the context of xenophobic discourse that often surrounds migration. The *Convention on the Rights of the Child* (CRC)⁴ provides guidelines for facilitating family reunification and ensuring protection of migrant children. The *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)⁵ and the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED)⁶ prohibit State parties from returning a person to another State if there are substantial grounds for believing that he or she is in danger of being subjected to torture or forced disappearance.

Some core human rights principles are also part of customary international law, which binds all States regardless of whether or not the State is party to a particular human rights treaty. These include the right to life, the prohibition against racial discrimination, the prohibition against slavery and servitude, the prohibition against collective expulsion, as well as some procedural guarantees necessary to give effect to these rights. Some rules, such as the prohibition against torture, have become what are known as *jus cogens*, or peremptory norms, from which States cannot derogate by treaty.

The principle of *non-refoulement* is also considered a rule of customary international law. Under international human rights law, the principle of *non-refoulement* prohibits States from forcibly returning people to locations where there are substantial grounds to believe that they would be in danger of being subjected to violations of certain fundamental rights, in particular persecution, torture, cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life.

1.2 Irregular migrants

People who have entered or are staying irregularly in a country are often referred to as “illegal migrants”. However, as early as 1975 the United Nations recommended the use of the term “irregular migrants”, defined as “those workers that illegally and/or surreptitiously enter another country to obtain work”.⁷ In 1994, the *Programme of Action of the International Conference on Population and Development* (ICPD) defined “undocumented or irregular migrants” as “persons who do not fulfil the requirements established by the country of destination to enter, stay or exercise an economic activity”.⁸ The expression “migrants in an irregular situation” may also be used.

Contrary to common opinion, irregular migrants are protected under international human rights law. International human rights law applies to everyone, irrespective of their status. Human rights therefore apply to irregular migrants, unless there is a specific limitation. For instance, article 12 of the ICCPR limits the right to liberty of movement to “everyone lawfully within the territory of a State”. However, many States restrict irregular migrants’ access to social rights beyond what is permissible under international human rights law.

³ UNGA, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

⁴ UNGA, *Convention on the Rights of the Child*, 20 November 1989, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

⁵ UNGA, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

⁶ UNGA, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, available at:

<http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.

⁷ UNGA, Resolution 3449 (XXX). *Measures to ensure the human rights and dignity of all migrant workers*, 1975, para. 2.

⁸ *Programme of Action adopted at the International Conference on Population and Development*, Cairo, 5-13 September 1994.

1.3 Migrant workers

According to the International Labour Organization (ILO), out of the 244 million international migrants recorded in 2015,⁹ 150 million are migrant workers.¹⁰ The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW)¹¹ defines a “migrant worker” 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”. Whether or not a migrant’s presence in a foreign country is irregular does not affect whether they come within this definition and thus the protection of the CMW.

The CMW contains fundamental rights that apply to all migrant workers, including irregular migrants. These rights mirror the fundamental rights enshrined in general human rights instruments, including the right to leave any State, even their State of origin; the right to life; the prohibition against torture; the right to freedom of thought and the right of access to education for their children, amongst others.

A broader set of rights and guarantees is accorded to migrant workers in a regular situation, including the right to liberty of movement within the territory of the host State, the right to form associations and trade unions, and equality of treatment with nationals in relation to access to educational institutions, vocational training, as well as social and health services.

The main weakness of the CMW, however, is that very few States have ratified it. Only 51 States are party to the CMW.¹² The vast majority of those States are countries of origin for many of the world’s migrant workers.

On the other hand, most countries in the world are party to the eight ‘core’ Conventions of the ILO, which include important protections for migrant workers, such as freedom of association and the effective recognition of the right to collective bargaining (Conventions 87 and 98); the elimination of all forms of forced or compulsory labour (Conventions 29 and 105); the effective abolition of child labour (Conventions 138 and 182); and the elimination of discrimination in respect of employment and occupation (Conventions 100 and 111).

⁹ United Nations Department of Economic and Social Affairs (UNDESA), *International Migration Report 2015. Highlights*, 2016, available at: http://www.un.org/en/development/desa/population/migration/publications/migration_report/docs/MigrationReport2015_Highlights.pdf.

¹⁰ International Labor Organization (ILO), *ILO global estimates on migrant workers. Results and methodology*, 2015, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/-dcomm/documents/publication/wcms_436343.pdf.

¹¹ UNGA, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, available at: <http://www.ohchr.org/Documents/ProfessionalInterest/cmw.pdf>.

¹² List of countries available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=en.



Jarkko Mikkonen / Finnish Red Cross

II. REFUGEES

2.1 Refugees or migrants

There is an ongoing debate regarding the use of the word “migrants” when referring to refugees. The terms of this debate were explained by Erika Feller, the former Deputy High Commissioner for Protection at the United Nations High Commissioner for Refugees (UNHCR), in 2004:

*“If persons are defined as migrants by virtue of the fact that they move from their own country to another, regardless of the reasons and their needs, then refugees are migrants. If, however, the causes of flight are the defining feature, together with the framework of rights and responsibilities within which the flight has to be managed, then there is a clear distinction between the two categories of persons”.*¹³

The IFRC recognises the specific practical and legal problems facing refugees and the need to promote the legal framework specifically applicable to refugees. The IFRC thus recommends the use of the term “refugees” when referring specifically to refugees, as opposed to the term “migrants”, which encompasses all categories of people crossing international borders. It also recommends the use of the expression “migrants and refugees” to refer to “mixed movements”, that is, movements where migrants and refugees are moving alongside each other, using the same routes and means of transport, or engaging the services of the same smugglers.

Refugees enjoy the same human rights as all other migrants. There are, however, two legal principles, which States are obliged to respect, that are particularly important for refugee protection:

1. The principle of *non-refoulement*

Under international refugee law, refugees must not be returned to situations where their life and/or liberty would be under threat.¹⁴ The principle, known as the principle of *non-refoulement*, is considered a rule of customary international law, which means that it applies to all States irrespective of whether they are party to any particular international instruments.

2. The duty of non-penalisation for unlawful entry (the “non-penalisation” clause)

Under international refugee law, refugees cannot be punished for their unlawful entry or presence in a country.¹⁵ This provision was specifically included to take into consideration the circumstances under which refugees are compelled to leave their home countries, and the practical difficulties they may face complying with administrative formalities in order to seek asylum in a new country.

¹³ Speech by Ms. Erika Feller, Director, Department of International Protection, UNHCR: SID lecture series “Migration and Development: Challenges for a World on the Move”, Vrije Universiteit, Amsterdam, Netherlands, 27 January 2004.

¹⁴ See in particular article 33.1 of the *Convention relating to the Status of Refugees*, 28 July 1951, available at: <http://www.refworld.org/docid/3be01b964.html>.

¹⁵ See article 31 of the 1951 Refugee Convention.

The role of the UNHCR in Refugee Status Determination

The UNHCR is a body tasked with monitoring the implementation of the 1951 Refugee Convention. The UNHCR is also responsible for conducting RSD procedures pursuant to its own Statute (United Nations General Assembly Resolution 428 (V) of 14 December 1950). It undertakes RSD procedures in States party to the 1951 Refugee Convention that have not established their own national RSD procedures, as well as in States that are not party to the 1951 Refugee Convention.

While the definition of “refugee” provided for in the UNHCR’s Statute mirrors the definition of “refugee” in the 1951 Refugee Convention, the UNHCR has extended its mandate to cover people fleeing armed conflict and violence, consistently with the broader definition under the OAU Convention. The definition does not, however, cover people fleeing massive violations of human rights as provided for in the Cartagena Declaration. Those recognised as refugees under the UNHCR’s broadened definition are sometimes referred to as “Mandate refugees”, as opposed to “Convention refugees” who meet the definition found in the 1951 Refugee Convention.

2.2 The International Refugee Regime

There are several treaties and bodies that make up the “international refugee regime”. The main international instruments are the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention) and the 1967 Protocol relating to the Status of Refugees (the 1967 Refugee Protocol).¹⁶ There are also regional instruments that include broader definitions of the term “refugee”. These regional instruments were adopted to take into consideration the specificities of movements of populations in different regions. As a result, a person seeking asylum¹⁷ may be recognised as a refugee under some rules but not under others. The UNHCR also has a particularly important role to play regarding assistance to and protection of refugees.

A. The 1951 Refugee Convention and its 1967 Refugee Protocol

The 1951 Refugee Convention is the main instrument concerning the protection of refugees. It was adopted in 1951 following the Second World War and at the beginning of the Cold War. The Refugee Convention was thus primarily adopted to respond to refugee issues in Europe, where people had been displaced due to persecution on grounds of race, religion, nationality and political opinion.

Under the 1951 Refugee Convention, a refugee is someone who:

- (i) has a well-founded fear of persecution because of his or her race, religion, nationality, political opinion, or membership in a particular social group;
- (ii) is outside his or her country of origin; and
- (iii) is unable or unwilling (because of the fear of persecution) to rely on the protection of that country, or return there.

The “well-founded fear of persecution” criterion set out in the 1951 Refugee Convention has traditionally been interpreted as referring to an “individual” fear of persecution. This requires that the persons concerned demonstrate that they were personally at risk of being persecuted on one of the five grounds of persecution.¹⁸ However, the Refugee Convention is silent as to how the refugee status of an individual should be determined. States party to the 1951 Refugee Convention are therefore expected to establish national Refugee Status Determination (RSD) procedures to determine the claims of asylum-seekers.

¹⁶ UNGA, *Protocol Relating to the Status of Refugees*, 31 January 1967, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

¹⁷ The expression “asylum seekers” does not appear in the 1951 Refugee Convention. It is generally used to refer to a person who has not yet had his or her application for refugee status determined. In other words, he or she is seeking “asylum”, i.e. protection as a refugee. Not every asylum seeker will ultimately be granted refugee status.

¹⁸ In December 2016, the UNHCR adopted new Guidelines to argue that the definition provided for in the 1951 Refugee Convention should be interpreted as covering persons fleeing armed conflict and violence. See UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definition*, December 2016, available at: <http://www.refworld.org/docid/583595ff4.html>.

The 1951 Refugee Convention was initially limited to “events occurring in Europe before 1 January 1951” but these geographic and temporal limitations were removed with the adoption of the 1967 Refugee Protocol. The 1967 Refugee Protocol’s preamble recognises that “new refugee situations have arisen since the Convention was adopted” and that “the refugees concerned may therefore not fall within the scope of the Convention”. The 1967 Refugee Protocol expanded the scope of the 1951 Refugee Convention definition of a “refugee”. It does not provide additional rights for refugees beyond the 1951 Refugee Convention. States which accede only to the 1967 Refugee Protocol accept the definition and related obligations provided for in the 1951 Refugee Convention.

As of October 2017, 145 States are party to the 1951 Refugee Convention and 146 States are party to the 1967 Protocol.¹⁹ The number of States party to the 1951 Refugee Convention and its Protocol in the Asia-Pacific region and the Middle East is particularly low. This issue is addressed in more detail below.

B. Refugee Status in Africa

In the mid-1960s, States in Africa were engaged in the process of decolonisation. Many African populations struggled against colonial or apartheid governments, which led to significant numbers of people leaving their countries to escape oppression. The 1951 Refugee Convention requirement that there must be an individualised “fear of persecution” excluded these groups of people from the definition of “refugee” and was therefore inadequate in the African context.

Against this backdrop, in 1969 the Organisation of African Unity (OAU) adopted the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (OAU Convention).²⁰ While the 1951 Convention was considered to be a “euro-centric” instrument, it can also be said that the OAU Convention reflects the specificities of population movements in Africa during this period. The definition of “refugee” in the OAU Convention includes the “well-founded fear of persecution” criterion but also extends to:

“every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

This expanded definition, which includes people fleeing situations of violence and armed conflict, does not require an asylum seeker to demonstrate a *subjective* fear of persecution. Refugees who flee armed conflict and violence are thus recognised as groups of refugees on a *prima facie* basis, without the need to follow an RSD procedure. Consequently, the expanded refugee definition provided for in the OAU Convention is often considered more “generous” than the definition in the 1951 Convention.

C. Refugee Status in Latin America

Similarly, in Latin America, the definition of “refugee” in the 1951 Refugee Convention proved inadequate to capture millions of people who were displaced from 1960-1980. Many of these individuals were displaced after fleeing the outbreak of violence in Central America in the 1960s, as a result of political and military upheaval. This was followed in the 1970s and 1980s by the displacement of people fleeing massive human rights violations by dictatorial governments.

In response to these events, a group of experts adopted the *Cartagena Declaration* in 1984,²¹ which included a definition of “refugee” that was even broader than the definition provided by the OAU Convention. This new definition included “massive violations of human rights” as a ground to seek refugee status. The text of the *Cartagena Declaration* is as follows:

¹⁹ List of countries available at: https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en.

²⁰ Organisation of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, available at: <http://www.refworld.org/docid/3ae6b36018.html>.

²¹ *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html>.

“To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

Although the *Cartagena Declaration* is a non-binding instrument, it has had a considerable influence over the policies and legislation adopted throughout Latin America. Most Latin American countries have incorporated the provisions of the *Cartagena Declaration* into their domestic legal framework. However, the extended definition of “refugee” to include people fleeing massive violation of human rights has not been accepted outside Latin America.

D. Refugee status in Europe

All European Union (EU) Member States are party to the 1951 Refugee Convention, as are many European countries that are not EU Member States. EU law uses the criterion provided for in the 1951 Refugee Convention, meaning that asylum seekers are granted refugee status only if they can demonstrate that they have an individual “well-founded fear of persecution”.

However, EU law also provides for what is referred to as “subsidiary protection” of people who face serious threats to their lives due to indiscriminate violence in armed conflict and massive violations of human rights. Under “subsidiary protection”, people are protected against being forcibly returned to the country from which they have fled (i.e. the principle of *non-refoulement*, explained above). Subsidiary protection has been applied to many Syrians fleeing to European countries since the start of the Syrian civil war. Syrians have been protected from being forcibly returned to Syria without *formally* being recognised as refugees in most EU countries. Nevertheless, some EU Member States have followed the advice of the UNHCR and formally recognised many Syrians as refugees.²²

The EU has also established a “temporary protection” regime, which establishes minimum standards for admitting and protecting groups of persons in the event of a mass influx, where refugee status is difficult to determine on an individual basis. To some extent, the “temporary protection” regime mirrors the extended definition of a refugee provided for in the OAU Convention. However, this mechanism has never been applied, including during the large-scale influx of migrants and refugees that took place in 2015. The standards of protection under subsidiary protection and temporary protection are lower than those of the 1951 Refugee Convention, in particular with regard to the right to remain within the territory of a State.

E. Refugee status in the Asia-Pacific region

A critical gap in the international regime concerning refugees is in the Asia-Pacific region. More than half of the countries in the region are not party to the 1951 Refugee Convention and its 1967 Protocol. The UNHCR undertakes RSD procedures in many of these countries on the basis of its Statute, recognising as refugees both people with a well-founded fear of persecution and those fleeing armed conflict or generalised violence.

While there is no regional binding instrument pertaining to the protection of refugees in the region, the Asian-African Legal Consultative Organization (AALCO), formerly known as the Asian-African Legal Consultative Committee (AALCC), adopted the *Bangkok Principles on Status and Treatment of Refugees* in 1966 (the final version of the text was adopted in 2001).²³ The definition of “refugee” provided for in the *Bangkok Principles* reflects the definition contained in the OAU Convention:

²² See UNHCR, *International Protection Consideration with Regard to People Fleeing the Syrian Arab Republic. Update IV*, November 2015, HCR/PC/SYR/01, available at : <http://www.refworld.org/pdfid/5641ef894.pdf>.

²³ Asian-African Legal Consultative Organization (AALCO), *Final Text of the AALCO 1966 Bangkok Principles on Status and Treatment of Refugees, as adopted on 24 June 2001 at the AALCO's 40th Session, New Delhi*, available at: <http://www.refworld.org/docid/3de5f2d52.html>.

“The term ‘refugee’ shall also apply to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

Like the *Cartagena Declaration*, the *Bangkok Principles* is not legally binding. While many States are not party to the 1951 Convention, in practice many of them admit people in need of international protection, including those fleeing persecution, armed conflict and generalised violence. These people in need of international protection are referred to as “irregular” or “illegal” migrants. Other expressions, such as “displaced persons”, have been used to describe those in need of international protection but who are not formally recognised as refugees. Therefore, in countries that are not party to the Refugee Convention, “refugees” (or those in a “refugee-like” situation) are primarily protected under international human rights law.

A Protection Gap?

The complexity of the refugee protection regime means that many individuals who require protection are sometimes classified as migrants as opposed to refugees. The circumstances surrounding a person’s flight from their home country can affect whether they obtain refugee status and thus international protection. Drawing a distinction between “refugees” (“who are forced to move”) and “migrants” (“who choose to leave their country in search of better prospects”) is often problematic. Many migrants not eligible for refugee status are also vulnerable and require special protection, including against being forcibly returned to their country of origin.

There are a number of situations where people compelled to leave their home or place of residence are in need of international protection (in particular, the principle of non-refoulement) but are not recognised as refugees. Such situations include:

- People fleeing armed conflict and generalised violence to regions and countries that adopt a narrow definition of what constitutes a refugee, i.e. limited to a “well-founded fear of persecution” in accordance with the 1951 Refugee Convention.
- People compelled to leave their home country because of extreme poverty and deprivation.
- Migrants located in a State which experiences a natural or man-made disaster. People in these circumstances cannot be recognised as refugees as they still theoretically benefit from the protection of the State in which they are located. The Migrants in Countries in Crisis Initiative (MICIC) led by the Governments of the Philippines and the United States of America attempted to address these gaps through the development of the MICIC guiding principles and guidelines. The MICIC principles are “cross-cutting precepts” intended to “inform, underpin, and guide actions to protect migrants in countries experiencing conflicts or natural disasters”. The MICIC envisaged implementation of the MICIC principles by States, private sector actors, international organisations, and civil society.
- People fleeing the effects of natural disasters and climate change who seek protection outside their country of origin. Launched in 2012, the Nansen Initiative led to the adoption of the “Protection Agenda” to ensure better protection for “cross-border disaster displaced persons”. The Nansen Initiative has been replaced by the Platform on Disaster Displacement (PDD) which aims to promote the international implementation of the Protection Agenda.

As already stated above, irrespective of why someone departs their home country, everyone is protected under international human rights law. The real challenge lies in effectively implementing the legal framework, as opposed to simply adopting new instruments.



Jarkko Mikkonen / Finnish Red Cross

III. VICTIMS OF TRAFFICKING AND SMUGGLED MIGRANTS

The differences between migrant smuggling and the trafficking of persons

There are four main differences between migrant smuggling and the trafficking of persons:

- *Consent:* Although smuggling will often involve dangerous or degrading conditions, it often involves the consent of the person being smuggled. Victims of trafficking have either never consented, or their initial consent has been rendered meaningless by the subsequent coercive, deceptive or abusive action of traffickers.
- *Exploitation:* Exploitation is always a key element of trafficking, but not necessarily of migrant smuggling.
- *Transnationality:* Smuggling is always transnational. Trafficking can occur when victims are taken to another country or when moved within a State.
- *Source of profits:* In smuggling cases, profits are derived from the transportation, or its facilitation, of persons across an international border. In trafficking cases, profits are derived from the exploitation of persons, which typically occurs at the destination.

The 2000 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the Protocol against Trafficking)²⁴ and the 2000 *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (the Protocol against Smuggling)²⁵ are both important for the protection of migrants. These two Protocols are also referred to as the “Palermo Protocols”.

Although commonly confused, “trafficking” and “smuggling” of persons have different meanings under international law.

The definition of “trafficking” pursuant to the Protocol against Trafficking has three constituent elements:

- (i) the recruitment, transportation, transfer, harbouring or receipt of persons;
- (ii) by means of the threat or use of force or other forms of coercion; and
- (iii) for the purpose of exploitation (exploitation includes, at a minimum, the exploitation or the prostitution of others, other forms of sexual exploitation, forced labour, slavery, servitude or the removal of organs).

Trafficking in persons, often called human trafficking, is a serious violation of human rights. While the focus has traditionally been on the trafficking of women and children for the purpose of sexual exploitation, the exploitation for the purpose of forced labour is also a significant and worrying phenomenon.

The Protocol against Smuggling defines “smuggling” as:

“the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”

“Smuggling” is a commercial transaction between someone who wants to travel irregularly to another country and someone offering to facilitate that. Smuggling does not necessarily entail human rights violations. In some circumstances, relying on smugglers may even be considered a “solution” for people who have no other practical choice when fleeing persecution or violence.

²⁴ UNGA, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/4720706c0.html>.

²⁵ UNGA, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/479dee062.html>.

However, situations of trafficking and migrant smuggling may overlap. For example, migrants might start their journey by agreeing to be smuggled into a country, but may subsequently be deceived, coerced or forced into an exploitative situation, in particular through “debt bondage” (i.e. when a person is forced to work to pay off a debt).

While the Palermo Protocols focus primarily on the need to strengthen border controls, limit the irregular movement of people and criminalise both trafficking and smuggling, they also contain provisions regarding the protection of victims of trafficking and persons who are the object of smuggling. Although most of these provisions are discretionary, they may nonetheless constitute an additional source of protection for migrants and refugees who are objects of smuggling or victims of trafficking.

The rights that apply to migrants apply to victims of trafficking and to smuggled migrants. Additional specific protections under the Protocol against Trafficking apply to victims of trafficking, such as the protection of their identity during legal proceedings, assistance to present their views and concerns at appropriate stages of criminal proceedings against offenders, and the possibility of obtaining compensation for damage they have suffered. The Protocol against Trafficking also requires States to consider providing appropriate housing, counselling and information, medical, psychological and material assistance, as well as employment, educational and training opportunities. These are, however, only recommendations. The Protocol against Trafficking also provides that a State party to it “shall endeavour to provide for the safety of victims of trafficking while they are within its territory”.

Under the Protocol against Smuggling, migrants should not be prosecuted for having been smuggled. However, this does not prevent States from prosecuting them for breaching local immigration laws. Smuggled migrants do not enjoy any additional specific rights. The Protocol merely provides that States “shall take all appropriate measures” to preserve and protect the rights of smuggled migrants, including the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. States should also take appropriate measures to protect smuggled persons “against violence that may be inflicted upon them, whether by individuals or groups, by reason of being [smuggled]”.

The two protocols also include specific articles (Article 19 of the Protocol against Smuggling and Article 14.1 of the Protocol against Trafficking), designed to ensure that none of the protections afforded under other international law instruments is affected by the measures envisaged in the Protocols.

Children

All children regardless of their age, gender, sex or health status enjoy the same protections under international law as adults. However, due to their particular vulnerabilities, children enjoy additional protections regardless of whether they are refugees, asylum seekers, migrants (regular or irregular), stateless, or victims of trafficking or smuggling.

The overarching term “children on the move” is often used to refer to all children moving across international borders, regardless of the context and purpose of such movement. “Children on the move” is defined by the Inter-Agency Working Group on Children on the Move as:

“Those children moving for a variety of reasons, voluntarily or involuntarily, within or between countries, with or without their parents or other primary caregivers, and whose movement, while it may open up opportunities, might also place them at risk (or at an increased risk) of economic or sexual exploitation, abuse, neglect and violence.”²⁶

The primary international legal instrument that defines the rights of children on the move is the 1989 *United Nations Convention on the Rights of the Child* (CRC).

²⁶ International Organization for Migration, *Children on the Move*, 2013, available at http://publications.iom.int/system/files/pdf/children_on_the_move_15may.pdf (2013).

The CRC defines a child as any person under the age of 18. Under the UNCRC, “unaccompanied children” are children who have been separated from both parents and from other relatives and are not being cared for by an adult. “Separated children” have been separated from both parents, or from their legal or customary primary caregiver, but not necessarily from other adult relatives. Unaccompanied and separated children are particularly vulnerable to violence, exploitation, trafficking, and violations of their rights.

Under the CRC, the best interests of the child must be the primary consideration in all actions concerning a child. The CRC lists a series of rights that apply specifically to children on the move. Article 22 of the CRC entitles all refugee children and those seeking asylum, “whether unaccompanied or accompanied by his or her parents,” to “appropriate protection and humanitarian assistance”.

Other essential rights provided to children under the CRC include: the right to be free from discrimination (Article 2); the right to a nationality (Article 8); the right to family reunification (Article 10); the right to safety from all forms of violence (Article 19); the right to health (Article 24); the right to education (Article 28); the right to protection from sexual abuse (Article 34); and the right to protection from all forms of exploitation (Article 36).

Article 37 of the CRC also protects children from torture or other cruel, inhuman or degrading treatment or punishment and from unlawful and arbitrary deprivation of liberty. Nevertheless, many States continue to place unaccompanied and separated children in detention. Detention poses considerable risks to the physical and psychological safety of such children.

In addition to the CRC, the 1949 Geneva Conventions and customary international humanitarian law call for special protections to be put in place for children affected by conflict, including those on the move and separated from their families.²⁷ The International Labour Organization’s Child Labour Convention 182, one of eight ‘core’ conventions of the ILO, includes provisions that prohibit child trafficking.

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²⁷ ICRC, IHL Database, Rule 135, *Children*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule135.



Stephen Ryan / IFRC

The Fundamental Principles of the International Red Cross and Red Crescent Movement

Humanity The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.

Impartiality It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

Neutrality In order to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

Voluntary service It is a voluntary relief movement not prompted in any manner by desire for gain.

Unity There can be only one Red Cross or Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality The International Red Cross and Red Crescent Movement, in which all societies have equal status and share equal responsibilities and duties in helping each other, is worldwide.