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Arrivals, confusing words, and mixed signals in U.S. immigration law and policy

Presentation notes

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The homeless, tempest-tost, huddled masses yearning to breathe free and coming to the United States are not necessarily, legally speaking, refugees. That makes an enormous difference in their legal and substantive options, because the legal definition of refugee is relatively narrow and interpreted even more narrowly. As civic persons and helpers, we need to understand some of the legal vocabulary. Why? People suffer, but the extent of relief, the eligibility and procedural rules of, and the difficulty of getting that relief are negotiated in international organizations and by and within governments. The terminology matters.

So it will make sense: First, some context; then a few key concepts; then a few specific terms.

In ordinary usage we refer to innocent persons who seek refuge outside their home countries as refugees. The term speaks to our better nature, to human compassion for those fleeing terrible conditions. Law and public policy are not that generous. Law and public policy differentiate between those who are refugees and those who are not. Further confusing matters: Persons considered for some purposes as entitled to protection as refugees are not considered as refugees for other purposes. Refugees who are legally recognized as such may get some official sympathy and help; others less or none.

The international legal terminology of migration reflects the extent, limitations, and disconnects of official compassion. Our national laws, policies, and practices may interpret ostensibly protective legal obligations very narrowly. An applicant who can't exactly meet one narrow definition, may meet another, or may be out of luck. That's why, having gotten into the United States, many persons still face the legal maze of eligibility to stay.

These definitions are apparently simple, but their apparent promise may die in the procedures and standards of proof demanded in national immigration and travel restrictions.

Key concepts:

International human rights law: civil and political rights: Including but not limited to: freedom from invidious discrimination "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; freedom of expression; freedom from torture or other degrading treatment; freedom from

medical research without informed consent; freedom from arbitrary arrest; the right to due process of law; the right to a name and nationality; and freedom to leave any country, including one's own.

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 11 April 2022]

International humanitarian law: Protection of persons in international and non-international armed conflicts. Protection of civilians, non-combatants, including civilian migrants and displaced persons, from military targeting, invidious discrimination, and abuse; protections of essential civilian facilities from military targeting; protections for military prisoners; laws of war. Obligations of states, and not only their militaries.

Helen Obregón Gieseken (Thematic Legal Adviser) & Éloïse Ouellet-Décoste (Legal Associate), International Committee of the Red Cross (ICRC), IHL & the protection of migrants caught in armed conflict, 4 June 2018, text and reference notes available at: <https://www.refworld.org/docid/5b1fc32c4.html> [accessed 12 April 2022].

Refugees and/or Internally displaced persons in armed conflicts: "[I]nternational humanitarian law, which is legally binding on both State and non-state actors in situations of armed conflict," addresses "most problems of internal displacement associated with such situations.... In addition international humanitarian law contains express prohibitions and limits on forced displacement.

"... Although the causes and consequences of displacement and the obstacles to their return may be similar for both internally displaced persons and refugees, the legal regimes applicable to the respective groups are different. While refugees are victims of persecution and as such are in need of a specific legal regime, the internally displaced are in their own country and accordingly remain fully entitled to the full range of protection provided by international human rights law, humanitarian law and domestic law. There can be no valid basis for assimilating the status of internally displaced persons with that of aliens, as is often done in the case of refugees."

International Committee of the Red Cross (ICRC), *Internally Displaced Persons: The Mandate and Role of the International Committee of the Red Cross (ICRC)*, 30 June 2000, International Review of the Red Cross No. 838, p. 491-500; available at: <https://www.refworld.org/docid/3decdcbe4.html> [accessed 12 April 2022]

International human rights law and international humanitarian law in occupied territories and in territories where national jurisdiction is in conflict: Both apply as obligations of the state(s) in control.

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. (July 9); available at: <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> [accessed 12 April 2022].

Non-refoulement: "A core principle of international human rights and refugee law that prohibits States from returning individuals in any manner whatsoever to territories where they are at risk of persecution, torture, or other forms of serious or irreparable harm."

UN High Commissioner for Refugees (UNHCR), *The 10-Point Plan in Action, 2016 - Glossary*, December 2016; available at: <https://www.refworld.org/docid/59e99eb94.html> [accessed 10 April 2022].

Torture: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, entered into force 26 June 1987; available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=en [accessed 12 April 2022].

Descriptors:

Afghan evacuee: Person "whose evacuation from Afghanistan to the United States, or a location overseas controlled by the United States, was facilitated by the United States as part of Operation Allies Refuge." Possibly eligible for limited resettlement aid.

Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43 (117th Cong.), 135 Stat. 43 (2021), available at: <https://www.congress.gov/117/plaws/publ43/PLAW-117publ43.pdf> [accessed 20 April 2022].

Arrivals: An umbrella term used recently for non-U.S. persons coming into the United States from Afghanistan; not an immigration status.

Asylum seekers: Asylum is "a State's grant of protection to someone [who is] on its territory and protection on its territory to persons who are fleeing persecution, serious or irreparable harm or for other reasons defined in national law."

UN High Commissioner for Refugees (UNHCR), *The 10-Point Plan in Action, 2016 - Glossary*, December 2016; available at: <https://www.refworld.org/docid/59e99eb94.html> [accessed 11 April 2022]

National laws differ in their requirements for granting asylum. The recipient is an asylee and may have an immigration status equivalent to that of one who has been legally recognized as a refugee.

Displaced persons: Persons who forced to leave their home region or country or who have had to flee their home country or region because of widespread violence, disaster, or severe environmental change. Internally displaced persons ordinarily are not refugees.

International Organization for Migration, Glossary on Migration (2019); available at: <https://www.iom.int/glossary-migration-2019> [accessed 12 April 2022].

Evacuees: Persons helped to leave dangerous conditions; not a legal status for immigration purposes.

Immigrants: Generally, a national government's visa category for persons who declare their intention to resettle permanently in another country and are admitted for that purpose.

Migrants: There is no widely, internationally accepted legal definition of migrant. Some migrants are or are legally qualified as refugees. Regular migration refers to individuals who knowingly migrate within a formal legal framework; irregular migration refers to those who do not and for the purposes of national immigration laws are undocumented. Economic migrants might be in either category. Climate migrants are displaced persons but, absent other circumstances, are not refugees--in the legal sense.

"Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection defined by international refugee law. This Global Compact refers to migrants and presents a cooperative framework addressing migration in all its dimensions."

Global Compact for Safe, Orderly and Regular Migration, G.A. Res. 73/195, U.N. Doc. A/RES/73/195 (11 January 2019); available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement> [accessed 12 April 2022].

"[P]opulation movements are not necessarily homogenous, and may be of a composite character. Some may be large movements involving both refugees and others on the move; other situations may involve refugees and internally displaced persons; and, in certain situations, external forced displacement may result from sudden-onset natural disasters and environmental degradation."

U.N. High Commissioner for Refugees, Global Compact on Refugees, Report, Part 2 , U.N. Doc. A/73/12, available at: <https://digitallibrary.un.org/record/1640526?ln=en> [accessed 12 April 2022], adopted, G.A. Res. 73/151, U.N. Doc. A/RES/73/151 (10 January 2019), available at: <https://www.unhcr.org/5c658aed4> [accessed 12 April 2022].

Parolees: Persons temporarily allowed into another country, usually because of emergency or for humanitarian reasons. Not a legal status for immigration purposes.

Refugees: Persons 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, is unable or, owing to such fear, is unwilling to return to it."

Refugees by that definition are eligible to resettle in a country that will take them.

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, entered into force 22 April 1954; available at:

https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en [accessed 12 April 2022].

Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267, entered into force 4 October 1967, available at:

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5 [accessed 12 April 2022]

Persons seeking recognition as refugees are vetted to verify their identity and circumstances. Recognized refugees are eligible for resettlement in countries that willing to accept them.

Complementary forms of protection: The U.N. High Commissioner for Refugees has operational authority for protecting persons who do not meet the 1951-1961 definition but do qualify as refugees under various regional refugee agreements.

Executive Committee of the High Commissioner's Programme, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, 7 October 2005, No. 103 (LVI); available at:

<https://www.refworld.org/docid/43576e292.html> [accessed 12 April 2022]

UN High Commissioner for Refugees (UNHCR), Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019); available at: <https://www.unhcr.org/en-us/publications/legal/5ddfd47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [accessed 11 April 2022].

Refugees from conflict zones: "It is important to note here that although the term 'refugee' is not defined in GC IV, it is considered broader in scope than the definition found in the [1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol](#). In essence, what matters for the purposes of GC IV is that the person does not 'enjoy the protection of any government'. All migrants meeting this criterion would be considered refugees under GC IV, regardless of their status under international refugee law."

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<https://www.refworld.org/docid/5b1fc32c4.html> [accessed 12 April 2022].

Temporary protected status: U.S. legal authority for the President to allow designated categories of persons to remain in the United States for a specific period, usually for emergency or humanitarian reasons.

Torture victims: The Convention against Torture incorporates the principle of non-refoulement; it bars returning to their home countries persons who have been tortured or are in fear of torture. So although victims of torture are not necessarily refugees by definition under the refugee convention and protocol, they may have some but not all protections against removal.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, entered into force 26 June 1987; available at:
https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=en [accessed 12 April 2022].

Visa: A country's permit for a non-citizen to enter that country and remain for a specified purpose and a specified time; some countries require exit visas also. The United States has numerous visa categories, each with its own eligibility rules, in two broad classifications: Immigrant visas and non-immigrant visas.

Conclusion:

Migration involves the full complexity of human lives, including culture, family relationships, losses, personal histories, fears, hopes, and vulnerabilities, and their effects on eligibilities, procedures, and burdens of proof. Moreover, bad people may travel alongside good people. People who seek to enter or remain in a country have to prove who they are, why they left where they were, why they are where they are, and how and why they got where they are, and why they can't return. Legal categorization sorts people crudely at best. Nevertheless, the legal distinctions count.

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