

## Migration

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### ABSTRACT

Migration is inherent in human history. It is what we name a change of habitual residence or temporary residence by natural persons. It can be permanent or temporary. Its purpose may be, *inter alia*, tourism, education, treatment, pilgrimage, or earning money. Of course, also in this case we encounter a number of definitions that define a narrower or broader concept of migration. These forms include emigration, immigration, re-emigration, refugeehood, evacuation, and repatriation. The issue of admitting foreigners to a territory is, as a rule, regulated by national law. The freedom of action of states is, however, to some extent limited by international agreements.

International law pays particular attention to refugees. This matter is regulated, in particular, by the Geneva Convention relating to the Status of Refugees of 1951, amended by the New York Protocol of 1967. These issues are also tackled in the acts of international humanitarian law, including the Fourth Geneva Convention relative to the protection of civilian persons in time of war of 1949 and the First Additional Protocol of 1977 to the Geneva Conventions of 1949. Respective legal acts have been also adopted by the European Union and include Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted and Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Migrant workers are another form of migrants, whose status is regulated by the conventions of the International Labour Organization and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990. In Europe—within the scope of the Council of Europe—this issue is regulated by the European Convention on the Legal Status of Migrant Workers of 1977.

Other acts of international law, including universal treaties such as International Covenant on Civil and Political Rights of 1966, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and UN Convention on the Rights of the Child of 1989 refer partly to some aspects of the status of foreigners. Regional acts such as the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights also refer to these issues.

The international community has established a number of institutions handling the status and rights of migrants as a whole and their individual types. These institutions include the UN High Commissioner for Refugees and the UN Special Rapporteur on the Human Rights of Migrants and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, which is a treaty body of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

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**KEYWORDS**

migrants, refugees, states, treaties

Migration is defined as a change of place of residence or temporary stay by natural persons. It may be external, when it involves crossing state borders, or internal, when it takes place within one country. In this Chapter, we will discuss the first of these, i.e., external migration. It may be permanent or temporary, and its purpose may be, *inter alia*, tourism, education, treatment, pilgrimage, or earning money. Other forms of migration include, in particular, emigration (departure), immigration (arrival), re-emigration (return from migration), refugeehood, evacuation (removal of given persons by the state to avoid a threat), and repatriation (permanent return of former citizens of a given country from a foreign territory). As Robert Tabaszewski emphasizes: “The decision to emigrate is made voluntarily by emigrants and can be withdrawn at any time, which means that migrants can, in principle, freely return to their home country. The lack of an unambiguous definition of a migrant in the binding acts of international law makes the protection granted to this category of people ambivalent and is largely determined by national legislation, including adopted immigration procedures. Hence, we can distinguish *de jure* migrants and *de facto* migrants.”<sup>1</sup>

Refugeehood is a special form of migration. As Barbara Mikołajczyk points out, “refugees are foreigners coming from another country and applying for protection because of persecution, wars and various types of catastrophes, although according to international law the concept of a refugee is narrower and is related to the institution of asylum.”<sup>2</sup> On the other hand, Dominika Cieślukowska emphasizes that refugeehood should be defined as: “The process of changing the place of permanent residence (usual residence) in the event of a threat of persecution. Contrary to migration, it does not take place entirely voluntarily, and is the result of the political and social situation in a given place (most often but not limited to armed conflicts).”<sup>3</sup> The author quotes the division of refugeehood into: “external—occurs when a person forced by the situation leaves the state of which he or she is a citizen and resigns from its protection, recognizing that the state authorities have not duly fulfilled their obligation to provide protection” and “internal—when a person forced by the situation leaves the place of permanent residence / stay, but does not cross the border recognized as international.”<sup>4</sup> She adds that:

“In order to avoid legal controversy, it is postulated to use the terms ‘internal displacement’ or ‘internal resettlement’ instead of internal refugeehood, because according to the letter of the law (e.g., the Geneva Convention)<sup>5</sup> international protection applies only to external refugeehood. However,

1 Tabaszewski, 2020, p. 251.

2 Mikołajczyk, 2014, p. 517. See also Owen, 2020, pp. 36–44.

3 Cieślukowska, 2022.

4 Ibid.

5 Convention relating to the Status of Refugees, 1951 (189 U.N.T.S. 137).

the practical activities of organizations dealing with the issues (e.g., the United Nations High Commissioner for Refugees) usually cover both types of refugeehood.”<sup>6</sup>

The definition of a refugee is provided in the Geneva Convention relating to the Status of Refugees of 1951. Pursuant to Art. 1(A)(2) of the Convention, the term “refugee” applies to any person who:

“as a result of events occurring before 1 January 1951 and owing to 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.”

Moreover, this provision states that the status under the Convention is also granted to any other person who has been or could be recognized as a refugee on the basis of other international agreements enumerated in the document. The definition referred to in this Convention is slightly modified—by removing time and territorial limitations with regard to circumstances that may form the basis for recognition as a refugee—in Art. 1 of the Protocol relating to the Status of Refugees of 1967 (New York Protocol).<sup>7</sup>

Not all people commonly referred to as refugees have this status under the Geneva Convention. As R. Tabaszewski points out:

“Therefore, taking into account the legal basis, the following types of refugees can be distinguished: (1) conventional refugees (based on the 1951 Convention); (2) mandated refugees (under the care of UNHCR<sup>8</sup>); (3) de facto refugees (due to the existing threat, they do not want to apply for the refugee status); (4) internal refugees (within the limits of national jurisdiction); (5) environmental refugees who, due to natural disasters, were objectively forced to leave their homes.”<sup>9</sup>

The European Union’s belief regarding its external obligations in this area and its own needs is expressed in the definition of the refugee provided currently in Art. 2(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for

6 Cieřlikowska, 2022.

7 Protocol Relating to the Status of Refugees, 1967 (606 U.N.T.S. 267). United Nations High Commissioner for Refugees. 1967.

8 United Nations High Commissioner for Refugees.

9 Tabaszewski, 2020, p. 254.

persons eligible for subsidiary protection, and for the content of the protection granted.<sup>10</sup> Pursuant to this provision, ‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it (...). “Some exclusions from the refugee status despite meeting the premises defined in Art. 2(d) of the directive are provided for in its Art. 12.”<sup>11</sup>

Persons staying on the territory of a given country can be divided into citizens of that country, foreigners who are citizens of other countries, and persons who do not have citizenship of any country, i.e., apatrides (stateless persons). As a rule, the citizens of the given state stay on its territory except for special cases, while foreigners stay within that state temporarily. However, there may be cases where a foreigner has the right of permanent residence in a given state.

Citizenship is a special, permanent legal bond that connects the state with a natural person. As Remigiusz Bierzanek and Janusz Symonides point out:

“Citizenship is the basis on which all the rights and obligations of an individual towards the state are based. It causes a number of significant consequences at the international level. A state with which an individual has a permanent legal relationship exercises diplomatic and consular protection over such individual, and in some cases, when it was obliged to prevent violations of the law, it is also responsible for the actions of such individual. It is a universal obligation for the state to admit its own citizens to its territory.”<sup>12</sup>

Although all persons staying in the territory of a given state, both citizens and foreigners, are subject to the authority and law of that state, there are certain exclusions in this respect, concerning, *inter alia*, diplomats. As a rule, the treatment of foreigners remains a national competence of the states, governed by national law. However, states conclude international agreements regarding the treatment of their citizens in other countries and, consequently, the treatment of foreigners. A certain international law practice has developed in this respect. As Wojciech Góralczyk and Stefan Sawicki indicate, the main systems include:

1. national treatment (general equality), which provides for granting foreigners, in principle, the scope of civil rights enjoyed by citizens of that state;

10 OJ L 337, 20.12.2011, p. 9.

11 Karska, 2020, p. 11–12. For historical solutions see Fitzmaurice, 2013; Holborn, 1956; Holborn, 1938; Karska, 2017; Simpson, 1938, pp. 607–628.

12 Bierzanek and Symonides, 1998, pp. 260–261.

2. special treatment (specific equality), under which foreigners are granted only certain rights in specific areas, which are inherent in that country to its citizens;
3. highest preferential treatment, i.e., granting citizens of another country the scope of rights enjoyed by nationals of any other third country.<sup>13</sup>

When defining the status of foreigners on their territory, states often refer to the principle of reciprocity, according to which a given country grants certain rights to citizens of another specific country only if the latter provides the same rights to the citizens of the former. These rights may include issues of trade, settlement, or legal issues. These issues may be regulated by acts of national law or international agreements. It should also be noted that the Geneva Convention relating to the Status of Refugees of 1951 formulates certain limitations with regard to the applicability of the principle of reciprocity in relation to refugees. Pursuant to Art. 7 (1) of the Convention, except where this Convention contains more favorable provisions, a State shall accord to refugees the same treatment as is accorded to aliens generally; (2) after a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the State; (3) each State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State; (4) the State shall consider favorably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to Paras. 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfill the conditions provided for in Paras. 2 and 3; (5) the provisions of Paras. 2 and 3 apply both to the rights and benefits referred to in Articles 13 (Movable and immovable property), 18 (Self-employment), 19 (Liberal professions), 21 (Housing), and 22 (Public education) of the Convention and to rights and benefits for which this Convention does not provide.

The state may expel or deport, i.e., forcibly return to the border, a foreigner who has violated the law or whose further stay threatens the interests or security of that state. This right should be limited by the provisions of international law that a given state is bound by. It should also be applied in a non-discriminatory manner.<sup>14</sup>

The state has full competence to regulate international passenger traffic, which, however, is limited at their will by the concluded international agreements. According to the definition by W. Góralczyk and S. Sawicki:

“International passenger traffic should be defined as the movement of persons combined with the crossing of the border or state borders. The international movement of persons includes temporary or permanent transfers of individuals, and includes leaving the territory of a state by its own nationals as well as

<sup>13</sup> Góralczyk and Sawicki, 2020, p. 287.

<sup>14</sup> Ibid., p. 288.

the admission of foreigners to the territory of the state. This movement takes place by voluntarily moving across state borders under normal, peaceful conditions. Therefore, its scope does not include such phenomena as movement of troops during the war or forced displacement of people.”<sup>15</sup>

These authors also add that:

“The state, by virtue of its sovereign power, may itself establish the rules for crossing its borders. Therefore, it may pursue a policy of freedom or restriction of personal traffic, set conditions for its own citizens to leave its territory and for foreigners to be admitted to its territory. A state’s discretion in this area may be limited by the provisions of international agreements binding that state. There is now a large number of multilateral and bilateral agreements aimed at increasing the freedom of the international movement of people (...).”<sup>16</sup>

An expression of this tendency is, *inter alia*, free movement of persons, as one of the freedoms operating within the European Union, and the abolition of border controls between most European Union Member States.<sup>17</sup>

As R. Bierzanek and J. Symonides point out:

“No state is obliged to admit foreigners—people who do not have its citizenship—to its territory. It may prohibit access, and may set conditions whose fulfillment determines the consent. In the modern world there is, in principle, no state that would admit all foreigners into its territory without any restrictions and conditions or would not let anyone in. Certain restrictions on the freedom of action in this respect may result from bilateral and multilateral international agreements that states conclude on matters related to the movement of persons. An examination of the practice and internal legislation leads to the conclusion that while tourists obtain permission to enter relatively easily, in the case of economic immigration this consent is granted selectively.”<sup>18</sup>

The issues associated with migration are regulated by many international law agreements. Their creation was significantly accelerated as a result of migration processes that were the result of the World War I and its consequences, including specifically the Russian Revolution. The related mass movements of people made it necessary to protect them, and at the same time, a need arose to control and record the movements of individual natural persons. In 1921, as part of the League of Nations, the office of

15 Ibid.

16 Ibid. See also Perruchoud, 2012.

17 See Socha, 2005, pp. 66–70.

18 Bierzanek and Symonides, 1998, p. 265.

the High Commissioner for Refugees was established, headed by the Norwegian polar explorer Fridtjof Nansen. He was the creator of the so-called Nansen passports, i.e., special documents issued to stateless persons. The Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees (89 LNTS 47) was signed in 1926, followed in 1928 by the Arrangement Relating to the Legal Status of Russian and Armenian Refugees (89 LNTS 53). Following F. Nansen's death, the Nansen International Office for Refugees operated from 1930, to be replaced in 1938 by the Intergovernmental Committee on Refugees. Subsequent events that preceded World War II, and in particular the mass persecution of the Jewish population, led to the conclusion of the 1933 Convention Relating to the International Status of Refugees, the 1936 Provisional Protocol Relating to Refugees Arriving from Germany, and the 1938 Convention Relating to the Status of Refugees Arriving from Germany (192 LNTS 59) and the Additional Protocol of 1939 to the Interim Agreement and the Conventions of 1936 and 1938 on Refugees Arriving from Germany (198 LNTS 141). The United Nations Relief and Rehabilitation Administration was established during World War II, which operated in the years 1943–1947. In 1946, the Constitution of the International Refugee Organization (18 UNTS 3) was adopted, which in 1948 became one of the specialized organizations of the United Nations system. In 1950 it was replaced by a UN agency, the UN High Commissioner for Refugees (UNHCR), which is elected by the UN General Assembly for a five-year term at the request of the UN Secretary-General. UNHCR is mandated to aid and protect refugees, forcibly displaced communities, and stateless people, and to assist in their voluntary repatriation, local integration, or resettlement to a third country.<sup>19</sup>

Wider protection—as opposed to migrants at large—is granted to their special category, i.e., refugees. This is related to some extent to the forced circumstances of their relocation to other countries, i.e., the direct threat of persecution or death, as well as the objective source of the threat (war, riots, actions of undemocratic regimes, etc.). As already indicated, the concept of a refugee is often invoked together with the concept of asylum, one of the oldest institutions of international law, the rationale of which is to provide shelter to a person fleeing persecution.<sup>20</sup> B. Mikołajczyk emphasizes that it is defined in three ways. First: “Asylum is regarded as one of the forms (next to refugee status) of protection granted to foreigners to which the UN General Assembly declaration on territorial asylum of 1967 refers.”<sup>21</sup> Second:

“Asylum is the equivalent of broadly understood international protection granted to people seeking refuge from persecution outside their country of origin, in accordance with Art. 14 (1) of the Universal Declaration of Human

19 See Omelaniuk, 2012.

20 Karska, 2020, p. 12; Mikołajczyk, 2014, p. 517; Tabaszewski, 2020, p. 252. For the issue of asylum see Wieruszewski, 2014, pp 35–37; Kotzeva, Murray and Tam, 2008, pp. 5–39.

21 Mikołajczyk, 2014, p. 517.

Rights of 1948 formulating the right to seek asylum: ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’”<sup>22</sup>

B. Mikołajczyk rightly notes that: “In practice, however, most often asylum means the status of a refugee within the meaning of the Geneva Convention relating to the Status of Refugees of 1951 and the New York Protocol of 1967. The terms asylum seeker and refugee are often used interchangeably, however, according to the Geneva Convention, a refugee is only a person who meets the criteria set out therein.”<sup>23</sup>

The issue of the legal nature of the stay of foreigners on the territory of a country other than their own country is also regulated by the International Covenant on Civil and Political Rights of 1966 (999 UNTS 171). Such a state has a right to expel a foreigner however only subject to certain conditions. Pursuant to Art. 13 of that treaty:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

This matter is also regulated in the acts concerning detailed regulations referring to specific actions or groups of people. For example, under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (1465 UNTS 65), Art. 3(1) specifies that: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Art. 3(2) additionally specifies that:

“For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

22 Ibid. It should be also stressed that—pursuant to Art. 14(2) of this document—“This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.” The 1948 Universal Declaration of Human Rights [A / RES / 217 (III)], being a resolution of the United Nations General Assembly, is not formally a legally binding document. However, the doctrine emphasizes that it reflects the norms of common law and / or general principles of law. Czapliński and Wyrozum-ska, 2004, pp. 431–432.

23 Mikołajczyk, 2014, p. 517.



The UN Convention on the Rights of the Child of 1989 (1577 UNTS 3) also refers to this matter, and in accordance with Art. 22(1) of that treaty:

“States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

It was added in Art. 22(2) that:

“For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent inter-governmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

These matters are also in the center of interest of regional systems, including the European Union’s legislation. The Charter of Fundamental Rights of the European Union<sup>24</sup> guarantees the right to asylum. Art. 18 thereof stipulates that:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of (...) 1951 and the Protocol of (...) 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.”

This means that a reference was made to other legal acts that shall apply in that case. Moreover, Art. 19 of the Charter stipulates that: “(1) Collective expulsions are prohibited. (2) No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”<sup>25</sup>

24 OJ C 326, 26.10.2012, p. 391.

25 Hurvitz, 2009, pp. 205, 210, 247–249.

These issues are also regulated in EU secondary legislation. These legal acts include, *inter alia*, Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person<sup>26</sup> and—already mentioned—Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.<sup>27</sup> The EU institutions also issued a general legal act in the case of occurrence of specific individual situations related to mass influx of displaced persons. This is Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, i.e., the Temporary Protection Directive (TPD).<sup>28</sup> This Directive served as a basis to issue, *inter alia*—adopted unanimously—Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.<sup>29</sup> Pursuant to these regulations:

“Individuals who receive TPD status will be granted the following protections and rights: (1) Residence Authorization—issued for an initial one year; Renewal eligibility and details have yet to be announced; (2) Work Authorization / Access to Labour Market—in line with the duration of the individual’s residence authorization; (3) Social Welfare Assistance; (4) Access to Medical System; (5) Access to Other Government Assistance Programs; (6) Study Permission for Student-Aged Individuals—note that TPD will also confer the right to legal guardianship and access to the local education system for unaccompanied children and teenagers.”<sup>30</sup>

Migrations are also a consequence of armed conflicts. For this reason, the international agreements in the area of international humanitarian law of armed conflicts refer to them as well.<sup>31</sup> The Fourth Geneva Convention relative to the protection of civilian persons in time of war of 1949 (75 UNTS 287) uses the term “refugee,” although it does not define it. Moreover, Art. 73 of the additional First Protocol of 1977 to the

26 OJ L 180, 29.6.2013, p. 31.

27 OJ L 337, 20.12.2011, p. 9.

28 OJ L 212, 7.8.2001, p. 12.

29 OJ L 71, 4.3.2022, p. 1.

30 Newland Chase, 2022.

31 The issue of states and natural persons for the breach of the provisions of international humanitarian law is discussed *inter alia* in Karska, 2009; Socha, 2002–2003.

Geneva Conventions of 1949, and relating to the protection of victims of international armed conflicts (1125 UNTS 3) stipulates that:

“Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of (...) the Fourth [Geneva] Convention, in all circumstances and without any adverse distinction.”

The primary act of international law regulating the issue of refugees is the Geneva Convention relating to the Status of Refugees of 1951 including the New York Protocol of 1967. These acts regulate the rights and obligations of refugees, the procedure of obtaining refugee status, and the positive and negative obligations of the state in respect to refugees.<sup>32</sup>

Refugee status is not granted in an irrevocable manner. Pursuant to Art. 1(C) of the Convention, it ceases to apply in respect to a person when: (1) he has voluntarily re-availed himself of the protection of the country of his nationality; or (2) having lost his nationality, he has voluntarily reacquired it; or (3) he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) he can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

In accordance with Art. 1(F) of the Convention, refugee status may be denied to any person with respect to whom there are serious reasons for considering that: (a) he has 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; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Art. 2 quotes the obvious statement that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Refugees should be treated in non-discriminatory manner. Art. 3 stipulates that the states shall apply the provisions of the Convention to refugees without discrimination as to race, religion, or country of origin. Moreover, in accordance with Art. 4, States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

The Convention also refers to the juridical status of a refugee, which is regulated in Chapter II (Arts. 12–16). In respect to the personal status of a refugee, (1) it shall

32 See Chetail, 2012, pp. 56–92.

be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence; (2) rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee. Subsequently, in regard to movable and immovable property, the Convention stipulates that States shall accord to a refugee treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property. Therefore, in this case we are dealing with a specific clause of most preferential treatment. It also regulates the issue of artistic rights and industrial property. In respect of the protection of industrial property, such as inventions, designs or models, trademarks, and trade names, and of rights in literary, artistic, and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence. The Convention also contains a reference to the right of association of a refugee. As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country, in the same circumstances. In respect to access to courts, (1) a refugee shall have free access to the courts of law on the territory of all States; (2) a refugee shall enjoy in the State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*; and (3) a refugee shall be accorded in the matters referred to in Para. 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III (Arts. 17–19) stipulates further the right of refugees to gainful employment. States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the State concerned, or who fulfils one of the following conditions: (a) He has completed three years' residence in the country; (b) he has a spouse possessing the nationality of the country of residence (a refugee may not invoke the benefit of this provision if he has abandoned his spouse); and (c) he has one or more children possessing the nationality of the country of residence. States shall consider assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees

who have entered their territory pursuant to programs of labor recruitment or under immigration schemes. Moreover, the States shall accord to a refugee lawfully in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts, and commerce and to establish commercial and industrial companies. The Convention also refers to the issue of practising liberal professions by the refugees. States shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances. The Convention further stipulates that the States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV (Arts. 20–24) of the Convention also regulates the welfare of a refugee. It contains some elements of special treatment formula (detailed equality) and highest preferential treatment formula. For example, where a rationing system exists that applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals. Subsequently, as regards housing, the States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances. States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education. States shall accord to refugees treatment as favorable as possible, and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas, and degrees, the remission of fees and charges, and the award of scholarships. States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals. States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters; (a) in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on homework, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining; (b) social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities, and any other contingency that, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) There may be appropriate arrangements for the

maintenance of acquired rights and rights in course of acquisition; and (ii) national laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits that are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the State. Moreover, the States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

Chapter V (Arts. 25–34) refers to administrative measures. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority. The authority or authorities mentioned above shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities and shall be given credence in the absence of proof to the contrary. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services. Each State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances. States shall issue identity papers to any refugee in their territory who does not possess a valid travel document. States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require. States may issue such a travel document to any other refugee in their territory. Moreover, the States shall not impose upon refugees duties, charges, or taxes, of any description whatsoever, other or higher than those that are or may be levied on their nationals in similar situations. A State shall, in conformity with its laws and regulations, permit refugees to transfer assets that they have brought into its territory to another country where they have been admitted for the purposes of resettlement. A State also shall consider the application of refugees for permission to transfer assets wherever they may be and that are necessary for their resettlement in another country to which they have been admitted. States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Art. 1 of the Convention, enter or are present in their territory without authorization, provided

they present themselves without delay to the authorities and show good cause for their illegal entry or presence. This means that the refugee has the right to cross the border between the state in which he is threatened and the first safe state. The refugee must cross borders between successive safe states in accordance with national and international law regulating the rules of international passenger traffic, and it may be legally liable for their violation. An individual's fulfillment or potential fulfillment of the criteria set out in Art. 1 of the Convention does not constitute grounds for illegal border crossing between safe countries, or more precisely, does not make such an act legal or non-punishable. States may, of course, in such cases elect not to punish such a person on general terms. States shall not apply to the movements of such refugees who managed to enter their territory, restrictions other than those which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. States shall allow such a refugee a reasonable period within which to seek legal admission into another country. States reserve the right to apply during that period such internal measures, as they may deem necessary. No State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>33</sup> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. Moreover, the States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

As R. Tabaszewski points out:

"In practice, states granted (...) broader protection than it resulted from the provisions of the Convention. This is called subsidiary protection, i.e., protection granted to a foreigner who does not meet the conventional conditions for

33 The principle of non-refoulement is also based on the provisions of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) of 1950 (ETS No. 5, as amended), specifically its Art. 3. The scope of that protection is broader than envisaged in the Geneva Convention of 1951. See Kapelańska-Pręgowska, 2017.

granting refugee status, but nonetheless granted in the event that his return to the country of origin may expose him to a real risk of suffering serious harm (...), has not been regulated in a single convention-type document.”<sup>34</sup>

International law also regulates the issues related to migrant workers, who should be distinguished from refugees. The first regulations in this area were drafted by the International Labour Organization (ILO). These legal acts include the Migration for Employment Convention of 1939 (ILO No. 66),<sup>35</sup> the Migration for Employment Convention (Revised) of 1949 (ILO No. 97), and the Migrant Workers (Supplementary Provisions) Convention of 1975 (ILO No. 143). These regulations deal with the recruitment, job agency, and working conditions of migrant workers. In turn, the European Convention on the Legal Status of Migrant Workers (ETS No. 093) was adopted within the framework of the Council of Europe in 1977. Pursuant to Article 1(1), for the purpose of this Convention, the term “migrant worker” shall mean a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment. The Conventions of ILO and the Council of Europe adopt as a rule that a foreigner (migrant worker) needs to obtain a permit for the entry and employment on the territory of the given state unless individual consent is not required from the citizens of certain countries or other groups of people. A Consultative Committee was created to examine Parties’ reports on the application of the European Convention. Except for some Western Europe countries, the European Convention was signed only by Albania, Moldavia, and Ukraine. Another act of international law regulating this matter is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (2220 UNTS 3).<sup>36</sup> For the purposes of the Convention, the term “migrant worker” refers to 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. Pursuant to Art. 5 thereof, migrant workers and members of their families: (a) are considered as documented or in a regular situation if they are authorized to enter, to stay, and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; and (b) are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in Para. (a). States undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, color, language, religion or conviction, political or other opinion, national, ethnic, or social origin, nationality, age, economic position, property,

34 Tabaszewski, 2020, p. 254.

35 This is an already withdrawn instrument made under the decision of the International Labour Conference at its 88th Session in 2000.

36 International Labour Office, 2003; World Council of Churches, 1991.



marital status, birth, or other status. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law and are necessary to protect national security, public order (“*ordre public*”), public health or morals, or the rights and freedoms of others and, are consistent with the other rights recognized in the present part of the Convention. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin. The right to life of migrant workers and members of their families shall be protected by law. The Convention established another treaty body to monitor the execution of human rights insofar as defined therein. This body is the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Its powers include the review of periodical reports of the states. The Committee also may accept inter-state and individual complaints. The Convention has been signed so far by less than half of the states.<sup>37</sup>

The UN Special Rapporteur on the Human Rights of Migrants operates within the scope of the Special Procedures of the UN Human Rights Council. This mandate was created in 1999 by the Commission on Human Rights, pursuant to Resolution 1999/44. The task of the Special Rapporteur is to examine ways and means to overcome the obstacles to the full and effective protection of the human rights of all migrants at all stages of migration and elaborate recommendations on strengthening the promotion, protection, and implementation of the human rights of all migrants. The mandate of the Special Rapporteur on the Human Rights of Migrants covers all countries, irrespective of whether a State has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990.<sup>38</sup>

37 See Cholewiński, 2012.

38 For more on the mandates operating within the scope of UN Special Procedures, see, e.g., Rattan and Rattan, 2018, pp. 217–220, 226–227; Ramcharan, 2015, pp. 136–137, 161–162, 207–210; Tabaszewski, 2020, pp. 257–258.

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