

5. IRREGULAR MIGRATION, HUMAN TRAFFICKING AND REFUGEES

Irregular migration poses multiple challenges to countries of origin, transit and destination, as well as to migrants themselves. Migrants in irregular situation are particularly vulnerable to discrimination, exploitation and abuse. Such migrants are also in danger of being exploited by crime organizations involved in human trafficking and migrant smuggling—crimes that constitute a serious violation of the human rights of its victims. Refugees and asylum seekers, despite the protection granted by international law, also face many difficulties in their migratory process, especially as the process of obtaining refugee status has become increasingly complicated, and it is more and more difficult to find countries willing to receive refugees.

This chapter provides information on the magnitude of undocumented or irregular migration, as well as estimates of refugees and victims of human trafficking. It also examines Government concerns about irregular migration, and discusses major conventions with respect to human trafficking, and refugees and asylum seekers.

5.1. IRREGULAR MIGRATION

Information about undocumented migrants or migrants in irregular situation is often difficult to obtain or quantify. Estimates vary greatly from one source to another. For example, the International Organization for Migration (IOM) has estimated that 10–15 per cent of the world's 214 million international migrants in 2010 were undocumented (IOM, 2013a). The United Nations Development Programme (UNDP) has estimated that around one third of all migration flows in countries in less developed regions were undocumented (UNDP, 2009). Both the United Nations and the OECD include undocumented migrants in their estimation of migrant stocks, but the exact magnitude of migrants in irregular situation remains unknown.

The United States of America is one of the few countries with relatively accurate estimates of undocumented migrants. Using a “residual methodology”, the number of undocumented migrants in the United States of America was estimated at 11.7 million in March 2012 (Pew Research Center, 2013). For the 27 countries of the European Union in 2008, the CLANDESTINO Project estimated 1.9–3.8 million undocumented migrants (CLANDESTINO, 2009). In Australia, the Government estimated that in 2012 about 61,000 persons were in irregular situation (Australia, Department of Immigration and Border Protection, 2013). The Federal Migration Service of the Russian Federation estimated the number of undocumented migrants at 3 million in 2013 (RIA Novosti, 2013), whereas the OECD had estimated a total of 5–6 million undocumented migrants in Russia in 2012 (OECD, 2012).

In recent years, the international community has paid greater attention to the plight of migrants in irregular situation, and called upon Governments to address this issue. For example, at the 2010 Global Forum on Migration and Development (GFMD), the Office of the United Nations High Commissioner for Human Rights and the Global Migration Group issued a joint statement expressing concern about the human rights of migrants in irregular situation and called

for an end to their criminalization (United Nations, 2012). The following year, in 2011, the GFMD noted the importance of specific regional dynamics of irregular migration from and to countries in less developed regions, and stressed that further examination of regional differentials in irregular migration was needed (GFMD, 2011a; 2011b). Most recently, the High-level Dialogue on International Migration and Development has called upon Governments to protect the human rights of migrants in irregular situation (United Nations, General Assembly, 2013a)

There is no “one size fits all” policy to curb irregular migration. There is a need to establish comprehensive, rights-based approaches that address the root causes of irregular migration, especially those related to labour market demands.

Countries have responded to address irregular migration by reforming their immigration laws, promoting the return of migrants in irregular situation to their countries of citizenship, and implementing regularization programmes. For instance, Spain regularized more than 570,000 undocumented immigrants in 2005 (Arango, 2013). In Argentina, since 2006, the National Programme for the Standardization of Immigration Documents regularized the status of approximately 13,000 international migrants from countries outside the Southern Common Market (MERCOSUR).¹³ Under the same programme, permanent or temporary residence permits were granted to more than 200,000 applicants from the region (United Nations, 2011). In 2011, the Government of Thailand launched a regularization campaign for migrant workers, whereby more than 1 million migrants in irregular situation were reported to have been registered during a one month period (IOM, 2013b).

Among 146 countries with information in 2011, irregular migration was considered as a matter of concern by Governments of all but five countries (table 5.1). Seventy-five per cent of Governments viewed irregular migration in their countries as a major concern, and another 22 per cent viewed it as a minor concern. Countries challenged by irregular migration are not necessarily dissatisfied with their levels of regular migration: out of 108 countries where Governments viewed irregular migration as a major concern in 2011, 71 per cent (77 countries) considered their overall level of regular migration as satisfactory.

Although irregular migration does not affect all countries uniformly, Governments in both more and less developed regions were about equally likely (77 per cent in more developed regions and 73 per cent in less developed regions) to consider irregular migration as a major concern in 2011. Notably, irregular migration was considered a major concern by 84 per cent of Governments in Africa and 79 per cent in Asia. Governments of 29 of the 34 OECD countries considered irregular migration as a major concern in 2011.

Irregular migration was a major concern for Governments of 22 of the 25 countries with the largest migrant stocks, and for Governments of 16 of the 25 countries with the highest percentages of migrants in the total population.

¹³ The Southern Common Market comprises Argentina, the Bolivarian Republic of Venezuela, Brazil, Paraguay and Uruguay.

5.2. HUMAN TRAFFICKING

According to article 3, paragraph (a), of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, human trafficking is defined as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation” (UNODC, n.d.).

The exact number of victims of human trafficking is not known. However, the International Labour Organization (ILO) estimated that 20.9 million people were victims of forced labour globally in 2012. This estimate includes victims of trafficking in persons (ILO, 2012). According to the United Nations Office on Drugs and Crime (UNODC) 2012 Global Report on Trafficking in Persons, between 2007 and 2010, people from at least 136 different nationalities were trafficked and detected in 118 countries. During this time, women accounted for 55–60 per cent of all trafficking victims detected globally, while 27 per cent of all victims were children. Almost half of trafficking flows were intraregional, i.e., victims were trafficked within the region of origin. Approximately one quarter were trafficked interregionally, while another quarter of victims were trafficked domestically (UNODC, 2012).

While human trafficking and migrant smuggling are two distinct crimes, frequently the two phenomena overlap. In the context of increasing control over borders to prevent irregular migration, many potential migrants turn to organized criminal groups to arrange their border crossing. Smuggled migrants are generally unaware of the risks involved in these transactions and they often become victims of abuse by organized crime syndicates. In addition, they are vulnerable to become victims of human trafficking.

The legal frameworks for international cooperation on these issues are the two Protocols to the United Nations Convention against Transnational Organized Crime: (a) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and (b) the Protocol against the Smuggling of Migrants by Land, Sea and Air. These documents guide the normative and legal response to human trafficking and smuggling crimes at the international level, and provide guidance to Member States to develop policy and legal frameworks to ensure that these instruments can be implemented at the national level.

The adoption of the Trafficking in Persons Protocol triggered the development of specific legislation addressing and criminalizing trafficking in persons at the national level. The number of countries that have adopted such legislation has increased dramatically in the past decade. Before the Protocol came into force, many countries did not have any legislation addressing human trafficking, or only had legislation that covered trafficking of women and children for sexual exploitation. According to the UNODC, the number of countries with legislation criminalizing all or most forms of trafficking doubled between 2003 and 2008, and this positive trend has continued thereafter (UNODC, 2012).

Most recently, in the second High-level Dialogue on International Migration and Development in 2013, Member States adopted a Declaration stressing their commitment to prevent and combat trafficking in persons and human smuggling. In this document, Member States underscored “[t]he need to establish or upgrade, as appropriate, national and regional anti-human trafficking policies” (United Nations, General Assembly, 2013a).

Efforts to address human trafficking and migrant smuggling have been undertaken both at the country and regional levels. Some examples of such efforts are provided below.

Thailand, as a country of origin, transit and destination of victims of human trafficking, has been particularly active in its efforts to fight against this crime. In 2008, it passed the Anti-Trafficking in Persons Act, a comprehensive law that provided a broader definition of human trafficking and imposed heavier penalties to persons involved in this crime. In addition, the country launched awareness-raising activities and campaigns, provided capacity-building to both public and private agencies, and created several mechanisms to strengthen its fight against human trafficking (OSCE, 2009).

In 2006, Brazil developed a national policy to fight human trafficking, establishing for the first time the principles, directives and actions on prevention, repression and prosecution of this crime. It defined and implemented actions in the areas of justice and public security, as well as in the fields of external relations, education, health, social assistance, promotion of racial equality, employment, human rights, women rights, tourism and culture. In 2013, the country approved the IInd National Plan to Fight Human Trafficking for the period 2013–2016, which was preceded by the Ist National Plan that was implemented between 2008 and 2010 (Brazil, Ministry of Justice, 2013).

In 2010, the Arab Initiative for Building National Capacities for Combating Human Trafficking was launched in the Doha Foundation Forum. This initiative seeks to establish an Arab partnership that involves all relevant stakeholders in the region to foster a political consensus for future regional action to combat this crime, and at the same time the national capacities in the relevant governmental and non-governmental bodies to effectively combat human trafficking. Among other objectives, this initiative aims at increasing the compliance of domestic legislation with the Protocol and other human rights legal instruments, raising awareness about human trafficking and the means to combat it, and improving the mechanisms for the identification, referral, support and protection of the victims of human trafficking (Qatar Foundation for Combating Human Trafficking, n.d.).

The current legal framework of the European Union to fight human trafficking is the Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, which was approved in 2011. This directive obliges the member States of the European Union to establish national rapporteurs or equivalent mechanisms for monitoring the implementation of anti-trafficking policies. The European Union also launched the EU Strategy Towards the Eradication of Trafficking in Human Beings 2012–2016 that builds on the priorities identified in the directive and shares its holistic approach, addressing issues on prevention, protection, prosecution and partnerships. Additionally, the Stockholm Programme of 2009, adopted by the

European Council to set a framework on issues of citizenship, justice, security, asylum, immigration and visa policy between 2010 and 2014, stresses the need to further strengthen existing mechanisms in the fight against human trafficking and migrant smuggling (European Commission, 2013).

5.3. REFUGEES AND ASYLUM SEEKERS

According to Article 1 A(2) of the 1951 Convention relating to the Status of Refugees,¹⁴ a refugee is someone who "... 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 to, 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" (UNHCR, 2011).

International migration flows have become increasingly mixed, whereby refugees and asylum seekers in need of international protection, move alongside migrants in search of better livelihood. As a result of increasingly mixed migration flows, it has become more difficult to identify refugees and asylum seekers from other international migrants.

By the end of 2012, an estimated 15.4 million people were refugees, including 10.5 million under the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR) and 4.9 million Palestinian refugees registered by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).¹⁵ Another nearly 1 million (937,000) people were asylum seekers. Refugee women and girls accounted for 48 per cent of the refugee population in 2012, a proportion that has remained constant over the past decade. Children below 18 years constituted 26 per cent of the refugee population in 2012 (UNHCR, 2013).

Countries in less developed regions hosted over 87 per cent of the world's refugees in 2013. The 49 least developed countries were providing asylum to 2.3 million refugees. Jordan hosted the largest number of refugees worldwide (2.6 million), followed by the State of Palestine (2.2 million), Pakistan (1.7 million), the Syrian Arab Republic (1.2 million) and the Islamic Republic of Iran (886,468) (United Nations 2013a). A large majority of all refugees worldwide came from five countries: the State of Palestine, Afghanistan, Somalia, Iraq and the Syrian Arab Republic. The recent unrest in the Syrian Arab Republic, alone, has given rise to over 2.2 million registered refugees as of December 2013 (UNHCR, n.d.).

¹⁴ The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951.

¹⁵ Palestine refugees are defined as "persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict" (UNRWA, n.d.).

The protection of refugees and asylum seekers has been a binding international responsibility since the adoption of the 1951 Convention relating to the Status of Refugees. The Convention set the minimum standards of treatment for refugees, including the basic rights to which they are entitled. It also established the juridical status of refugees and outlined provisions regarding their rights to gainful employment and welfare, identification papers and travel documents, and right to transfer assets to another country where they have been resettled. As an instrument developed after the Second World War, the scope of the 1951 United Nations Convention was limited to persons fleeing events occurring before 1 January 1951 within Europe. In 1967, a Protocol relating to the Status of Refugees was formulated to remove these limitations, giving universal coverage to the Convention (UNHCR, 2011). As of December 2013, 145 States were Parties to the 1951 Convention, and 146 to the 1967 Protocol (United Nations, n.d.).

Several regional regulations and conventions have also addressed the definition and conditions of refugees. For instance, the European Union and its member States adopted the common European asylum system through the adoption of the Dublin III Regulation in July 2013¹⁶ (Official Journal of the European Union, 2013). In Africa, among the most important conventions is the 1969 Convention Governing the Specific Aspects of Refugees in Africa adopted by the former Organization of African Unity (OAU) (D’Orsi, 2012). Latin American countries adopted the Cartagena Declaration on Refugees in 1984 (UNHCR, 1984). This Declaration is a non-binding agreement but has been incorporated in refugee laws in a number of Latin American countries. The Cartagena Declaration, like the 1969 OAU Convention, broadened the definition of the term “refugee” as found in the 1951 Convention to include persons who have fled their country because their lives, safety or freedom were threatened by generalized violence, foreign aggression, internal conflicts or massive violation of human rights.

In recent years, it has become increasingly difficult to find countries willing to accept substantial numbers of refugees. Moreover, some who seek asylum or claim refugee status may have migrated to escape poverty and may not qualify for refugee status. *De facto*, some countries have established separate humanitarian categories for those who do not fit in the 1951 United Nations Convention. For example, Brazil has seen a large number of immigrants from Haiti since the 2010 earthquake. To address this humanitarian crisis, in January 2012, the Brazilian Government created a special visa for Haitians, named Humanitarian Visa. This visa can be issued to Haitians that live in Haiti and have no criminal record. There are no requirements regarding educational or professional qualifications or employment status. The visa is valid for five years, after which the Haitian migrant will have to demonstrate means of subsistence in Brazil (Brazil, Ministry of Labour, 2012).

¹⁶ Refers to the adoption of Regulation (EU) No. 604/2013 of the European Parliament and of the European Council of 26 June 2013, which established 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.

Chapter 5

Table

Table 5.1. Government level of concern about irregular migration, 2011

Year	Number of countries				Percentage			
	Major concern	Minor concern	Not a concern	Total	Major concern	Minor concern	Not a concern	Total
By level of development								
<i>World</i>								
2011	109	32	5	146	75	22	3	100
<i>More developed regions</i>								
2011	37	9	2	48	77	19	4	100
<i>Less developed regions</i>								
2011	72	23	3	98	73	23	3	100
<i>Least developed countries</i>								
2011	18	4	1	23	78	17	4	100
By major area								
<i>Africa</i>								
2011	26	3	2	31	84	10	6	100
<i>Asia</i>								
2011	26	6	1	33	79	18	3	100
<i>Europe</i>								
2011	33	8	2	43	77	19	5	100
<i>Latin America and the Caribbean</i>								
2011	18	12	0	30	60	40	0	100
<i>Northern America</i>								
2011	1	1	0	2	50	50	0	100
<i>Oceania</i>								
2011	5	2	0	7	71	29	0	100