THE INTERNATIONAL LEGAL FRAMEWORK OF MIGRATION

Duško Dimitrijević, PhD[1]
Institute of International Politics and Economics, Belgrade, Serbia

Abstract: Efforts to develop and codify uniform rules for different categories of migrants run into obstacles due to different approaches of states on all major status issues. In order to solve this problem, international community is increasingly working on the adoption of global migration policies in line with the international legal framework. The mentioned approach aims to avoid the existing inconsistency of legislative solutions and particularity of practice at the internal legal level. Given the mentioned circumstances, the author of this study will try to point out the importance of positive legal rules and principles from the corpus of international refugee law and human rights law for harmonizing the legal status of different categories of migrants.

Keywords*:* Migration, international law, emigrants, immigrants, refugees, asylum seekers.

INTRODUCTION

Legal rules and principles on migration are contained in various international legal sources of different legal force, which should be interpreted and applied fully and functionally. This is all the more so because in modern international relations there is a tendency to harmonize the status of various categories of migrants under the auspices of the United Nations (within ECOSOC, UNHCR, IOM, IRO and GFMD), or through certain regional organizations (EU, CE, OAU and OAS). It is clear from this that there is a prevailing opinion in the world that the migrant population should be institutionally assisted in enjoying fundamental human rights and freedoms. Given the differences between countries in the adoption and implementation of international rules on migrants, the United Nations and its competent bodies and organizations dealing with this issue often resort to various palliative measures, expanding the scope of their competences, without neglecting the existing rules in the field of legal protection. This situation contributes to the increased concern of the international community for the problem of migration, which is manifested in its efforts to find unique solutions for equal application

1 dimitrijevicd@diplomacy.bg.ac.rs

of international rules and for effective participation of the existing institutional system in humanitarian protection of various categories of migrant population (Chimni, 2001: 158; Lambert, 2009: 350; Goodwin Gill, 2016: 679). In that sense, the next part of the study will provide an overview and analysis of the basic legal acts of international law that regulate the field of migration.

LEGAL STATUS OF DIFFERENT CATEGORIES OF MIGRANTS

The term "emigration" is covered in international law by the broader concept of "migration". From the aspect of the home country, the people who leave it represent emigrants. The reasons for leaving the home country can be various. They are mainly reduced to economic reasons and reasons that include internal and international conflicts when people leaving their home country are transformed into refugees. At the international level, states have undertaken appropriate obligations regarding emigrants. Thus, for example, in the *Universal Declaration of Human Rights* of 1948, the provision of Article 13, paragraph 2, guarantees that: "Everyone has the right to leave any country, including his own, and to return to his country". The provision of Article 12, paragraph 2 of the *International Covenant on Civil and Political Rights* of 1966 guarantees the similar right along with certain clarification contained in paragraph 3 of the same Article where it states that: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". The *Convention on the Elimination of all forms of Racial Discrimination* of 1965 confirms in Article 5, the prohibition and elimination of racial discrimination in all its forms and guarantees equality before the law for everyone without distinction of race, national or ethnic origin. Special emphasis in the Convention in this regard is placed on the provision of point d) ii) where equality includes "the right to leave any country, including one's own, and to return to one's own country". At the regional level there are several international legal instruments governing the subject matter. Thus, on 13 December 1955 the Council of Europe (CE) adopted the *European Convention on Establishment*. According to this Convention, the citizens of the Contracting Parties are guaranteed an extended or permanent stay in their territories with a ban on their expulsion. It then provides equal treatment in terms of possession and exercise of private rights, legal and judicial protection and the right to pursue certain occupations. On 16 September 1963 the CE adopted the *Protocol 4 to the European Convention on Human Rights* of 1950, which, like the previous international legal instruments of universal character, provides that: "1) Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence; 2) Everyone shall be free to leave any country, including his own; 3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of *'ordre public'*, for the prevention of crime, for the protection of rights and freedoms of others; 4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposes in accordance with law and justified by the public interest in a democratic society". On 24 November 1977, the CE adopted the *European Convention on the Legal Status of Migrant Workers*. The Convention regulates the legal status of migrant workers, in particular the problems of employment, travel, residence and work permits, family reunification, working conditions, social security and social and medical assistance. On 3 May 1996, the CE adopted a revised version of the *European Social Charter.* This international legal instrument guarantees basic social and economic rights classified into four groups: 1) Rights to employment, training and equal opportunities; 2) Rights to health and social security and social protection; 3) Labour rights and, 4) Children's and family rights, the rights of migrant workers and their

families. Finally, the CE, together with UNESCO, adopted the *Convention on the Recognition of Qualifications concerning Higher Education in the European Region* on 11 April 1997 in Lisbon. It reaffirms international cooperation on a wide range of issues related to increasing academic and professional mobility and promoting best practices in assessing and recognizing academic credentials that include the academic rights of migrants. Under the auspices of the Organization of American States (OAS), in 1969 the member states adopted the *American Convention on Human Rights* (known as the Pact of San José). In Africa, the Organization of African Unity (OAU) adopted in 1981 the *African Charter on Human and Peoples' Rights* (known as the Banjul Charter). These instruments guarantee freedom of movement and the right to emigration. Based on the presented examples of universal and regional legal acts, it is clear that the international community has established certain standards and rules that apply *erga omnes* (Higgins, 1973: 341; Weis & Zimmermann, 1995: 74).

Unlike the term "emigration", the term "immigration" is another aspect of the concept of "migration". In international law, immigration is the process of voluntary entry into a country other than the country of origin for the purpose of permanent settlement. Persons who leave their home country for permanent residence in another country are immigrants for that other country. In international practice, "voluntary entry" and "permanent settlement" of immigrants are not fully specified, so immigration is considered "voluntary" when migrants enter another country regardless of the specific reason, while for "permanent settlement", what applies are the recipient countries' internal laws that have the discretion to exclude certain categories of foreigners from all or part of their territory (for example, diplomatic representatives, foreign students, traders and tourists). At the international level, however, there are definitions of principles and rules built into conventions and international treaties that are the relevant legal basis for states' behaviour regarding immigrants. The UN, through its specialized organizations and bodies, regulates the issue of protection of immigrants, and through their control mechanisms performs supervision over implementation of common standards. Existing international legal instruments generally guarantee the right to move or leave one's own country. However, there is no clear duty to establish the obligation of the receiving states to allow entry into the country. Protection of immigrants however, stems from the international protection of human rights. Thus, immigrants have, *inter alia*, the rights deriving from the right to life such as the right to work and the right to citizenship, etc. With regard to the protection of the lives of immigrants and their families, as well as their right to work and other human rights and freedoms, in 1990 the UN adopted the *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*. This Convention is the only international legal instrument that deals exclusively with the problems of migrants. The Convention applies to all migrant workers and members of their families, regardless of their legal status. States Parties are required to respect fundamental human rights during the entire migratory process, including preparation, departure, transit, and the eventual stay, residency, and employment in another country (Truong &. Gasper, 2011; Hune & Niessen, 1991: 133). Taking into account the present solutions in international legal practice, it is clear that states are not entirely free to ignore the freedoms and rights of immigrants, which are guaranteed by international law. In this regard, the states are trying to incorporate in their internal legislation provisions on respect of the rights of immigrants also predicting the special procedural rules on crossing state borders, entering the national territory and the acquisition of their citizenship. In international practice, there are some cases that cannot be subsumed under the term "immigrants". These cases, although reminiscent of immigration, does not take place within the framework of international legal standards. On the contrary, these cases are examples of violations of international law. It is about the so-called "illegal immigration" which includes all categories of illegal migratory movements (for example, crossing state borders with forged travel documents or without valid personal documents, etc.). Illegal immigration is often linked to the commission of serious crimes, such as coercion and torture, human trafficking and the

creation of the illegal labour market. The legislation of many countries prescribes restrictive measures regarding illegal immigration, including detention and deportation (Briggs, 2009: 177). This category of migrants is subject to the rules contained in human rights instruments. These rules can help first to ensure the fundamental rights of illegal immigrants in the process of applying restrictive measures by the receiving state, and second, in the process of legalizing their status if they meet all the necessary conditions.

REFUGEES AND OTHER SIMILAR CATEGORIES OF VULNERABLE PERSONS

The international refugee legal protection system does not have a single definition of the term "refugee". Particularization stems from different national legislations (Goodwin Gill, 1996: 4). After the Second World War, the International Refugee Organization (IRO) Constitution defined "refugees" as a special group of pre-war and war refugees. The Constitution includes a general clause according to which all persons outside their home country who could not or for valid reasons did not want to be placed under the protection of their country of origin (due to persecution on various grounds or fear based on reasonable grounds). The mentioned clause later refers to the basic elements of the term "refugee" contained in the Statute of the UNHCR which is a successor of the IRO. In the UNHCR Statute, "refugees" are persons who acquired that status before January 1, 1951. The Statute also includes other persons who are outside the country of their citizenship or persons who do not have the citizenship of the country of their previous residence, due to a well-founded fear of persecution for racial, religious, political and other reasons. It also includes persons who are not able to use the protection of the state whose citizenship they possess, i.e. if they do not have citizenship, they do not want to return to the country of their previous habitual residence for fear of persecution. Given the increased number of refugees after the Second World War, as well as the number of people whose status was legally undefined, the mandate of the UNHCR was interpreted flexibly in accordance with humanitarian needs and political guidelines of the UN General Assembly and the ECOSOC. The *Convention Relating to the Status of Refugees* is the most comprehensive international instrument governing refugee status. This instrument is based on Article 14 of the 1948 Universal Declaration of Human Rights, which guarantees the right to asylum. The Convention defines the notion "refugee" as a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. The main disadvantage of this Convention was the fact that it applied only to refugees due to events that occurred prior to 1 January 1951. This time limitation of the Convention was the result of the efforts of the state, at the time of the adoption of the Convention to limit their obligations to refugee situations that existed at the time, or to situations that could subsequently occur as a result of already existing situation. In addition to restriction *ratione temporis*, the Convention stipulated possibility of introducing *ratione loci* restriction (application of the Convention only to events occurred only in Europe or in Europe or elsewhere). Relatively few states appear to have availed themselves of this option. The passage of time and the emergence of new refugees from other geographical areas, led to the amendment of the provisions of the Convention, and the adoption of the *Protocol Relating to the Status of Refugees*. The Protocol made no changes to the substance of the Convention. It did remove the time limitation to events occurring before 1 January 1951 and any *ratione loci* limitation, except for those states that had opted for a re-

striction to events occurred only in Europe. Since parties to the Protocol have agree to be bound by the substantive provision of the Convention and the definition of refugee in that Convention as amended by the Protocol, it is possible for a state to accept obligations of the Convention by only ratifying the Protocol (Nygh & Blay, 2005: 287). In comparison with the Convention, the Protocol formulates the following criteria according to which "refugees" are determined, as follows: a) persons who are outside their country of origin or habitual residence; b) persons who are, owing to well-founded fear of being persecuted for reasons of race, religion, nationality of political opinion, unable or unwilling to avail themselves of the protection of that country, or to return there. The Convention excludes certain categories of persons from the term of "refugee" even though they qualify under the above quoted definition. They include categories of persons who have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, then the persons who have committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee, and finally, the persons who have been guilty of acts contrary to the purposes and principles of the UN. In addition to these categories of persons which are excluded from the categories of "refugees", the Convention stipulates even the exclusion of the categories who are already receiving protection or assistance from an agencies or bodies of the UN (for example, from the UN Relief and Works Agency for Palestinian Refugees in the Near East – UNRWA, or the UN Office for the Coordination of Humanitarian Affairs – OCHA which is different in comparison with protection and assistance of the UNHCR), as well as the categories who do not need international protection but may need international assistance (so-called *national refugees* in the host country that have equal status as its nationals). The Convention also included the provisions that define the legal status of refugees and their rights and obligations in the receiving state (where they have simple or lawful presence, lawful or habitual residence). Thus, in setting out the fundamental rights of refugees, the amended Convention stipulates a variety of treatments ranging from a "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally", self-employment and the practice of liberal professions, housing and public education, to "the most favourable treatment stipulates to nationals of a foreign country" and to "the same treatment as is accorded to nationals" (in the matter of elementary education, public relief, employment, labour and social security). The Convention confirms in favour of refugees the principles of non-discrimination and of freedom of religion. It exempts refugees from the requirement of reciprocity and from exceptional measures taken against nationals of the state of origin in time of war or other exceptional circumstances and from *cautio judicatum solvi.* It provides that the personal status of the refugee shall in principle be governed by the law of the state of his domicile or residence. Also, it sets rules in respect of administrative assistance, identity paper and travel documents. Certainly, one of the most important provisions of the Convention is the principle of *non-refoulment* which provides protection against expulsion or forced return of refugees to countries where their life or liberty would be endangered due to racial, religious, national or social affiliation or political opinion. The only exception to this general principle of international law would be cases where certain categories of persons represent security threat to the host country. Taking into account all the mentioned characteristics of the term "refugees", it is clear that the amended Convention represents the main international legal instrument when considering standards of treatment of these categories of migrant peoples. The Convention imposes on states a duty to cooperate with the UNHCR, in the exercise of its competences and, in particular, to facilitate its duty of supervising the application of the provisions of the Convention. Essentially, the amended Convention eliminated prior restrictions and that provided universal effect in international law. At the regional level, there are also relevant legal acts which create international obligations to the contracting parties to respect international standards in the area of refugee law. These instruments include *inter alia,* the OAU *Convention Governing the Specific Aspects of Refugee Problems in Africa* of 1969, which contains redaction of the

conventional term "refugee" which includes: "Any person compelled to leave his/her country 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" (Rwelamira, 1989: 557). In the American continent, under the framework of the OAS, two legal instruments were adopted on the same day (28 March 1954). First was the *Convention on Diplomatic Asylum* and the second was the *Convention on Territorial Asylum* (Caracas Convention). The notion of refugee is very similar to the concept laid down in the Convention Relating to the Status of Refugees. In Latin America, in 1984, the *Cartagena Declaration* was adopted, which is very important and well accepted in international practice and which has confirmed the principle of *non-refoulement,* the obligation to integrate refugees and undertake efforts to eradicate the causes of the refugee problem (Kugelmann, 2010: 2). At the European level, the CE has adopted important legal instruments governing refugee status, such as the *European Convention on Extradition* of 1957, *the European Agreement on the Abolition of Visas for Refugees* of 1959, the *European Convention on Social Security* of 1972, the *European Agreement relating to the Transfer of Responsibility for Refugees* of 1980, etc. The CE has also adopted certain acts that serve as guidelines for member states' treatment of different categories of migrants. On the other side, the EU itself has incorporated significant legal instruments on refugees into its legal system. It is well known that in the last decade of the 20th century, the EU adopted the *Maastricht Treaty,* which harmonized the rules on asylum and refugees. In the same period, the EU adopted two important documents: the *Dublin Convention Determining the State Responsibility for Examining Applications for Asylum lodged in one of the Member States of the European Communities* and the *Convention implementing the Schengen Agreement*. Perhaps the best examples of the EU working to harmonize refugee rules are the provision of Article 18 of the *Charter of Fundamental Rights* and the corresponding provisions of Articles 67-79 *Treaty on the Functioning of the EU* (TFEU). Also, the EU has adopted a number of Directives of secondary legal nature *(Soft Law),* in order to harmonize domestic law with international legal standards concerning the protection of the rights of refugees (Dimitrijević, 2017). A special group of vulnerable people similar to refugees are the so-called *de facto* refugees. Under the 1951 Convention with its 1967 Additional Protocol, *de facto* refugees are persons who are unable or unwilling to return to their countries of origin for political, racial, religious or other valid reasons. In international practice, a large number of asylum seekers who do not qualify as refugees fall into this category of subsidiary or complementary protection (Bacaian, 2011: 18).

In international law, asylum seekers are a special category of vulnerable persons similar to refugees. International law however, does not explicitly articulate the right to asylum, nor does it impose an obligation on states to grant asylum. States therefore have the possibility in their territory (including the area under their control) to provide asylum to aliens at risk of persecution or some serious danger (so-called territorial and extraterritorial or diplomatic asylum). Granting asylum is a sovereign right of each state and each state determines the conditions under which a foreign national can obtain such protection. Other countries are obliged to adhere to it. This is logical because the right to asylum is a human right guaranteed by the 1951 Convention and the *Declaration on Territorial Asylum* from 1967 which guarantee the right to seek asylum but leave it to the discretion of states to grant that request. Given that the UNHCR High Commissioner has a mandate to monitor the implementation of international obligations regarding the exercise of this right, in his opinion, the status of asylum seeker can be compared with the status of individuals who have sought international protection and whose refugee claims have not yet been resolved. As the resolution of refugee status can take a long time, this category of persons enjoys subsidiary or complementary protection that is fully equated with asylum. This status should be sufficient guarantee that individuals will not be deported to another country where their lives could be in danger or where they would be subjected to severe torture (Dimitrijević, Popović, Papić & Petrović, 2007: 181-184).

A particularly vulnerable category for which there is no special legal regime in international law is internally displaced persons. At the international level, there are *Guiding Principles on Internal Displacement* from 1998 that resulted from the work of the Commission on Human Rights, the General Assembly and representatives of the Secretary-General of the UN. Thus, internally displaced persons include: "Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border". As internally displaced persons do not have refugee status under the Refugee Convention, they should receive primary assistance from their state. This obligation stems from sovereignty and the principle of non-intervention. The responsibility of the state for its citizens exists even if the state authorities do not want or cannot protect a person who belongs to this category (Goodwin Gill, 1996: 264).

CONCLUSION

This paper focuses on the existing international legal framework for different categories of migrants (emigrants, immigrants, refugees, asylum seekers, internally displaced persons). The analysis indicates certain legal inconsistencies at the regional and national levels. These inconsistencies arise from different national interests of the states, which in international practice are manifested through the mass acceptance of international obligations from international instruments (as is the case with the Convention and Protocol Relating to the Status of Refugees), or through their sporadic takeover (for example in the case of the UN Convention on the Protection of All Migrant Workers and Members of Their Families). In order to overcome this inconsistent approach, states need to adopt regulations that harmonize domestic legislation with international legal rules and principles. Also, in order to harmonize different national interests, states need to harmonize their internal policies with regional and global migration policies. In that sense, it is understood that states retain a certain scope of discretionary powers related to the protection of their vital national interests (in relation to national security, public order, public health, the proper administration of justice, economy, etc.). The author believes that in this way it would be possible to establish a set of guidelines that would contribute to the correct interpretation of the international legal framework on migrants, as well as its more efficient implementation in state practice. Finally, in an effort to reconcile their national interests, states should develop additional forms of institutional cooperation and mutual consultation under the auspices of the United Nations and its specialized bodies and agencies (UNHCR, IOM, IRO) or within certain regional organizations (EU, CE, OAU and OAS). According to the authors, this would enable the consistent application of international legal standards, which is one of the key preconditions for achieving greater efficiency and effectiveness of protection mechanisms for different categories of the migrant population.

REFERENCES

1. Bacaian, L.E. (2011). *The Protection of Refugees and their Right to Seek Asylum in the European Union*, Genève: Institut Eurpéen de'l Université de Genève.
2. Briggs, V.M. (2009). "The State of U.S. Immigration Policy: The Quandary of Economic Methodology and the Relevance of Economic Research to Know", *Journal of Law, Economics and Policy,* 5, (1), 177-193.

3. Chimni, B.S. (2001). "Reforming the international refugee regime: a dialogic model", Journal of Refugee Studies, 14 (2), 151-168.

4. Dimitrijević, D. (2017). "Migrant crisis – safety challenge for the Republic of Serbia", in: Slobodan Janković, Zoran Pavlović, Dragana Dabić (eds.), *Migration as security challenge: West Balkans route,* Belgrade: Institute of International Politics and Economics.

5. Dimitrijević, V. et al. (2007), *Međunarodno pravo ljudskih prava,* Beograd: Službeni glasnik.

6. Goodwin Gill, G. (1996). *The Refugee in International Law*, Oxford.

7. Goodwin Gill, G. (2016). "The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change", *International Journal of Refugee Law*, 28(4), 679.

8. Higgins, R. (1973). "The Right in International Law of an Individual to Enter, Stay and Leave a Country", *International Affairs,* 1973, 49, 341-357.

9. Hune, S., Niessen, J. (1991), "The First UN Convention on Migrant Workers", *Netherlands Quarterly of Human Rights,* 9, 133.

10. Jenny, R.K. (1984). "Current Trends and Developments: The Changing Character of Contemporary Migration", International Migration, 22 (4) 388.

11. Kugelmann, D. (2010). "Refugees", in: Max Planck Encyclopedia of Public International Law, Oxford: University Press.

12. Lambert, H. (2009). "International refugee law: dominant and emerging approaches", in: David Armstrong (ed.), Routledge Handbook of International Law. New York: Rutledge.

13. Nygh, P., Blay, S. (2005), "Refugees", in: Sam Blay, Ryszard Piotrowicz, Martin Tsamenyi (eds.), *Public International Law, an Australian Perspective,* Oxford: University Press, 2005.

14. Rwelamira, M.R. (1989). "Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa", *International Refugee Law,* 1(4), 577-561.

15. Truong, T.D., Gasper, D. (2011), *Transnational Migration and Human Security: The Migration-Development-Security Nexus*, Springer, Berlin.

16. Weis, P., Zimmermann, A. (1995). "Emigration", in. R. Bernhardt (ed.), *Encyclopedia of Public International Law,* Amsterdam: Elsevier, 1995, 2, 74-78.