

Addressing the protection and assistance needs of migrants: The ICRC approach to migration

Stéphanie Le Bihan*

Stéphanie Le Bihan is Global Adviser on Migration Issues at the International Committee of the Red Cross.

Abstract

The vulnerability of migrants and the threats to which they are exposed during their journey, on land, at sea, or in countries where they have settled, raise serious humanitarian concerns that cannot be ignored. In view of the transregional nature of migration, the International Committee of the Red Cross (ICRC) and other components of the International Red Cross and Red Crescent Movement (the Movement) draw on their presence all along migration routes to contribute to the humanitarian response and alleviate the suffering of vulnerable migrants. The Movement's proximity to vulnerable migrants through its solid and experienced network of responders along migratory routes is one of its specific advantages. The aim of this article is to explain the ICRC's view on and approach to migration. It underlines that the ICRC's response is dictated by humanitarian needs, and stresses that these needs can be greatly reduced when States abide by their commitments under international law and adopt and implement policies that take into account the protection and assistance needs of migrants. It acknowledges the diverse and complex human realities behind migration and outlines the main

* The author would like to thank Pilar Gimeno, Guilhem Ravier, Helen Obregón Gieseken and Catherine-Lune Grayson for their valuable comments on earlier drafts of this article.

protection and assistance concerns of migrants in countries and regions where the ICRC operates.

Keywords: migrants, migration, asylum, vulnerability, immigration detention, family links, missing migrants, forensics, use of force, *non-refoulement*, International Red Cross and Red Crescent Movement.

.....

Introduction

Migration¹ is a complex global phenomenon and is intrinsic to the history of mankind. More than 244 million people around the world are migrants.² Although most arrive safely in their country of destination and integrate into new communities, a significant minority face hardship and need protection or assistance along their journey as they travel from their home country, often through other countries, to their intended destination. Migration is a challenging reality, although it is neither new nor limited to a certain region of the world. The causes behind migration are many and often multifaceted. Migration can be voluntary or involuntary, but people often act on a combination of choices and constraints that include armed conflicts and other situations of violence, persecution, human rights violations, poverty, the effects of climate change, and the desire to be reunited with family members abroad. Whatever the reasons, migrants may become vulnerable at many stages of the journey and the vulnerabilities and risks they face can shift along the route. Countless migrants continue to risk their lives in search of safety and a better future for themselves and their families. Many face extreme peril, often travelling over great distances; in the case of irregular migration,³ people are often placed in situations of great vulnerability and may be detained or deported. Globally, an unknown number of

- 1 In this article, the term “migration” is used in the sense of “international migration”. The International Red Cross and Red Crescent Movement (the Movement) describes migrants as “persons who leave or flee their habitual residence ... to seek opportunities or safer and better prospects. Migration can be voluntary or involuntary, but most of the time a combination of choices and constraints are involved.” See International Federation of Red Cross and Red Crescent Societies (IFRC), “Policy on Migration”, November 2009, available at: www.ifrc.org/en/what-we-do/migration/migration-policy/ (all internet references were accessed in August 2017). See also the section “The ICRC Vulnerability Approach”, below.
- 2 This represents about 3.3% of the world’s 7 billion people. The proportion of migrants relative to the world’s population has been relatively stable over the last fifty years. For further information see United Nations (UN), *International Migration Report 2015*, UN Doc. ST/ESA/SER.A/384, Department of Economic and Social Affairs, Population Division, September 2016, available at: www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015.pdf.
- 3 This term is used by the International Committee of the Red Cross (ICRC) to describe the movement of individuals who are not or are no longer authorized to stay, enter or reside in the territory of a country of which they are not nationals (transit or destination countries). Thus, it includes both migrants who have entered a country without the necessary authorization and those whose residence permit or visa has expired.

migrants have died or have gone missing during their journey – at least 5,000 people in the Mediterranean alone in 2016.⁴

While it is debated whether the past years have witnessed a hardening of migration policies,⁵ it is undeniable that a large number of States are adopting measures designed to prevent and deter foreign nationals from arriving on their territory, including through the establishment of new border barriers, the systematic resort to detention and the curtailment of migrants' rights in host countries. Such containment strategies and other policies aiming essentially to prevent onwards movement of people create greater hardship and suffering.

Studies indicate that over-reliance on securitization of borders and restrictive migration policies do not prevent people from starting a journey as long as migrating is perceived as being the best or sole option.⁶ For instance, some reports argue that stricter border control measures, far from deterring migrants from taking the journeys, actually compel them to rely on longer and more dangerous routes, exposing them to greater risks.⁷ Specifically, as armed conflicts keep on raging and legal channels to reach safe ground are becoming more limited, people will continue to turn to the only options they are afforded – however risky those may be.

The plight of migrants is a critical concern for the International Committee of the Red Cross (ICRC) and the International Red Cross and Red Crescent Movement (the Movement) as a whole.⁸ Traditionally, the ICRC is known for its humanitarian work on behalf of victims of armed conflict and other situations of violence. Less well-known is its action for vulnerable migrants.⁹

- 4 See, for instance, the latest global figures recorded by the International Organization for Migration (IOM) Missing Migrants Project, available at: missingmigrants.iom.int/latest-global-figures. As noted, these are minimum figures and should be taken as estimates.
- 5 See, for instance, Hein De Haas, Katharina Natter and Simona Vezzoli, "Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies", *International Migration Review*, Autumn 2016, available at: onlinelibrary.wiley.com/doi/10.1111/imre.12288/pdf.
- 6 See, for example, the report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, *Banking on Mobility over a Generation: Follow-up to the Regional Study on the Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants*, UN Doc. A/HRC/29/36, 8 May 2015.
- 7 Hein de Haas, "There Is No 'Silver Bullet' Migration Policy", 16 December 2016, available at: heindehaas.blogspot.ch/2016/12/there-is-no-silver-bullet-migration.html. See also Washington Office on Latin America (WOLA) reports: Maureen Meyer, Adam Isacson and Carolyn Scorpio, *Not a National Security Crisis: The U.S.-Mexico Border and Humanitarian Concerns, Seen from El Paso*, WOLA, October 2016; Adam Isacson, Maureen Meyer, and Hannah Smith, *Increased Enforcement at Mexico's Southern border – An Update on Security, Migration, and U.S. Assistance*, WOLA, November 2015.
- 8 The Movement is made of the world's 191 National Red Cross and Red Crescent Societies (National Societies), the IFRC and the ICRC. The three components of the Movement, in accordance with their respective mandates, specific roles and expertise, cooperate closely and coordinate their efforts to respond to the protection and assistance needs of vulnerable migrants in a complementary manner. The ICRC plays a leading role in the Movement's protection work, notably by visiting detained migrants and restoring family links. For further information, see, for instance, Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 5, "International Migration", 24 November 2007, available at: www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-5-2007.htm.
- 9 The term "vulnerable migrants" is used by the ICRC to refer to migrants in need of humanitarian assistance and protection. This includes migrants who find themselves in danger because they are caught in a situation of armed conflict or other situations of violence, are in distress at sea or on land, or lack access to essential services. It also includes specific categories of people, such as children, elderly persons, disabled persons and victims of trafficking.

The ICRC has a long-standing presence in many of the countries from which people are fleeing. It is often disrespect for the rules of international humanitarian law (IHL), which are applicable in situations of armed conflict, and international human rights law (IHRL) that forces people to flee within their country¹⁰ or across borders.¹¹ Protracted conflicts and their compounded effects may also result in population movement.¹² The ICRC's work shows that strengthening the protection of the civilian population through greater respect for IHL¹³ and through respect for people's human rights¹⁴ could contribute to preventing and reducing forced displacement.¹⁵

However, an exclusive focus on forced displacement does not take into account the fate of a large number of migrants who are not on the move because

- 10 Internally displaced persons (IDPs) are outside the scope of this article, which focuses exclusively on people outside their country of origin or habitual residence. The Movement has made a deliberate choice to call for greater clarity on policies and responses for migrants and IDPs, and has developed two distinct operational approaches to highlight the specific vulnerabilities and risks faced by IDPs and migrants and address their respective protection and assistance needs, as well as the fact that different legal frameworks may apply. See IFRC, above note 1; Council of Delegates of the International Red Cross and Red Crescent, Resolution 5, "Movement Policy on Internal Displacement", Nairobi, November 2009, available at: www.icrc.org/en/publication/1124-movement-policy-internal-displacement-resolution-no-5-2009-council-delegates. See note 11 below for further information.
- 11 Internal displacement can be a first stage leading to further movement across borders, notably because IDPs might be unable to find safety and protection in their own country or lack prospects for a durable solution. Furthermore, returnee migrants (including refugees) may become internally displaced (again or for the first time) if their return to their countries of origin is premature or involuntary, particularly if they are returned to conditions of insecurity. However, it is important not to systematically infer a nexus between internal displacement and migration. The situation and needs of IDPs should not be considered exclusively through the lens of migration. Indeed, two thirds of the total number of forcibly displaced worldwide as a result of armed conflict, other situations of violence, persecution or human rights violations do not cross an international border and remain within their country of origin. For further information, see Office of the UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2016*, Geneva, 2017, available at: www.unhcr.org/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html.
- 12 For further information, see ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016, p. 15, available at: www.icrc.org/en/publication/4265-protracted-conflict-and-humanitarian-action-some-recent-icrc-experiences.
- 13 IHL expressly prohibits forced displacement of civilians for reasons related to an armed conflict, unless the security of the civilians involved or imperative military reasons so demand. In addition, respect for other rules of IHL, such as the prohibition on attacks directed against civilians and civilian objects or indiscriminate attacks, the prohibitions against the use of starvation of the civilian population as a method of warfare or attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, and the rules on the conduct of hostilities, can prevent displacement.
- 14 The Guiding Principles on Internal Displacement prohibit the "arbitrary" displacement of persons, including in situations of armed conflict and of generalized violence.
- 15 Forced displacement as a general term (distinct from the understanding of this notion under IHL) refers to the movement across international borders of refugees and asylum-seekers. It also includes IDPs. This encompasses individuals forcibly displaced worldwide as a result of persecution, armed conflict, generalized violence or human rights violations. See, for instance, UNHCR, above note 11. The World Bank also uses this term with the same meaning: see World Bank, "Forced Displacement: A Growing Global Crisis FAQs", 16 December 2015, available at: www.worldbank.org/en/topic/fragilityconflictviolence/brief/forced-displacement-a-growing-global-crisis-faqs. Note this term's specific meaning under IHL, above note 13.

of conflict or violence, but can still be in dire situations. They might not have been vulnerable when they left their country of origin, but might become so on their way. Furthermore, migrants may be even more “invisible”, particularly when caught in armed conflicts or other situations of violence along the route. Indeed, many migrants are living in – or crossing through – countries affected by armed conflict or other situations of violence in different parts of the world. All migrants in countries affected by armed conflict are generally part of the civilian population and are protected as such under IHL;¹⁶ they are included in the ICRC’s response on behalf of all civilians while taking into account their specific vulnerabilities.

Further to the ICRC’s operational response in armed conflict and other situations of violence, its expertise on protection matters and presence along migratory routes contribute to the humanitarian response to the needs of vulnerable migrants. Together with National Red Cross and Red Crescent Societies (National Societies), the ICRC strives to mitigate individual vulnerabilities along migratory routes and alleviate some of the humanitarian consequences linked to migration, preventing further suffering of migrants and their families. At all times, attention is paid to the resilience and capacities of migrant communities and strategies to build on existing coping mechanisms.

In light of this reality, more than sixty ICRC delegations work on behalf of vulnerable migrants, either through broad or more targeted programmes.¹⁷ This work is a testimony to the migration-related challenges faced in all regions – with some common and some distinctive features – which prompt contextualized and individualized responses based on migrants’ varying needs and vulnerabilities.¹⁸

In the past years, the ICRC’s engagement on behalf of vulnerable migrants has evolved, taking shape within various ICRC fields of expertise, notably restoring family links (including tracing missing persons and accompanying their families), ensuring proper and dignified handling of human remains and other humanitarian forensic services, and activities for detained migrants. The ICRC neither prevents nor encourages migration but engages in a dialogue with authorities to ensure that the rights of migrants are respected throughout their journeys. While the ICRC is not a migration agency and has no aspiration to become one, it is committed to its role as a reference humanitarian organization in the field of protection, building on its field experience and domains of expertise to meet people’s needs. Efforts are focused on bridging existing protection and assistance gaps along migration routes, working together with National Societies;¹⁹ and reducing, where possible, migrants’ vulnerability and

16 For further information, see Helen Obregón Gieseken, “The Protection of Migrants under International Humanitarian Law”, in this issue of the *Review*. See also the section “Main Protection Concerns and ICRC Response on Behalf of Vulnerable Migrants”, below.

17 Note that migration is featured in the ICRC Institutional Strategy 2015–2018 as one of the priorities, see ICRC, *ICRC Strategy 2015–2018*, 18 June 2014, available at: www.icrc.org/en/publication/4203-icrc-strategy-2015-2018-adopted-icrc-assembly-18-june-2014.

18 For further information on ICRC activities, see the regional factsheets on ICRC activities for migrants available at: www.icrc.org/en/migrants.

19 For an overview of ICRC activities for vulnerable migrants and their families around the world, see ICRC, *Activities for Migrants*, booklet, available at: www.icrc.org/en/document/activities-migrants-brief.

exposure to risks, for example by promoting self-care messages²⁰ and helping migrants to restore and maintain contacts with their family members.

The ICRC engages directly and confidentially with all concerned authorities in order to seek to ensure that States fulfil their obligations to protect the lives, preserve the dignity and alleviate the suffering of vulnerable migrants. It also contributes to migration policy debates in a range of multilateral, regional and global fora, with the aim of ensuring that migration-related policies respect States' obligations under international and domestic law and align with humanitarian considerations.

This article presents the ICRC's approach to migration and its main protection concerns, and argues that while the ICRC can respond to certain humanitarian needs, a greater commitment by States to adopt and implement policies that do not create further humanitarian suffering is required.

The ICRC vulnerability approach

In the absence of a universally accepted definition, the ICRC and the other components of the Movement describe migrants as persons who are outside of their country of origin or habitual residence.²¹ They may be, for instance, migrant workers²² or migrants deemed irregular by public authorities. They can also be refugees, asylum-seekers and/or stateless persons entitled to special protection under international law.²³ The Movement's description is deliberately broad to include all people who leave or flee their home to seek safety or better prospects abroad, and who may be in distress and need protection or humanitarian assistance.

The ICRC uses this inclusive description to capture without discrimination the full extent of humanitarian concerns related to migration and to provide sufficient flexibility to address migrants' often complex situations. It seeks to take into account the fact that journeys are often non-linear and involve a great deal of risk, fear and uncertainty; migrants who were not necessarily vulnerable when they left their country of origin might become vulnerable on their way or in the country of destination. The ICRC's specific added value lies in this distinct vulnerability-based approach.

20 See, for instance, ICRC, "Mexico and Central America: Practical Advice for Migrants", leaflet, August 2016, available at: www.icrc.org/en/document/mexico-and-central-america-migrants-advice.

21 See IFRC, above note 1.

22 The term "migrant worker" is defined in Article 2.1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158, 18 December 1990 (entered into force 1 July 2003).

23 For further information, see, notably, Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954) (Refugee Convention); Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967) (1967 Protocol); Convention relating to the Status of Stateless Persons, 360 UNTS 117, 28 September 1954 (entered into force 6 June 1960); Convention on the Reduction of Statelessness, 989 UNTS 175, 30 August 1961 (entered into force 13 December 1975).

Such an approach intends to reflect the complexity of migration patterns. It acknowledges that “mixed migration” or “mixed flows” involve people with varying protection profiles, reasons for migrating and needs, such as refugees, asylum-seekers and other migrants using similar routes and transports, generally in an irregular manner. The concept of “mixed flows” has been used to highlight the presence within these movements of people who are eligible for international protection and others who are not. More generally, much of the current migration discourse tends to make a distinction between “voluntary” and “forced” movements. In reality, however, this distinction is not clear-cut and determining who is in need of protection is more complicated than simply differentiating between refugees and non-refugees. For instance, some people fleeing armed conflict or other situations of violence may not be recognized by all States as being legally entitled to refugee status under the 1951 Refugee Convention, but may nevertheless have (international) protection needs and might be unable to return home safely.

Using this inclusive description allows us to highlight the broad “umbrella” protection that all persons enjoy under several bodies of international law. Notably, all migrants are entitled to the protection of IHRL.²⁴ Recognizing this, the ICRC’s approach underlines that all individuals have rights and that they must not fall into a legal or protection gap.

The ICRC’s action seeks to ensure that persons are afforded the full protection to which they are individually entitled under international law, in accordance with their legal status (e.g., the special protection afforded to certain categories of persons such as refugees and asylum-seekers²⁵) and/or depending on their particular circumstances (e.g., protection under international humanitarian law when in a situation of armed conflict). This is an individualized approach that respects each individual’s rights, including those of irregular migrants, and recognizes the fact that some categories of migrants are entitled to more extensive legal protection (refugees, asylum-seekers and stateless persons).

The ICRC’s action does not aim to reach all migrants but focuses on people who have protection or assistance needs and are particularly vulnerable, in line with the Movement’s Fundamental Principles.²⁶ These Principles, notably humanity,

24 For more information on the legal protection of migrants under international law, in particular IHRL, see, for example, UNHCR, *Report on the Promotion and Protection of the Human Rights of Migrants in the Context of Large Movements*, UN Doc. A/HRC/33/67, Geneva, 2016; Office of the UN High Commissioner for Human Rights (OHCHR), *Situation of Migrants in Transit*, UN Doc. A/HRC/31/35, Geneva, 2016; OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, Report of the UN Secretary-General on Protection of Migrants, Geneva, 2014.

25 Refugees and asylum-seekers are afforded, in addition to the general protection of IHRL and other bodies of international law, special protection under international refugee law. The key legal instruments are the 1951 Refugee Convention and its 1967 Protocol, which grant refugees and asylum-seekers specific rights and minimum standards of treatment. See above note 23.

26 See the thematic issue on “Principles Guiding Humanitarian Action”, *International Review of the Red Cross*, Vol. 97, No. 897–898, 2015, and specifically the article by Jérémie Labbé and Pascal Daudin, “Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross”, available at: www.icrc.org/en/international-review/article/applying-humanitarian-principles-reflecting-experience-international.

impartiality, neutrality and independence, are relevant to building a response that addresses vulnerabilities without discrimination. Together, the Fundamental Principles are the Movement's compass for a humanitarian action solely shaped by the needs of vulnerable migrants, and they help it to navigate the complex and highly politicized environment of migration.

Main protection concerns and ICRC response on behalf of vulnerable migrants

Many migrants endure great hardship that can affect their physical integrity, mental health and well-being, and that of their families. All along their routes, they make easy targets for abuse and exploitation, and face countless other risks. Some migrants lose contact with their families; many suffer accidents or serious illness and cannot get access to medical care; others are detained for entering or remaining in a country irregularly. Still others face discrimination when they seek help. Every year, thousands of migrants die or disappear along the way, leaving their families to wait in anguish for answers.

Ensuring protection along migratory routes remains critical for the ICRC, particularly when migrants are stranded in a country affected by armed conflict, which may expose them to new and greater threats. Migrants in countries affected by armed conflict are generally considered to be a part of the civilian population and are thus entitled to the full protection granted to civilians by virtue of IHL.²⁷ Further, foreigners can often be the most vulnerable among the civilian population in such situations. They run a greater risk of violence and abuse and are often the first victims of various groups that seek to take advantage of their vulnerability. In situations of armed conflict, their vulnerability may be exacerbated by not speaking the language of the country they are in,²⁸ or because of discrimination in access to basic services such as health care and assistance. Furthermore, migrants may be detained and may even be at risk of being transferred to countries where they fear a violation of certain fundamental rights.²⁹ Families of migrants in countries of origin and in the diaspora may also be desperate to know the fate and whereabouts of their loved ones, in particular knowing that they may be caught in a situation of armed conflict. Some migrants

27 That protection can be lost if and for such time as they directly participate in hostilities. On another note, in international armed conflicts, a migrant may, by virtue of his or her nationality, or if he or she is considered a refugee or a stateless person within the meaning of those terms under IHL, also enjoy the special protection granted to certain categories of aliens in the territory of a party to a conflict or in occupied territory. For further information, see Helen Obregón Gieseken, "The Protection of Migrants under International Humanitarian Law", in this issue of the *Review*.

28 Migrants often do not receive information in a language they can understand, affecting their ability to make an informed decision, or are not provided with the necessary support to communicate their needs. For further information, see, for instance, Translators without Borders, *Putting Language on the Map in the European Refugee Response*, research report, September 2017, available at: [translatorswithoutborders.org/wp-content/uploads/2017/04/Putting-language-on-the-map.pdf](https://www.translatorswithoutborders.org/wp-content/uploads/2017/04/Putting-language-on-the-map.pdf).

29 For further information, see the section "Return of Migrants", below. See also ICRC, "Note on Migration and the Principle of *Non-Refoulement*", in this issue of the *Review*.

may also have limited consular support. The ICRC's action on behalf of vulnerable migrants and their families mostly takes place in these situations.

The Movement has on several occasions, including at the International Conferences of the Red Cross and Red Crescent,³⁰ reiterated the increasing scale of humanitarian needs linked to migration, and reaffirmed its commitment to alleviating the plight of vulnerable migrants. The ICRC contributes to responding to the needs of vulnerable migrants, notably by helping to prevent family separation, restoring family links, ensuring proper and dignified handling of human remains, activities for detained migrants and other protection aspects. These areas of expertise are anchored in a protection dialogue (in addition to delivery of direct services or support when relevant), reminding State authorities of their primary obligations to protect and assist vulnerable migrants.

The humanitarian cost of immigration detention³¹

Restrictive migration policies often result in the use of coercive measures, including systematic resort to detention, and moves to criminalize immigration infractions. Systematically resorting to the detention of irregular migrants, regardless of their personal circumstances, is in contradiction with the right to liberty and security of person – which is one of the most fundamental human rights.³² Migrants may be held for months, sometimes years while waiting for status determination or deportation. Depriving people of their liberty is a severe measure, and often has serious consequences for the individuals concerned. Detention may reactivate past trauma and expose migrants to additional ones. Further, detained migrants are particularly vulnerable as they are less likely to have local support networks or an understanding of national procedures, including those for seeking asylum. The ICRC encourages States to treat irregular migration as an administrative

30 See, for instance, 30th International Conference of the Red Cross and Red Crescent, Resolution 1, “Together for Humanity”, 2007; 31st International Conference of the Red Cross and Red Crescent, Resolution 3, “Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion”, 2011. Migration was also a central theme at the 32nd International Conference in 2015, during which various events were organized and where pledges were made, notably to reassert the importance of implementing Resolution 3.

31 The term “immigration detention” is used by the ICRC to refer to administrative detention for reasons of irregular entry or stay in a country's territory. Migrants are placed in administrative detention, for example, for identity verification or to prevent them from absconding during status determination or deportation procedures.

32 The right to liberty and security of person is set down in several international legal documents, such as the Universal Declaration of Human Rights, UNGA Res. 217 A(III), 10 December 1948, Arts 3, 9; and the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 9.1. At the regional level, the right to liberty and security of person is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 4 November 1950 (entered into force 3 September 1953), Art. 5; the American Convention on Human Rights, 22 November 1969 (entered into force 18 July 1978), Art. 7; the African Charter on Human and People's Rights, CAB/LEG/67/3 Rev. 5, 21 ILM 58, 27 June 1981 (entered into force 21 October 1986), Art. 6; and the Arab Charter on Human Rights, 15 September 1994, Art. 14. This right is not absolute and does not prohibit detention; rather, it requires that detention not be unlawful, namely that it be based on such grounds and procedures as established by law. Moreover, the decision to detain must not be arbitrary.

infraction rather than a criminal offence.³³ Criminalization of irregular entry or stay may hinder detained migrants' access to specialized services, further stigmatize irregular migrants as a group, and prevent such migrants from finding the social, medical or psychological support they may need following previous exposure to violence and abuse.

The ICRC visits people detained in relation to their migratory status in both criminal and dedicated immigration detention facilities along the migration routes.³⁴ It is a daily witness to the negative, lasting and potentially irreversible damage caused by detention to the mental health and well-being of migrants.³⁵ A large body of research has shown that administrative detention is particularly harmful, especially for migrants' mental health, because of uncertainty about the administrative process and fears for the future. These fears compound the trauma that migrants may already have suffered.³⁶ Migrants may have pre-existing physical and mental health issues that might be exacerbated by the detention environment. Other humanitarian organizations, such as Médecins Sans Frontières, have also raised concerns about the detrimental impact of detention on migrants' health and well-being based on their experience in this area.³⁷

During detention visits, and through ongoing confidential dialogue with the authorities, the ICRC seeks to make sure that the principle of *non-refoulement*³⁸ is upheld, and that detained migrants are afforded due process of law, are treated humanely and held in conditions that preserve their dignity, and are able to maintain contact with the outside world, such as with their families and consular authorities, if they wish to do so.

33 For further information, see UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/7/4, 10 January 2008, para. 53. See also Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, UN Doc. A/HRC/20/24, 2 April 2012, para 13; Conclusion No. 44 (XXXVII) on the Detention of Refugees and Asylum-Seekers, adopted by the UNHCR Executive Committee in 1986; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Geneva, 2012, para 32.

34 The ICRC has worked on behalf of detained irregular migrants for many years as part of its activities for detainee populations in general, but has only recently started implementing specific programmes for migrants in immigration detention in countries of transit and destination.

35 The ICRC also provides expertise and support to National Societies that work with migrants in immigration detention. It holds workshops on immigration-related detention, which are an opportunity to discuss good practices and ways to help detained migrants more effectively.

36 See Mary Bosworth, "The Impact of Immigration Detention on Mental Health: A Literature Review", in Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw*, January 2016, Appendix 5; Janet Cleveland, Cécile Rousseau and Rachel Kronick, *The Harmful Effects of Detention and Family Separation on Asylum Seekers' Mental Health in the Context of Bill C-31*, brief submitted to the House of Commons Standing Committee on Citizenship and Immigration concerning Bill C-31, the Protecting Canada's Immigration System Act, April 2012; Colin Neave, *Suicide and Self-Harm in the Immigration Detention Network*, report of the Commonwealth and Immigration Ombudsman, No. 02/2013, May 2013.

37 See Ioanna Kotsioni, "Detention of Migrants and Asylum-Seekers: The Challenge for Humanitarian Actors", *Refugee Survey Quarterly*, Vol. 35, No. 2, 12 April 2016, available at academic.oup.com/rsq/article/35/2/41/2223324/Detention-of-Migrants-and-Asylum-Seekers-The.

38 For further information on the principle of *non-refoulement*, see the section "Return of Migrants", below. See also ICRC, "Note on Migration and the Principle of *Non-Refoulement*", in this issue of the *Review*.

The ICRC holds that detention should be a measure of last resort; a decision to detain can only be ordered on the basis of an individualized assessment. It must not be based on a mandatory rule for a broad category of persons. The suffering that it causes can be prevented or significantly alleviated by considering liberty as the norm; if there are grounds for deprivation of liberty, alternatives to detention should be considered first.³⁹ Any detention must be determined to be necessary, reasonable and proportionate to a legitimate purpose. When migrants are held in administrative detention, it is critical not to restrict their liberty beyond what is strictly necessary,⁴⁰ and migrants must be allowed to have contact with family members. Furthermore, the rights of detainees must be respected and a number of key procedural safeguards observed, as required by existing law or as a matter of policy and good practice.⁴¹ The special circumstances of certain categories of especially vulnerable migrants, such as children,⁴² victims of torture or trafficking, disabled people, people suffering from serious or chronic diseases, and elderly people, should be considered. The ICRC maintains that detention of these vulnerable groups should be avoided.

Missing migrants and their families: The complexity of working across borders

Throughout the migratory routes, family separation remains pervasive, with thousands of migrants losing contact with their families and going missing every year.

Family separation occurs in situations of large movements of people, as well as when members of a single family lose contact along the route. Countless hurdles put family members at risk of separation. Separation of families and disappearances can notably result from restrictive migration policies and containment strategies that compel migrants to take more dangerous routes, exposing them to greater risks. Family members who started their journey together can be separated at various points along the journey, including during border crossing or the process of registration, while boarding trains or buses, or during medical evacuations. The

39 The International Detention Coalition (IDC) research report *There are Alternatives* provides readers with guidance on how to avoid unnecessary detention and to ensure that community options are as effective as possible. IDC, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, revised ed., Melbourne, 2015, available at: idcoalition.org/publication/view/there-are-alternatives-revised-edition/.

40 For instance, migrants should be able to move freely within their place of detention.

41 See ICRC, *ICRC Policy Paper on Immigration Detention*, Geneva, 2016, available at: www.icrc.org/en/document/migrant-detainees-icrc-policy.

42 See ICRC, “Second Comment on the Global Compact for Safe, Orderly and Regular Migration: Focus on Immigration Detention”, Geneva, 2017, available at: www.icrc.org/en/document/icrc-comment-global-compact-safe-orderly-and-regular-migration.

number of unaccompanied children along migration routes is staggering;⁴³ some left their country of origin alone, while others were separated from relatives along the way. Children are exposed to greater risks than adults, and separation is a major factor that increases their vulnerability.

Many migrants die⁴⁴ along migratory routes and are never identified – their remains are often not handled with dignity and may be poorly documented or untraceable, including many buried in anonymous graves in countries of transit and destination.⁴⁵ Families live in anguish not knowing where their loved ones are or what happened to them, and in some cases feeling responsible for their fate. Although the tragic situation of thousands of migrants who perish while trying to cross the Mediterranean Sea en route to Europe has caught much attention recently, the plight of missing migrants worldwide is largely ignored. Recent initiatives have tried to capture the scope of the phenomenon, but figures can never truly convey the great suffering of migrants and their families.

Restoring family links (RFL) is one of the long-standing activities of the ICRC and its Central Tracing Agency,⁴⁶ and of the network of National Societies.⁴⁷ Drawing on their presence in countries of origin, transit and destination, the ICRC and the National Societies have expanded and adapted their activities to assist persons separated as a result of migration. These activities seek to prevent separation and restore and maintain contact between family members. They also aim, when and where possible, to reunite family members and help people clarify the fate and whereabouts of their loved ones reported missing. Carrying out RFL activities across numerous borders is complex and challenging, not only because migration routes pass through several countries and

43 According to UNHCR, data indicate that the number of unaccompanied or separated children seeking asylum on an individual basis has increased significantly over recent years. In 2015, nearly 100,000 unaccompanied or separated children filed claims for asylum in seventy-eight countries. This total represented nearly a threefold increase over the previous year and the highest number of applications since UNHCR began compiling these data in 2006. UNHCR noted that not all countries report information on the numbers of unaccompanied or separated children seeking asylum; thus it is very likely that the reported figure is an under-estimate. It should also be noted that this number only counts children who have reached a destination country and filed an asylum claim. See UNHCR, *Global Trends in Forced Displacement in 2015*, Geneva, 2016; UNICEF, *Uprooted: The Growing Crisis for Refugee and Migrant Children*, Geneva, 2016.

44 See above note 4.

45 Cristina Cattaneo, Morris Tidball Binz, Lourdes Penados, J. Prieto, Oran Finegan and M. Grandi, “The Forgotten Tragedy of Unidentified Dead in the Mediterranean”, *Forensic Science International*, Vol. 250, May 2015. For a detailed analysis of this phenomenon, see also: Cristina Cattaneo and Marilisa D’Amico, *I diritti annegati: I morti senza nome del Mediterraneo*, Franco Angeli, Milan, 2016.

46 The Central Tracing Agency provides a range of tracing services worldwide that enable detainees and civilians affected by conflict, disaster and other situations to restore contact with members of their families. For more information on the role of the Central Tracing Agency, see: ICRC, “ICRC Central Tracing Agency: Half a Century of Restoring Family Links”, interview, 7 April 2010, available at: www.icrc.org/eng/resources/documents/interview/centra-tracing-agency-interview-070410.htm; 25th International Conference of the Red Cross, Resolution 16, October 1986, available at: www.icrc.org/eng/resources/documents/article/other/57jmdk.htm.

47 The Family Links Network is made of all tracing services of the 191 National Societies as well as the Central Tracing Agency of the ICRC. The ICRC has a lead role within the Movement in the field of restoring family links, provides support and guidance, and coordinates the work of the Family Links Network. More information is available at: familylinks.icrc.org/en/Pages/home.aspx.

the migrants may have gone missing in any of them, but also because illness, injury, lack of resources or being detained may restrict migrants' access to means of communication. Some migrants may be forcibly prevented from contacting their families, while others may not wish to make contact in order to stay "invisible", especially when they are in an irregular situation or out of fear of reprisals against their families in their countries of origin.⁴⁸

Losing contact with family causes stress and anguish, disrupts cultural and community ties, damages self-protection mechanisms and generally increases vulnerability of migrants and their families. Moreover, separation from loved ones occurring during the journey can further impact migrants' well-being and resilience. Interventions for migrants and their families focus on helping people to stay connected along migration routes and, in doing so, contribute to preventing people from going missing. In the recent past, a growing number of RFL initiatives, sometimes experimental, have been developed on behalf of migrants. Better involvement of the people affected in the assessment of their needs and in designing an appropriate response – including through the use of new technologies⁴⁹ – is essential. Digital technology has brought about new opportunities but also new risks linked to the protection of personal data. The Family Links Network has developed a code of conduct for data protection which provides a means of protecting the fundamental rights and freedoms of individuals using RFL services, in particular the right to privacy as well as the protection of personal data.⁵⁰

The supply of telephone services, connectivity and power along migration routes for those who have their own devices has proved to be effective. On the other hand, disappearances of migrants still raise a considerable number of difficulties which require a specific and long-term follow-up. The most vulnerable of those affected still rely on the ICRC and National Societies to search for their loved ones through traditional tracing efforts.⁵¹ Coordinated transregional strategies along migration routes, including the provision of services based on a common methodology, are required in order to be able to restore and maintain family links and to help people clarify the fate and whereabouts of their loved ones. The Family

48 The best interests of the person benefiting from the Red Cross and Red Crescent services and his/her family must be taken into account when deciding on the type of action to be undertaken to solve their case. Once located, a person can choose whether or not to disclose his/her address to the enquirer. Respecting the wishes of the sought migrants themselves and obtaining their consent, after they have been traced, is paramount.

49 See Olivier Dubois, Katharine Marshall and Siobhan Sparkes McNamara, "New Technologies and New Policies: The ICRC's Evolving Approach to Working with Separated Families", *International Review of the Red Cross*, Vol. 94, No. 888, 2012, available at: www.icrc.org/en/international-review/article/new-technologies-and-new-policies-icrcs-evolving-approach-working.

50 The RFL Code of Conduct on data protection is available at www.icrc.org/en/document/rfl-code-conduct. See also the 2013 Professional Standards for Protection Work Carried out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence, which capture a set of common professional ethics that aim to make protection work safer and more effective, and in particular Chapter 6 on information management, available at www.icrc.org/en/publication/0999-professional-standards-protection-work-carried-out-humanitarian-and-human-rights.

51 For further information on ICRC RFL activities, see the ICRC leaflet "Are You Looking for a Family Member?", available at: www.icrc.org/en/publication/4102-are-you-looking-family-member-familylinks-icrcorg-can-help-you.

Links Network also supports innovative methods and tools⁵² for finding missing migrants and adapts support to families of missing migrants to their wide array of needs in order to help them face the anguish and the consequences they suffer when relatives disappear.⁵³

Analogies can be drawn with the long-lasting experience of the ICRC in clarifying the fate and whereabouts of persons who went missing in situations of armed conflict.⁵⁴ Families of migrants who go missing along migratory routes endure the same suffering as families faced with the disappearance of their loved ones as a result of armed conflict or natural disaster: the need to know the fate and whereabouts of their missing relatives is no different.⁵⁵ Data collection from families of missing migrants (including *ante mortem* data when necessary), coupled with effective data gathering and management in countries where migrants may have disappeared, will prove fundamental in this process.⁵⁶

Proper and dignified handling of the human remains of deceased migrants is also essential in the complex endeavour to identify migrants who died during their journey. Their identification is often impossible without information from their families: the search for and identification of missing migrants requires matching and triangulation of information between authorities and families in different countries. ICRC interventions in this area include support to national forensic institutions, from a humanitarian forensic perspective, to ensure that human remains of dead migrants are handled in a dignified manner and that the chances of identification are safeguarded and enhanced.⁵⁷

States should take all feasible measures, including adopting adequate policies, to prevent family separation, paying particular attention to vulnerable groups such as children. When family members are separated, measures should be taken to reunite them whenever possible and without delay. If migrants go missing, countries of origin, transit and destination should endeavour to clarify their fate and whereabouts, including through the setting up of transregional coordination channels (mechanisms), and communicate information about the missing to their families, in compliance with applicable data protection and privacy laws, and in their absence, with the standards set out in the Council of Europe Convention for

52 See, for example, the Trace the Face project, available at: familylinks.icrc.org/europe/en/Pages/Home.aspx.

53 See, for instance, ICRC, “Senegal: New Hope for Families of Missing Migrants”, 21 July 2016, available at: www.icrc.org/en/document/senegal-new-hope-families-missing-migrants. See also ICRC, “‘Barça ou Barsak’: Etude sur les besoins actuels des familles de migrants sénégalais disparus” Senegal, 2013, available at: familylinks.icrc.org/fr/Pages/ActualitésEtRessources/Ressources/FNAMigrantsSenegal.aspx.

54 For further information, see the thematic issue on “Missing Persons”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, available at: www.icrc.org/en/international-review/missing-persons.

55 The ICRC efforts have developed to better understand the specific needs of the families of missing migrants, be they socio-economical, legal/administrative, psychological or psychosocial needs, and to set up “accompaniment programmes”, when possible and relevant, to respond to these needs and to mobilize authorities and other service providers to do so.

56 In this respect, the ICRC promotes in its activities respect for data protection principles. For further information, see above note 50.

57 In the case of Mexico, for instance, the ICRC helped the authorities to develop the first national protocol for the management and identification of the dead, *Protocolo para tratamiento e identificación forense*, available at: coordinacionsemefotoluca.files.wordpress.com/2012/04/protocolo-tratamiento-e-identificacion-forense-final.pdf.

the Protection of Individuals with regard to Automatic Processing of Personal Data.⁵⁸ Improving practices of and coordination between national forensic services⁵⁹ is also critical to identifying migrants who have died during their journey.

ICRC experience shows that minimizing the risk of migrants going missing, treating those who perished with dignity, and supporting families to clarify the fate and whereabouts of their loved ones are all actions within reach. They require political will from States and international cooperation among States and relevant organizations.

Health consequences of unsafe migration

Migrants may be exposed to other types of risks and abuses along their journey. Their vulnerability may arise from their age, gender⁶⁰ or other personal attributes; lack of documents, information, family or community networks, material resources or language skills can make them easy targets for abuse, extortion, exploitation and sexual violence. They may also face hazardous conditions during their journey, including when boarding fragile, overloaded vessels or when stranded in inhospitable terrain.

Migrants who have directly suffered the effect of armed conflicts and other situations of violence or who have been persecuted, abused or exploited in their home country or during their journey have specific needs, beyond shelter and legal avenues. The person's history in his or her country of origin and the way he or she left will create specific needs that must be taken into account. Further, the implementation of restrictive migration policies may not only fail to curtail migration but can also often result in migrants undertaking more dangerous journeys, requiring reliance on smugglers or increasing the risk of falling prey to traffickers.⁶¹ En route, they may be robbed, held for ransom and/or tortured. As highlighted above, they might also lose contact with people from their family or group and/or witness deaths or injuries.

For all these reasons, migrants are far more likely than the general population to have trauma-related mental health problems. More generally, the health needs of migrants are usually greater than those of the general population as migrants may

58 See Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, Strasbourg, 28 January 1981, available at: rm.coe.int/1680078b37.

59 See, for example, the ICRC's "First Conference on the Management and Identification of Unidentified Decedents, with an Emphasis on Dead Migrants: The Experience of European Mediterranean Countries", Milan, 2013; and "Second Conference on the Management and Identification of Unidentified Decedents, with an Emphasis on Dead Migrants: The Experience of European Mediterranean Countries", Barcelona, 2015.

60 Children and women may be more vulnerable to trafficking and sexual violence. For more information, see, for instance, UNHCR, *Children on the Run: Unaccompanied Children leaving Central America and Mexico and the Need for International Protection*, Geneva, March 2014; UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico*, Geneva, October 2015.

61 For an explanation of the differences between smuggling and trafficking, see OHCHR, *Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc. E/2002/68/Add.1, Geneva, 2010. See also Inter-Agency Coordination Group against Trafficking in Persons, "What Is the Difference between Trafficking in Persons and Smuggling of Migrants?", Issue Brief No. 01, October 2016, available at: icat.network/sites/default/files/publications/documents/UNODC-IB-01-draft4.pdf.

have had limited access to health care in their own country, may not have access to health services during their journey and may face other ordeals such as exhaustion due to long journeys on foot or limited access to drinking water. Moreover, once in their country of destination they may not have access to basic health-care services due to their irregular status, local legislation and/or a lack of support networks.

These wider physical and psychological needs must be addressed. Like any other person, all migrants, irrespective of their status, have the right to the enjoyment of the highest attainable standard of physical and mental health.⁶² Further, early identification and referral mechanisms for the most vulnerable individuals (persons with specific needs, such as unaccompanied children, elderly people, victims of torture or trafficking, people with mental health or physical illnesses or disabilities, and pregnant women) should be put in place by States with the support of other organizations when necessary.

While States have the primary responsibility to assist migrants, depending on the circumstances, the ICRC may provide direct relief often in close cooperation with National Societies or help migrants access services provided by National Societies, governments or other actors. This assistance can include supplying drinking water or providing primary health care and physical rehabilitation for people who are seriously injured or have an amputated limb.⁶³

Other humanitarian concerns

Use of force

While the arrival of large numbers of migrants in a country creates challenges for the authorities, measures taken to manage migration must be in line with States' obligations and must respect the rights of those concerned.⁶⁴ When confronted with situations where migrants are seeking to cross international borders irregularly, unnecessary or excessive force has, in some instances, been used, resulting in suffering that could have been avoided. Furthermore, national security considerations may lead to militarization of borders. This, in turn, can entail a greater risk of recourse to excessive or unnecessary force. Military forces are generally not prepared or equipped to perform law enforcement tasks such as managing migration flows, which obey other rules and require a specific set of skills and equipment.

62 See International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976), Art. 12. In its General Comment No. 14 (2000, para. 34), the Committee on Economic, Social and Cultural Rights provided that States have an obligation to ensure that all migrants have equal access to preventive, curative and palliative health services, regardless of their legal status or documentation.

63 See, for instance, ICRC, "Mexico, Central America and Cuba: Helping the Most Vulnerable", 30 September 2014, available at www.icrc.org/en/document/mexico-central-america-and-cuba-helping-most-vulnerable.

64 For obligations related to the use of force, see ICRC Advisory Service on International Humanitarian Law, –"The Use of Force in Law Enforcement Operations", factsheet, September 2015, available at: www.icrc.org/en/document/use-force-law-enforcement-operations; ICRC, *Violence and the Use of Force*, Geneva, July 2011, available at: www.alnap.org/help-library/violence-and-the-use-of-force. See also the UN Code of Conduct for Law Enforcement Officials of 1979 and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990.

Whether at borders, in transit or in destination countries, force may only be used as a last resort, when other available means remain ineffective or without any promise of achieving the intended result. In line with IHRL, any use of force must be consistent with the principles and requirements of legality, necessity, proportionality, precaution and accountability. In any event, intentional use of lethal force may only be resorted to when strictly unavoidable in order to protect life. International law and standards on the use of force undoubtedly bind States' police and military forces. Similarly, if States task private security companies with exercising elements of governmental authority, such as border guarding, such actors are considered agents of the State, meaning that the State is responsible for their actions and must ensure that these actors comply with the State's international obligations.⁶⁵

In line with the above, force should not be used simply to prevent migrants from crossing borders or to deter them from seeking access to international protection. In all circumstances, including in a detention setting, any approach privileging prevention, mediation and de-escalation should be encouraged.

Furthermore, it is important that political authorities and security forces factor in the enormous suffering that some migrants may have undergone. They should therefore be able to identify and take into account migrants' specific vulnerabilities and needs and provide or direct them towards the necessary support.

The ICRC has a long-standing practice of engaging in a dialogue with armed actors on the use of force, and a specific protection dialogue is being further developed with the relevant authorities and law enforcement agencies to address the humanitarian dimensions of migration.

*Return of migrants*⁶⁶

In recent times, within political discussions on migration governance, the question of return has gained renewed momentum. While the circumstances surrounding return are complex and wide-ranging, in all situations⁶⁷ States must comply with their obligations under international law, including the principle of *non-refoulement*.

65 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1, November 2001, Art. 5, available at: www.refworld.org/docid/3ddb8f804.html. For further information, see Tilman Rodenhäuser, "Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control", *International Journal of Refugee Law*, Vol. 26, No. 2, 2014.

66 The ICRC generally uses the term "return" broadly to refer to the process of going back to one's State of origin or transit, or another third State. The return may be voluntary or forced. "Return" therefore encompasses deportation, expulsion and removal, as well as other circumstances.

67 It has been suggested that there is no clear-cut boundary but rather a gradual scale from voluntary to involuntary return. Some migrants may return out of their own free will, whereas others may be forcibly returned in a coercive manner to places where they may have almost no connection. In between, there is a wide array of potential scenarios. The authorities may create conditions that deprive the individual migrant of any real alternative to leaving. Migrants may be given incentives to return that may ultimately result in withdrawing their asylum claim, they might be pressured into accepting return when, for instance, indefinite detention is the only alternative offered by a State migration policy, or they might not be well informed about their rights. Some of these situations may also be considered as "forced returns". It is important to stress that there is no authoritative legal test for ascertaining the voluntariness of a return. However, a determination of whether a return is "voluntary" or "forced" can only be made on an individual basis, assessing the particular circumstances.

Migrants may not have access to procedures to determine their need for international protection. They may also be at risk of being returned to countries in violation of the principle of *non-refoulement*,⁶⁸ or the return may be carried out in a way that is not compliant with their rights and dignity.

All persons seeking international protection⁶⁹ must be afforded the effective right to seek asylum and have fair and efficient access to procedures to determine their status and protection needs. In addition, although it is within the sovereign prerogative of States to regulate the presence of foreigners in their country and to decide on the criteria for admission and expulsion of non-nationals, that prerogative is not absolute. It must be exercised within the limits established by international and domestic law, as preventing people from accessing a territory or returning them to another country can have grave or fatal consequences.

When planning to transfer a migrant, a State is required to assess carefully and in good faith whether there are substantial grounds to believe that a particular individual would be in danger of being subjected to a violation of his/her rights in the country of return, and therefore be protected under the principle of *non-refoulement*. This individual determination must not be replaced by a collective one: the specific situation, needs and rights of each individual must be assessed. Moreover, migrants alleging a violation of their rights must be afforded effective remedies against the decision to return them, meaning at the very least that they need to be informed of the transfer in a timely manner, they must have the opportunity to challenge the transfer decision before an independent and impartial body, and their transfer must be suspended during the review process.⁷⁰ Expedited or fast-track procedures may be too rushed for this to happen.

The principle of *non-refoulement* prohibits the transfer of persons from one authority to another when there are substantial grounds to believe that the person would be in danger of being subjected to violations of certain fundamental rights. This is especially recognized in respect of torture or cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life, or persecution. Depending on the applicable universal or regional instruments, risks related to, notably, enforced disappearance, death penalty, trial by a special or *ad hoc* court, flagrant denial of justice, underage recruitment and participation in hostilities, or, in exceptional cases,

68 For more information on the principle of *non-refoulement*, see, for instance, Cordula Droegge, “Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Emanuela-Chiara Gillard, “There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008; Laurent Gisel, *The Principle of Non-Refoulement in Relation to Transfers: Proceedings of 15th Bruges Colloquium*, October 2014.

69 It should be noted that refugee status is declaratory. This is relevant for the issue of migration, particularly taking into account the mixed nature of movements, as in practice it entails that all persons who intend to apply for asylum (as a refugee or other person in need of international protection) must be given access to fair and efficient asylum procedures and allowed to remain in the country as long as their application is being examined.

70 There may be higher standards depending on the applicable human rights instruments or domestic law. This will need to be assessed on a case-by-case basis to ensure that the broadest protection to which a migrant is entitled is granted.

serious mental or physical illness (depending on the quality and availability of health care in the country of return) will also need to be considered.⁷¹

The principle of *non-refoulement* is found expressly in IHL,⁷² IHRL and refugee law, although with different scopes in each of these bodies of law. The gist of the principle of *non-refoulement* has also become customary international law. The scope of the protection afforded by international law against *refoulement* for a specific migrant will depend on the treaties ratified by the country he/she is in and the particular circumstances of the concerned person.

Importantly, under IHRL, this principle extends to all individuals, irrespective of their legal status. It is generally recognized that the principle of *non-refoulement* applies to admission and non-rejection at the border, interdiction (or interceptions) and rescue operations on the high seas. Further, it should be noted that policies such as expedited asylum procedures can never relieve States of their obligations under the principle of *non-refoulement*.

Even if a deportation⁷³ is not contrary to the principle of *non-refoulement*, the way deportations are carried out must also respect international law. Issues of concern during deportation processes may include family separations and lack of medical follow-up for sick and injured migrants. Migrants being deported have the right to humane treatment and the right to family unity,⁷⁴ and their specific and individual vulnerabilities should be taken into account.

Under the right conditions, the option for people to return to their homes is a positive development, as this is often people's preferred long-term solution. Nevertheless, experience suggests that returns will only be durable if they take place in safety and with dignity. Returning people to already difficult environments, in particular countries affected by armed conflict and other situations of violence, where the State and humanitarian organizations are struggling with massive needs, may create additional gaps and vulnerabilities. For instance, people may become internally displaced (again or for the first time) if their return to their countries of origin is premature or involuntary, particularly if they are returned to conditions of insecurity.

71 For a more comprehensive analysis of the principle of *non-refoulement* under different bodies of international law, see ICRC, "Note on Migration and the Principle of *Non-Refoulement*", in this issue of the *Review*.

72 See H. Obregón Gieseken, above note 16.

73 In this text, "deportation" means that the person concerned does not consent to leave the country and that he/she is therefore compelled to do so by force. The ICRC generally uses the term "deportation" and "expulsion" to mean the same thing.

74 In international humanitarian law, respect for family life is provided for in Customary IHL Rule 105 and Articles 27(1) and 82(3) of Geneva Convention IV (GC IV). Rules relating to maintenance of family unity are found in Articles 49(3) and 82(3) of GC IV and Articles 4(3)(b) and 5(2)(a) of Additional Protocol II (AP II). The Commentary to Customary IHL Rule 131 on the treatment of displaced persons includes practice that requires respect for family unity in general terms, and is not only limited to displacement and facilitating the reunion of dispersed families; see GCIV, Art. 26; Additional Protocol I, Art. 74; AP II, Art. 4(3)(b). Under IHRL, the protection of the family is provided for in the International Covenant on Civil and Political Rights (ICCPR), in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in regional human rights conventions: see ICCPR, Art. 23(1); ICESCR, Art. 10(1); American Convention on Human Rights, Art. 17(1); African Charter on Human and Peoples' Rights, Art. 18. With respect to separation of children from their parents, the Convention on the Rights of the Child provides that "States Parties shall ensure that a child shall not be separated from his or her parents against their will" (Art. 9(1)).

Conclusion

Migration is an intricate global phenomenon. Daily, events around the world continue to show the great suffering of migrants and their families. Too often, migration is portrayed as a source of tension and people who leave or flee their homes are frequently viewed through numbers or dealt with through quotas. Behind the figures, there are human beings who often endure great hardship in their place of origin and along their journeys, and who have their own stories and aspirations. All too often, the inability or unwillingness of the national and international systems results in a failure to protect migrants and to respond to their most basic needs. Migration policies that have detrimental humanitarian consequences are still implemented. Addressing this global human and social phenomenon requires strong State commitments to international law and humanity. It also necessitates practical cooperation between States, international organizations, civil society and businesses.

While the ICRC recognizes that States have a responsibility to uphold public order and security as well as a right to regulate migration, these must not be the only considerations shaping migration policies. In fact, security and the protection of migrants should not be seen as mutually exclusive. Enacting State policies that uphold migrants' rights, complying with international and domestic obligations and focusing on the humanity, dignity and safety of migrants⁷⁵ can contribute to greater security and stability.⁷⁶

The ICRC and other components of the Movement will continue to contribute to the humanitarian response for migrants, particularly in the ICRC's areas of expertise, and will strive to address vulnerabilities along migratory routes in order to alleviate humanitarian consequences and prevent further suffering. The ICRC recognizes that the plight of migrants requires concerted efforts and effective cooperation.

However, States bear the primary responsibility for ensuring that migrants receive protection and assistance. They can do a lot to prevent and alleviate the suffering of migrants. They should carefully and regularly assess and adapt their migration practices and policies to address their potential humanitarian

75 Resolution 3 from the 31st International Conference of the Red Cross and Red Crescent Movement (entitled "Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion") is an important guide to State practice: States are reminded, in line with relevant international law, of their responsibility to ensure that their national legislation and procedures at international borders include adequate safeguards to protect the safety and dignity of migrants and to ensure access for migrants to essential services. Further, the Resolution requests States "to ensure that relevant laws and procedures are in place to enable National Societies, in conformity with the Statutes of the Movement and, in particular, the Fundamental Principles, to enjoy effective and safe access to all migrants without discrimination and irrespective of their legal status". Available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-3-2011.htm.

76 See, for instance, "Statement by Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights, at the Future of the Human Rights Covenants", 6 October 2016, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20647&LangID=E; the Report of the UN High Commissioner for Human Rights to the Human Rights Council, *Promotion and Protection of the Human Rights of Migrants in the Context of Large Movements*, UN Doc. A/HRC/33/67, Geneva, October 2016, available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Documents/A_HRC_33_67.docx.

consequences, including the risks that people go missing. New and existing migration practices and policies should be driven by the principle of humanity, focusing on the dignity and safety of migrants at every stage of their journey, alongside other legitimate concerns, and they must always be in line with international obligations.

