

Migrants' Protection and Assistance in the Face of a Changing World: Taking Stock of the Challenges and Responses

Emnet B. Gebre

Abstract

The majority of migrants cross international borders to work, to reunite with family or to pursue studies. These categories of migrants generally do not have specific protection needs. In contrast, migrants fleeing conflict, persecution and natural disaster situations, and even those who are compelled to leave their countries of origin in search of better economic and social opportunities, face tremendous protection challenges during their journey. Many irregular migrants are highly vulnerable during their migration journey, facing a heightened risk of violence, exploitation and abuse, leading to traumatic experiences or even loss of life. Looking at this reality on the ground, the 75th anniversary of the United Nations represents an occasion to provide an overview of how the organization has addressed the persistent and ever-growing challenges surrounding migrant protection and assistance. This chapter highlights existing normative and institutional gaps in addressing challenges related to migrant protection and assistance and the responses taken, primarily at the policy and programmatic level, to address them.

Keywords

irregular migrants – human rights of migrants – international migration law – IOM – migrant vulnerability – unilateralism – Global Compact on Migration

Introduction

Harrowing stories of migrants risking everything for a better life have woefully become common. They consistently reveal the growing challenges surrounding irregular migration and the lack of response that is commensurate with the scale of the problem – not necessarily in terms of the volume of irregular

migrants (Ardittis and Laczko 2017, 2–3), but mostly in terms of the extent of human sufferings and vulnerabilities.

The majority of migrants cross international borders to work, to reunite with family or to pursue studies. These categories of migrants generally do not have specific protection needs. In contrast, migrants fleeing conflict, persecution and natural disaster situations, and even those who are compelled to leave their countries of origin in search of better economic and social opportunities, face tremendous protection challenges during their journey. For many youths, the hope of finding better education or employment opportunities justifies the risk of migrating irregularly. The belief that migration, by any means possible, is the only pathway to a successful (or at the very least an improved) life is deeply engraved in the minds of many sending communities. While migration can be considered an opportunity and a strategy of adaptation to social, economic, political and environmental change, it can also be a source of high vulnerability when not done through safe and regular pathways.

Many irregular migrants are highly vulnerable during their migration journey, facing a heightened risk of violence, exploitation and abuse, leading to traumatic experiences or even loss of life. Between 2014 and 2020, an average of 5,804 migrants died per year worldwide due to dehydration, drowning, killings, shootings and car accidents, among other things (IOM, n.d.). Oftentimes migrants employ the services of criminal enterprises, including smugglers and traffickers, to reach their intended destination, exposing themselves to physical and mental harm, extortion and kidnapping. As smugglers' *modi operandi* change to become more violent and exploitative, the line between smuggling activities and trafficking becomes blurry. Victims of trafficking face many risks and protection challenges ranging from forced labor in tough conditions to sexual abuse and other types of exploitation, which result in the violation of their fundamental rights. Despite difficulties in giving accurate data, the International Organization for Migration (IOM) has assisted over 100,000 victims of trafficking globally since the mid-1990s (IOM 2020a, 49).

Among the migrant population, unaccompanied and separated children constitute a significant portion, making the issue of child migration of paramount importance for origin, transit and destination countries. Given their physical and mental susceptibility to harm, the situation of migrant children raises serious protection issues. This, coupled with a lack of adequate assistance and protection services, poses severe threats to their fundamental rights. Within these contexts, children are often denied access to education and other basic services, making them extremely vulnerable to poor health and social conditions, including mental illness, substance abuse and

sexual and gender-based violence (UNICEF and IOM 2017). The hardship migrants encounter is further compounded by the lack of access to protection and support services due to a lack of resources or discriminatory policies and practices in countries of origin, transit or destination. Many migrants, including children, are subjected to administrative detention and deportation without prior screening to determine their eligibility for protection status as refugees, victims of trafficking or beneficiaries of subsidiary protection (US Department of State 2020).

It is worth recalling that it is not only those who leave their habitual place of residence irregularly who experience challenging journeys leading to human rights violations. Low-skilled migrant workers who migrate using regular channels are also subject to risk factors that threaten their lives, health and well-being. This, unfortunately, is the reality of many migrant workers from sub-Saharan African and Southeast Asian countries employed in the Middle East as domestic workers or in other low-skill work, including construction, agriculture and manufacturing. Recent reports reveal that 6,500 migrant workers have died in Qatar in the past ten years, working mainly on the World Cup infrastructure projects (The Guardian 2021). In many parts of the world, migrants' vulnerabilities have also been exacerbated by the COVID-19 pandemic due to the compounded effects of pre-existing socio-economic and health conditions, restrictive government measures, and stigmatization and exclusion (IMREF 2020).

Looking at this reality on the ground, the 75th anniversary of the United Nations represents an occasion to provide an overview of how the organization has addressed the persistent and ever growing challenges surrounding migrant protection and assistance. This chapter highlights existing gaps in addressing challenges related to migrant protection and assistance and the responses taken, primarily at the policy and programmatic level, to address them. As pointed out in 2013 by the Special Rapporteur on the human rights of migrants, despite the complexity and transnational nature of migration issues, a comprehensive governance framework capable of addressing protection challenges has been lacking, necessitating "a need for an international migration governance regime strongly focused on human rights" (UN General Assembly 2013a, 8).

The issue of migration governance is torn between upholding a state's international obligations in the field of human rights and guaranteeing the state's sovereignty and its exclusive right to settle domestic politics in various domains such as the integrity of borders, economic policy, unemployment, demography, cultural values and identity, citizenship and national security. In

her explanation of the causes of the challenges faced by migrants claiming their human rights, Milena Chimienti alluded to the concept of “liberal paradox,” developed by Hollifield, to illustrate

the tension between the will of liberal states to protect their national borders from newcomers – who are seen as economic, cultural and human risk for citizens of their country – and international human rights, which aim to protect people on an individual basis, independent of their citizenship status.

CHIMIENI 2018, 1

The gaps in the global migration governance system reflect states’ reluctance to cooperate because effective international cooperation will require them to consider other countries’ interests – a task that is extremely challenging to undertake when states do not have clarity about their own national interests. States are paralyzed by a misconceived idea that they necessarily have divergent interests on the matter and, consequently, “win – win” agreements in a highly heterogeneous world are very difficult to reach, especially in the North – South context where differences in economic growth, as well as cultural and demographic considerations, are accentuated. The “transnational connectiveness” and interdependence of states – for better or for worse – has long been denied in the field of migration because the latter was seen as the sole problem of sending countries, whose requests for more multilateralism were vetoed by receiving countries. This asymmetry of power has led to the development of a fragmented governance regime that consists of a plethora of informal forums outside the UN in lieu of a formal multilateral regime (Kainz and Betts 2021, 65–89).

In response to several refugee and migration crises from Syria to Venezuela, Afghanistan, Bangladesh and Libya, among others, significant policy changes have recently been initiated, foretelling the advent of an international consensus around the issue of migration. Adopted on September 19, 2016, by the United Nations General Assembly, the New York Declaration for Refugees and Migrants marked an important milestone in setting up a collective understanding for international migration governance. States unanimously expressed the political will to address the plight of refugees and migrants, protect their rights and share the responsibility to manage large movements through international cooperation (UN General Assembly 2016). The commitments laid down in the New York Declaration were further spelled out in two separate instruments: the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration.

It has been said repeatedly that the Global Compact for Migration (GCM) does not revolutionize the international legal order in any way, as it merely reiterates the legal commitments of states under already existing international conventions applicable to migrants (McAdam 2018, 574). This leads us to wonder how we can explain the gaps that prevented the needs of vulnerable migrants from being met thus far, if the relevant provisions that could be mobilized to protect vulnerable migrants already existed. Institutionally, the adoption of the New York Declaration brought about a much more significant change by enabling the integration of IOM into the UN system. Many other instruments featuring an inclusive and comprehensive approach have also been adopted to fill existing normative gaps that make the protection and assistance of vulnerable migrants the weak link in the international normative and institutional system.

Migrant Protection and Assistance: The Weak Link in the International Normative and Institutional Framework

Against the backdrop of fragmented global migration governance, clear guidance on the application of relevant international norms, especially those deriving from human rights law, for the protection of vulnerable migrants was missing for a long time. Moreover, in contrast to what already exists for refugees, labor migrants or migrant children, there was an institutional vacuum on top of this normative gap due to the absence of an organization mandated to protect and assist vulnerable migrants, leaving their humanitarian and protection needs unaddressed.

Normative Gap: The Absence of the Right to Entry for Vulnerable Migrants

Treaty law and customary law are the principal sources of international migration law (IML). The latter has historically been the bedrock of IML, which manifests itself through basic principles governing different aspects of one's migration journey. From departure to admission, sojourn and return, the movement of persons has been regulated by customary international law that guarantees the right to leave one's country, the principle of non-refoulement, the prohibitions of collective expulsion, access to consular protection and the principle of non-discrimination (Chetail 2014; 2017). Over time, customary law has been supplemented by treaty law, which features a sectoral approach to migration: protective provisions for migrants are scattered in different branches of international law, each corresponding to specialized regimes. Rather than

being a stand-alone branch of international law, international migration law is constituted by heterogeneous norms scattered throughout various fields of international law, including refugee law, transnational criminal law, labor law and human rights law.

In this day and age, the fragmented nature of global migration governance is ill-suited to address protection needs arising from mixed migration situations that encompass complex population movements, constituted by refugees, stateless persons, asylum seekers, economic migrants, unaccompanied and separated minors, environmental migrants, smuggled persons, victims of trafficking and stranded migrants. These categories of migrants are usually “travelling together, generally in an irregular manner, using the same routes and means of transport, but for different reasons [and with] varying needs and profiles” (IOM 2019a, 141–142). As the situation of migrants evolves along their journey, their legal qualification is likely to change. A migrant may also tick more than one box and fall into overlapping categories. The majority of migrants do not fit perfectly into protected categories under international law even though they can still be highly vulnerable and subject to risks of human rights violations and abuse at all stages of their migration journey. Perilous and alarming as their situation may be, a significant number of men, women and children do not fulfill the criteria set by existing instruments to be deserving of a protection status. This categorization, initially planned to protect a specific group of people, has in fact a perverse effect. While the granting of refugee status saves millions of individuals from persecution, the classification leaves many more unprotected as they don’t administratively fit in that exact category but still have protection needs. One can legitimately argue that the current system was built not so much to ensure that a specific group benefits from protective measures but more to sort migrants according to restrictive criteria and thus exclude the vast majority from protection regimes. This approach has the detrimental effect of creating a sense of hierarchy among human suffering so that “categories such as ‘refugees’ and ‘migrants’ tend to naturalize the social construction – as if there was a qualitative difference between these persons” (Chimienti 2018, 2). The concept that refugees are more deserving of a legal status from which protection is derived than other groups of migrants does not stem from a universal truth. It is rather a political construct whose fluctuations throughout different periods have depended on the political, ideological and economic priorities of Western countries, testifying to the relativity of the distinction. Karen Akoka explains that the definition, interpretation and application of the term “refugee” have been heavily influenced by the international political climate, diplomatic relations and the job market. There was a time

when the refugee and migrant statuses, far from being hermetically separated, were used in a complementary manner according to the political, diplomatic and economic costs and benefits provided by the attribution of each status for a given nationality (Akoka 2018 15–30).

A human rights-based approach to migration can, to some extent, mitigate the effects of the categorization. Unlike refugee law, human rights law is of variable geometry with the distinct leverage of having a universal scope, which permits in principle the protection of the fundamental rights of all migrants regardless of the cause of their flight and their immigration status. It also allows for an extensive application of the principle of non-refoulement, affording wider protection than refugee law. Vulnerable migrants are entitled to benefit without discrimination from the protective provisions provided by international and regional human rights law in their capacity as human beings. Indeed, “human beings are not deprived of the rights inherent to them as such, as a result of their migratory status or any other circumstances” (Trindade 2011, 149). A human rights-based approach to migration defines the obligations of states under the jurisdiction of which the migrants are found. It is required from the state to uphold migrants’ rights as the latter are entitled to the respect, protection and fulfillment of their rights. As rights holders, migrants can claim their rights to the state, which must meet its international and regional obligations as a duty bearer. Moreover, human rights law contains provisions that justify both reactive and proactive measures to address migrants’ vulnerabilities by preventing possible human rights violations but also remedying possible materialized infringements. However, the recognition and acceptance that migrants, like everyone else, are entitled to inalienable rights are not always a given. The absence of a single legally binding instrument covering all the relevant rights of migrants can explain the challenges and gaps in protection. While international and regional human rights instruments are pertinent to protect the rights of migrants, most of them do not explicitly mention the latter, which can create an open door for possible discrimination in the enjoyment of the rights provided by human rights conventions.

Nevertheless, the major gap that drives migrants to take high risks and fall prey to criminals lies in the absence of a right to access states’ territories for migrants in highly vulnerable situations. While the right to leave one’s country is well established, the right to immigrate is far from being regarded as such. International human rights law does not recognize a right to enter a foreign state’s territory, even less a right of residence. The UN Human Rights Committee has explicitly confirmed the absence of such a right in international law as follows:

The Covenant [civil and political rights] does not recognize the right of aliens to enter or reside in the territory of a state party. It is in principle a matter for the state to decide who it will admit to its territory.

UN HUMAN RIGHTS COMMITTEE 1986, 5

Thus, the right to freedom of movement only entails the right to leave any country, including one's own country, without a right to access another state's territory. This asymmetry between the right of emigration and immigration has given inspiration to expressions such as "the suspended step of the stark" to qualify the situation in which migrants might find themselves (Wihtol de Wenden 2013, 22). Without a right to admission into the territory of a state, many migrants are "on a journey without a destination" (Paz 2018, 517), left in limbo in transit countries, often impotent to effectively address the protection and assistance needs of stranded migrants. The freedom of movement is conceived with respect to the state's territory or, at best, its jurisdiction, which serves as a reference for determining the extent of an individual's entitlement to it (Paz 2018, 517). The right to mobility is not defined as a continuum because of the legal vacuum between the moment individuals leave their country and the moment they are at the discretion of the destination country's jurisdiction.

The universal exit guaranteed by human rights law is also subjected to restrictions for the sake of destination countries' interests in a way that uses diplomatic and financial means to nip the problem in the bud. Origin and transit countries are experiencing mounting pressure from developed nations to reinforce the controls on exit. Sometimes, the techniques used by border and immigration officers to prevent would-be migrants from leaving the country heavily contravene fundamental rights, including their freedom of movement and their right to liberty and security.

Once migrants, including undocumented ones, have entered the territory of a state, they have the right to enjoy the full range of human rights and be treated with dignity in accordance with international and regional human rights instruments. For instance, according to the Convention on the Rights of the Child, unaccompanied and separated migrant children must not be discriminated against in the enjoyment of their civil, political and socio-economic rights on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum seeker or migrant (UN Committee on the Rights of the Child 2005). And yet states bypass their duty to respect, protect and fulfill the human rights of all individuals regardless of their status by externalizing their borders and outsourcing their responsibility with regard to migration controls and asylum processing. This type of approach allowed the European Union to circumvent the European Court of Human Rights' (ECHR) judicial control over the treatment of migrants under the jurisdiction of the

member states (ECHR 2012).¹ In 2013, the Special Rapporteur characterized this practice as “particularly troubling as it means that the responsibility for migration control is shifted to countries outside the EU and that, consequently, the recourse of those migrants to human rights mechanisms within the EU becomes legally restricted or practically impossible” (UN General Assembly 2013b, 58). Beyond this race to the bottom for the protection of migrants’ rights, the externalization of borders, compounded by the reinforcement of border controls, does not necessarily have the intended deterrent effect on the plan of individuals to migrate. On the contrary, it pushes them to resort to desperate measures and take incalculable risks to reach their destination by using more hazardous routes entirely at the mercy of smugglers and traffickers (Red Cross EU Office 2013). The externalization of border controls has led origin countries to use coercive measures to prevent their citizens from leaving their countries, posing a significant threat to migrants’ enjoyment of their fundamental rights. The existing operational gap leaves many vulnerable migrants unassisted without proper allocation of a protection mandate to a specific organization, in turn exposing them to human rights violations.

*Institutional Gap: The Absence of an Organization Mandated
with the Protection of Migrants’ Rights*

The fragmented tapestry of migration governance was also reflected at the institutional level, where “a coherent and easily identifiable institutional framework” was lacking for quite some time because of the absence of a UN migration agency (Betts 2010, 5). The IOM has been handling migration-related issues since 1951. However, its commitment to the human rights of migrants has not been without question. The absence of express reference to human rights in its constitution as well as allegations that its early operations were carried out in the interest of Western countries to restrict the irregular entry of migrants into their territory have been points of criticism. The main contention had to do with the fact that “the interests of states are front and center, and the migrant, considered as a bearer of rights and duties, does not appear [in the IOM Constitution]” (Goodwin-Gill 2019). The lack of an explicit legal protection mandate similar to that of the UNHCR, UNICEF or the International Labour Organization and its project-based funding have meant that IOM has been perceived as deferential to its member states at the expense of migrants’ rights. The UN Special Rapporteur on the human rights of migrants has pointed out that “the mandate and funding of IOM pose structural problems with regard to

1 The ECHR applies a broad interpretation of “jurisdiction,” which is not limited to the territory of the member states and can encompass, for instance, the ships of their armed forces sailing on the high seas.

fully adopting a human rights framework” (UN General Assembly 2013b, 60). The incompatibility of some of its interventions, including assisted voluntary return programs, offshore asylum claims processing, provision of services in detention centers and border management systems, with international human rights, particularly the principle of non-refoulement and the right to seek asylum, have been pointed out by human rights advocates. In 2003, Human Rights Watch pointed out that IOM did not effectively mainstream international protection norms to match its operations with its rhetorical commitment to protecting human rights beyond simply adopting human rights-friendly language (Human Rights Watch 2003, 3). Inversely, for IOM’s proponents, the absence of a specific protection mandate enabled the organization to play a gap-filling role. It provided IOM with a much-needed flexibility of action to adapt to the challenges of contemporary migration trends, as shown by its involvement in favor of persons displaced by natural disasters and the impacts of climate change. As such, unlike other organizations that are restricted by their strict legal mandate and scrutinized each time they want to navigate new waters, IOM has been able to take under its wing a broader range of populations of concern, often left unassisted by states and other organizations.

One must recognize that IOM has come a long way as it has evolved considerably over the past twenty years and matured into a vital humanitarian actor contributing to the advancement of the protection agenda of vulnerable migrants. The organization has developed a large range of policies and frameworks that enable the mainstreaming of a rights-based approach into its work. The Human Rights of Migrants: IOM Policy and Activities (2009), IOM Protection Policy (2015), Gender Equality Policy 2015–2019 and Humanitarian Policy – Principles for Humanitarian Action (2015) can be cited as compelling examples. The elaboration of the Migration Crisis Operational Framework (MCOF) and the Migration Governance Framework (MIGOF) has also provided IOM some legitimacy, reflecting its commitment to human rights and humanitarian principles. The MCOF, for example, states that

IOM adheres to humanitarian principles ... [and] is further bound and committed to the existing legal and institutional frameworks contributing to the effective delivery of assistance and protection and ultimately to the respect and promotion of human rights and humanitarian principles.

IOM 2012, 11

IOM has often been engaged in a tricky balancing act because of potential conflicts between its humanitarian role and migration management activities necessary to preserve its relationships with donor states. Lately, IOM has been attempting to reconcile the two sectors, considering that migration

management and migrant protection are not necessarily incompatible. For IOM, well-managed migration is beneficial to the human rights, human dignity and well-being of migrants. In the past, this premise was difficult to verify as the criteria to gauge a better management of migration were lacking until the elaboration of the Migration Governance Framework in 2015. The latter explicitly recognizes that the fulfillment of migrants' rights and the advancement of socio-economic well-being of migrants and society are, among other things, fundamental prerequisites for good migration governance (IOM 2015).

For instance, the way in which IOM has intervened and handled the situation in Libya throughout the years is indicative of the long-standing dilemmas the organization faces as a service provider for EU member states on the one hand, and an advocate for migrants' rights on the other. Before Gadhafi's fall, at the beginning of its interventions in Libya, there were perceptions that the organization mainly acted in the interest of the EU member states through capacity-building activities to manage and control irregular migration from Libya to the EU (Bradley 2020, 82–92). Its projects on border management, return and provision of services to detention centers were decried for their detrimental effects on the rights of vulnerable migrants to access asylum and to be protected against ill-treatment. During the 2011 revolution and the subsequent crisis, IOM has proved to be a major player in the humanitarian system given its decisive role in addressing the needs of vulnerable migrants in a crisis situation. Its fruitful collaboration with UNHCR for the benefits of migrant protection and humanitarian assistance was also noted. The willingness to shed light on the vulnerability of migrants in an emergency situation was acknowledged, leading to the development of critical policies and frameworks such as the MCOF and the Humanitarian Policy. After the revolution, even though IOM did not stop servicing the European countries, including through capacity-building interventions provided for the Libyan authorities to control irregular migration, IOM continued to be more and more vocal about the human rights violations perpetrated against migrants. All things considered, one must admit that IOM has gradually emerged as a much less unapologetic actor that, on some occasions, has not hesitated to speak up for migrants' rights and denounce practices that violate the human rights of migrants. The organization's strategic document (2019–2023) states that by 2023 it aims to evolve into a "principled" organization "guided by the principles enshrined in the Charter of the United Nations, including upholding human rights for all" and prioritizing the "respect for the rights, dignity and well-being of migrants" (IOM 2020b, 9).

At the operational level, IOM has had difficulties addressing protection and assistance issues in a holistic manner, particularly in the context of mixed migration. The exclusive approach utilized by international institutions has

had many shortcomings since, for a long time, interventions were thought of in terms of legal categories, while in reality migrants in need of assistance did not belong to a particular legal category entitled to protection and assistance. The approach was not comprehensive but also lacked sustainability, because while significant achievements were undertaken to provide direct assistance to migrants and address immediate and even medium-term needs, long-term solutions were not given the necessary precedence (IOM 2018, 1). Taking note of these drawbacks, it is worthwhile to soul-search and position migration governance in a way that strengthens the institutional response mechanism toward addressing challenges arising from the complexity of contemporary migration.

Migrant Protection and Assistance: Toward an Inclusive and Comprehensive Approach

In the face of mixed migration flows, there is a clear understanding that programming should not leave anyone behind. A growing willingness to encompass a wide range of vulnerable migrants and focus on their humanitarian and protection needs, regardless of the cause of their flight, helps to put into perspective the compartmentalization between categories of migrants and promote a universal and holistic approach to migration through the adoption of new instruments aimed at reaffirming existing norms. In a bid to fill in normative gaps and help states adapt to new challenges, the UN has a role to play in creating synergy between internal and external initiatives.

Promoting a Universal and Holistic Approach to Migration

The use of the concept of vulnerability is part of the effort undertaken to promote an inclusive, comprehensive and resilience-oriented approach to migrant protection and assistance. It is believed that it can help better understand and address multilevel underlying factors through a holistic and sustainable intervention on the ground. For several reasons, the concept of “vulnerable” can be deemed appropriate to qualify migrants, especially those in an irregular situation (Gebre 2016). The first reason stems directly from the general failure of categorizing migrants in mixed migration contexts. It must be recalled that under the current state of international law, many categories of migrants fall through the cracks of international protective regimes. For instance, for a long time, despite the existence of an international framework, the recognition of the vulnerability of smuggled migrants was far from evident because of the misconception that smuggling is primarily a commercial transaction that does not necessarily entail the use of force, coercion, abuse and deception.

Although the relationship between the smuggler and the migrant is fundamentally different from that between the trafficker and the victim, these differences are not sufficient to dismiss the vulnerabilities of migrants in the context of smuggling. Nowadays, the *modus operandi* used by smugglers involves so much violence and has such exploitative purposes that the line between the two categories has become blurred. As such, the concept of vulnerability can be regarded as palliative, because its recourse tends to fill this gap with the advantage of

establishing the reality of a situation irrespective of a determined legal status ... [and] enables to capture the different scenarios of migration affecting people, but also the different stages of an individual's migration, given that the person's situation varies during the migratory journey.

BLONDEL 2015, 264

Moreover, while introducing an approach based primarily on the needs of vulnerable migrants, the reference to vulnerability enables us to resolve "the problem of disconnection between legal protection and the person's lived reality" so as "to give priority to the real needs of the migrant over the legal category to which he or she belongs" (Blondel 2015, 263). Beyond the attention on the needs of migrants, the aim is to focus on migrants' human rights and the ensuing obligations for states to respect, protect and fulfill the latter. The Office of the United Nations High Commissioner for Human Rights advocated for the use of the expression "migrants in a situation of vulnerability" to designate "persons who are unable to effectively enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer's heightened duty of care" (OHCHR 2018, 12). Likewise, international organizations such as IOM have incorporated this inclusive phrase into their programmatic activities to cover migrants who are not covered by existing protection regimes and are in need of protection and assistance services (IOM 2018).

The second reason is that vulnerability is a variable geometry concept that covers a multitude of situations. It enables probing not only the vulnerability present in each individuality, but also that stemming from a particular context or environment (Soulet 2014, 22). Vulnerability is thus understood as the "limited capability to avoid, resist, cope with, or recover from risks or experiences of violence, exploitation, or abuse that they are exposed to or experience within a migration context" (IOM 2018, 3). This limited capability is the result of the unique interaction of risk and protective factors at various levels (e.g., individual, household/family, community and structural) (IOM 2018, 3). Vulnerability in the context of migration can be intrinsic and extrinsic. Linked

to the exodus, extrinsic vulnerability does not depend on the qualities characterizing the concerned individual. It is the result of an event outside the latter that puts her or him in a difficult situation. This extrinsic vulnerability linked to the exodus can be doubled or aggravated by an intrinsic vulnerability when the individual is already part of the categories of persons considered vulnerable. As such, vulnerability is “situational and personal” in that it can be associated with “the reasons for leaving the country of origin,” “the situations that migrants encounter during their journey and at their destination” and “a person’s identity, condition or circumstances” (OHCHR 2018, 14–16). It is also interesting to see that a migrant in a situation of vulnerability is not solely characterized by the risk factors to which he or she is exposed. Migrants also have the resources within themselves that help them to be resilient and adapt. Adopting a vulnerability lens helps identify the risk and protective factors that characterize a migrant’s situation to address, minimize and mitigate the risk factors and leverage the protective factors through a programmatic response framed at the individual, household, community and structural levels (IOM 2019b).

Beyond the identified analytical and programmatic advantages, recourse to the concept of vulnerability also makes it possible to situate in a space – time continuum the risk threatening the individual or the group by taking into account “the social conditions of production of the potential [risk]” (upstream) and “the conditions for the materialization of the [risk]” (downstream) (Soulet 2014, 24). Thus, this concept encourages us to look at the preventive and curative actions that society, the state or the international community take to manage the existing risks. In this perspective, the choice in favor of the concept takes on a particular meaning given its links with the notion of protection:

to speak of the greater vulnerability of a social group is immediately to situate it on the scale of production, either by implying a greater structural exposure to a particular risk or by pointing out a gap of the protection device.

SOULET 2014, 14

While translating the existence of “[a] shortfall of resources or the lack of framework conditions affecting the individual capacity to cope with a critical context” (Soulet 2014, 26), reasoning in terms of vulnerabilities enables us to bring up the questions linked to protection gaps on the ground of inequalities in the face of risks.

However, despite its apparent merits, the concept of vulnerability may also have its limits in the sense that one can fear that this shift in terminology can

negatively impact the legal treatment of migrants, perceiving them as “persons in need” rather than rights holders. The downside of this approach is the risk of regression of migrants’ rights because their protection is perceived not as an entitlement resulting from human rights law and other legal status but as a humanitarian gesture dependent on the goodwill of states rather than binding legal commitments. In the words of Camille de Vulpillières, rather than dealing “with acknowledged and guaranteed subjective rights,” the focus is put on “the possible protection the administration freely gives to some selected persons” (de Vulpillières 2020, 133–145). Moreover, there is also the risk that using the expression “migrants in vulnerable situations” undermines the effectiveness of migrants’ protection and assistance because the term is a catch-all category encompassing a multitude of overlapping categories of migrants, for whom tailored responses addressing “underlying protection needs” and focusing on “systemic reasons for risk” will be problematic to develop and implement (Goodwin-Gill 2019). Notwithstanding its drawbacks, the concept has been incorporated in the New York Declaration and the GCM.

Creating Synergy between Internal and External Initiatives

The GCM features a holistic approach to migration in the sense that it aims to cover all stages of the migration cycle (origin, transit, destination and return) and address the drivers of migration, including environmental degradation, and protection concerns, through a human rights lens. By giving attention to mixed migration movements, the compact is admirable in the sense that it is the first international instrument that strives to transcend the traditional binary vision between forced and voluntary flows, while promoting an inclusive approach. While the adoption of the GCM created a wave of enthusiasm and embodied hope for the future of migration governance, it remains a framework aimed at boosting international cooperation and whose effective implementation lies in the hands of states that will select the means at their discretion.

Prior to the adoption of the GCM in 2018, several instruments adopted in other areas of global governance had advanced the protection agenda of vulnerable migrants through a cross-fertilization process and an inter-systemic approach. The 2030 Agenda for Sustainable Development (SDGs) is one of the most compelling instruments to give prominent attention to migration-related issues. Starting with the pledge of leaving no one behind, the 2030 Agenda recognizes that the dignity of the human person is fundamental to global development and, as such, the benefits of the Agenda’s provisions should be guaranteed without discrimination (UN General Assembly 2015, 4) and “implemented in a

manner that is consistent with the rights and obligations of states under international law” (UN General Assembly 2015, 18), including international human rights law. The SDGs contain several protective provisions relevant for vulnerable migrants, such as eliminating all forms of discrimination and violence against all women and girls, including trafficking and sexual and other types of exploitation (Goal 5.2). It urges states to end abuse, exploitation, trafficking, and all forms of violence against and torture of children (Goal 16.2) as well as to promote and enforce non-discriminatory laws and policies for sustainable development (Goal 16.10 (b)). As part of efforts to promote full and productive employment and decent work for all, the SDGs require states to take measures to eradicate forced labor, modern slavery, human trafficking and the worst forms of child labor (Goal 8.7). They also include the protection of labor rights and the promotion of safe and secure working environments for all workers, including migrant workers, particularly women migrants, and those in precarious employment (Goal 8.8).

The Paris Agreement also represented a significant qualitative leap for the protection of climate migrants. It explicitly introduced a human rights-based approach to climate change, suggesting that

[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children persons with disabilities and people in vulnerable situations

UNFCCC 2015, 11

Before the Paris Agreement, it must be recalled that efforts to mainstream human rights and migration in the international climate regime contributed to the advancement of the protection agenda of climate migrants (UNFCCC 2011). The Sendai Framework for Disaster Risk Reduction 2015–2030 is also worth mentioning as it contains several relevant provisions for the protection of vulnerable migrants in the context of disaster. Beyond recognizing the link between disaster and displacement, the Framework promotes a preventive and reactive approach to disaster-induced displacement. It prioritizes

the adoption of policies and programs addressing disaster-induced human mobility to strengthen the resilience of affected people and that of host communities, in accordance with national laws and circumstances.

UNDRR 2015, PARA. 30 (L)

The inclusion of migrants in the design and implementation of disaster risk reduction can empower and build their resilience by addressing risk factors contributing to their vulnerability (UNDRR 2015, para. 36(a)(vi)). The Framework also promotes the principle of migration used as a strategy of adaptation to disaster through evacuations and relocations.

Although the implementation modalities of these instruments raise questions, it must be acknowledged that their adoption within the UN system has contributed to giving greater visibility to the rights and needs of migrants and represented progress toward less fragmentation in global migration governance. As such, these initiatives will serve as a foundation on which to build future strategies and interventions managing cross-border movements of people. This is all critical as the challenges arising from mixed migration require a multilateral, holistic and cooperative approach that is guided by international human rights law.

Initiatives aimed at filling existing normative protection gaps were also developed outside the UN system using consultative and bottom-up approaches and informal ad hoc processes through state-led mechanisms that produce non-binding norms. Launched by Norway and Switzerland in October 2012, the Nansen Initiative, which became the Platform on Disaster Displacement, aimed to address the protection gaps of people displaced across borders in the context of disaster and climate change. The Nansen Initiative first developed the Nansen Principles and later launched the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change in October 2015. While the Nansen Principles did not fixate on regulating the protection of environmentally displaced people, it sought to serve as a basis for future normative responses that must be provided to fill existing gaps. Regarded as non-binding norms (Tuitjer and Chevalier 2015, 147), it must be noted that the Nansen Principles and the Agenda for Protection are merely guiding and promotional tools rather than soft law. Although the Platform on Disaster Displacement does not explicitly advocate the adoption of a new ad hoc instrument, the development of the protection agenda and key messages for the relevant processes at the global and regional level can feed the international or regional normative process.

In the same vein, the Migrants in Countries in Crisis Initiative (MICIC) is also part of efforts to improve protection and assistance for vulnerable migrants through a state-led consultative process. Launched in 2014 by the United States and the Philippines, the MICIC Initiative aims to address the needs of migrants caught in situations of conflict or natural disaster, given that despite their vulnerabilities, the latter are often left behind in the context of crises and excluded

from preparedness, emergency response and recovery efforts. After a series of large and inclusive consultations, the MICIC Initiative developed Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster. The Guidelines provide practical guidance to relevant stakeholders on how to plan and prepare preventive interventions, as well as respond and recover from situations of crises in ways that protect migrants, reduce their vulnerabilities, enhance their resilience and empower them and their communities.

As part of the so-called minilateral system (UN General Assembly 2017, 89), these initiatives provide a clear comparative advantage in terms of flexibility of organization and action. One may concede that the success of the Nansen Initiative would have been difficult to achieve if the institutional mandate had been carried out by a Special Rapporteur or an international organization (McAdam 2016, 1518). Minilateralism facilitates international cooperation and creates forums where states can engage on particular issues related to migration and discuss potential solutions. In an era of defiance toward migration, these initiatives have the merit of including specific issues in the international political agenda and shedding light on the gaps surrounding migrant protection and responses that can be devised. Their recognition within the New York Declaration is a testament to the role they have played (UN General Assembly 2016). However, while they can be used as a springboard for the development of normative frameworks, including soft law instruments, they might not be regarded as an endpoint.

Conclusion

In the absence of a right to enter a foreign country, migrants do not hesitate to take incalculable risks to reach their destination at the expense of their physical and mental integrity and sometimes their life. The root cause of their plight lies mainly in the fact that the principles of international law guaranteeing their rights, dignity and well-being are largely scorned from the moment they leave their country of residence or origin and enter the territory of their final destination. In a context where migration has long been thought of in terms of sovereignty rather than humanity and dignity, placing the protection of migrants' human rights at the center of migration management activities was far from being a priority for governments. Global efforts to address migrants' vulnerabilities and tackle irregular migration through a human rights lens were lacking for quite some time.

Attempts to improve migrant protection and assistance have been undertaken at the policy and operational levels, but the fact that many are relatively

recent makes it challenging to measure their impact. Nevertheless, we have reasons to be cautiously optimistic since these efforts can herald a paradigm shift brought about by the willingness of states to deal with protection-related issues at the global level and to agree to put migrants' rights and safety at the center of migration management interventions. Along the way, the acknowledgment of the benefits of migration – including as a strategy of adaptation – is a recognition that can be harnessed to protect migrants from threatening social, economic and environmental change. However, the withdrawal of several states from the Global Compact for Migration under the pretext that the instrument undermines their sovereign rights is indicative that the fear that international commitments pertaining to migration encroach on states' prerogative to control entry and stay in their territory is still pervasive (Capone 2020, 713–730). In this context, adopting new instruments aimed at enhancing international cooperation in the field of migration to address the challenges of large movements of population does not suffice to remedy the gaps in the protection and assistance of vulnerable migrants. While the paradigm shift deserves to be acknowledged, the major challenge remains on improving negative public perceptions of migration and addressing xenophobia.

At the institutional level, the integration of IOM in the UN system can be a bearer of hope, if it means the agency is guided and bound by human rights and humanitarian principles, strengthening its ability to fulfill its mandate in the interest of not only its member states but also migrants. Despite competing interests, IOM has managed to progressively assert its legitimacy as a humanitarian organization that advocates and stands for the rights of vulnerable migrants, including by speaking about human rights violations. However, the extent to which IOM has fully integrated the protection of migrants' rights into its key priorities, organizational culture and operational management needs to be assessed over the long term.

In an ideal world, the ultimate protection that one can be afforded is freedom, which entails the possibility to come and go as one pleases. Migrants will not need protection from abuse, exploitation and violence during their perilous journey through irregular means if they are provided with the freedom to enter the territory of their country of choice and leave as they wish. While a universal right of entry will not be realistically guaranteed, facilitating the establishment of legal migration pathways allowing free circulation and addressing structural socio-economic, political and environmental vulnerabilities can contribute to protecting entire communities from the scourge of irregular migration.

Bibliography

- Akoka, Karen. 2018. "Réfugiés ou migrants? Les enjeux politiques d'une distinction juridique." *Nouvelle revue de psychosociologie* 25, no. 1: 15–30. <https://doi.org/10.3917/nrp.025.0015>.
- Ardittis, Solon and Frank Laczko. 2017. "Measuring Irregular Migrants: Innovative Practices." *Migration Policy Practice* 7, no. 2: 2–3.
- Betts, Alexander. 2010. *Migration Governance: Alternative Futures*. Background Paper WMR, IOM.
- Blondel, Marion. 2015. "La personne vulnérable en droit international." PhD Thesis, Université de Bordeaux.
- Bradley, Megan. 2020. *The International Organization for Migration: Challenges, commitments, complexities*. London; New York: Routledge.
- Capone, Francesca. 2020. "The Alleged Tension between the Global Compact for Safe, Orderly and Regular Migration and State Sovereignty: 'Much Ado about Nothing'?" *Leiden Journal of International Law* 33, no. 3: 713–730. <https://doi.org/10.1017/S0922156520000254>.
- Chetail, Vincent. 2014. "The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law." In *Research Handbook on International Law and Migration*, edited by Vincent Chetail and Celine Bauloz: 1–73. Cheltenham: Edward Elgar Publishing. <https://www.elgaronline.com/view/edcoll/9780857930040/9780857930040.00005.xml>.
- Chetail, Vincent. 2017. "The Architecture of International Migration Law: A Deconstructivist Design of Complexity and Contradiction." *AJIL Unbound* 11: 18–23.
- Chimienti, Milena. 2018. "The Failure of Global Migration Governance." *Ethnic and Racial Studies* 41, no. 3: 424–430. <https://doi.org/10.1080/01419870.2018.1388424>.
- de Vulpillières, Camille. 2020. "From a Right-Based Approach to a Humanitarian Approach: In What Way Does Migration Impact Human Rights?" In *Cosmopolitanism, Migration and Universal Human Rights*, edited by Mogens Chrom Jacobsen, Emnet Berhanu Gebre and Drago Župarić-Ilić: 133–145. Cham: Springer.
- ECHR (European Court of Human Rights). 2012. *Hirsi Jamaa and Others v. Italy*.
- Gebre, Emnet. 2016. "La protection internationale des personnes déplacées en raison des changements climatiques." PhD Thesis, Université Toulouse 1 Capitole.
- Goodwin-Gill, Guy. 2019. *A Brief and Somewhat Sceptical Perspective on the International Organization for Migration*. Paper prepared for Oxford University's Refugee Studies Centre Workshop, "IOM: The UN Migration Agency?", February 2. <https://www.kaldorcentre.unsw.edu.au/publication/brief-and-somewhat-sceptical-perspective-international-organization-migration>.

- The Guardian. 2021. "Revealed: 6,500 migrant workers have died in Qatar since World Cup awarded." *The Guardian: Rights and Freedom*, February 23. <https://www.theguardian.com/global-development/2021/feb/23/revealed-migrant-worker-deaths-qatar-fifa-world-cup-2022>.
- Human Rights Watch. 2003. *The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns*. Submission to the IOM Governing Council Meeting, 86th Session, Geneva.
- Independent Monitoring Research and Evidence (IMREF). 2020. *Exploring the Impact of COVID-19 on the Vulnerabilities of Migrants on the Central Mediterranean Route*. IMREF Report.
- IOM (International Organization for Migration). 2012. *IOM Migration Crisis Operational Framework*. Council 101st Session: MC/2355. https://www.iom.int/sites/g/files/tmzbd1486/files/documents/mc2355_-_iom_migration_crisis_operational_framework.pdf.
- IOM (International Organization for Migration). 2015. *Migration Governance Framework*. https://www.iom.int/sites/g/files/tmzbd1486/files/about-iom/migof_brochure_a4_en.pdf.
- IOM (International Organization for Migration). 2018. *Reducing Vulnerabilities and Empowering Migrants: The Determinants of Migrant Vulnerability Model as an analytical and programmatic tool for the East and Horn of Africa*. Nairobi: Regional Office for East and Horn of Africa. <https://reliefweb.int/sites/reliefweb.int/files/resources/DoV%20in%20EAHA%20for%20WEB.pdf>.
- IOM (International Organization for Migration). 2019a. International Migration Law no. 34 Glossary on Migration, edited by A.C. Bauloz Sironi and M. Emmanuel. Geneva: International Organization for Migration. https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf.
- IOM (International Organization for Migration). 2019b. *IOM Handbook on Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse*. Geneva: International Organization for Migration. <https://publications.iom.int/books/iom-handbook-migrants-vulnerable-violence-exploitation-and-abuse>.
- IOM (International Organization for Migration). 2020a. *World Migration Report 2020*. Geneva: International Organization for Migration. https://www.un.org/sites/un2.un.org/files/wmr_2020.pdf.
- IOM (International Organization for Migration). 2020b. *Strategic Vision: Setting a course for IOM*. Geneva: International Organization for Migration. <https://publications.iom.int/books/strategic-vision-setting-course-iom>.
- IOM (International Organization for Migration). n.d. "Missing Migrants, Latest Global Figures." Missing Migrants Project. Last modified 2021. <https://missingmigrants.iom.int>.

- Kainz, Lena and Alexander Betts. 2021. "Power and Proliferation: Explaining the Fragmentation of Global Migration Governance." *Migration Studies* 9, no. 1: 65–89.
- McAdam, Jane. 2016. "From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement." *University of New South Wales Law Journal* 39, no. 4: 1518–1546.
- McAdam, Jane. 2018. "The Global Compacts on Refugees and Migration: A New Era for International Protection?" *International Journal of Refugee Law* 30, no. 4: 571–574.
- OHCHR. 2018. *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*. OHCHR and Global Migration Group. <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>.
- Paz, Moria. 2018. "The Incomplete Right to Freedom of Movement." *AJIL Unbound* 111: 514–518. <https://doi.org/10.1017/ajil.2018.23>.
- Red Cross EU Office. 2013. *Shifting Borders: Externalising migrant vulnerabilities and rights?* Brussels: Red Cross EU Office. <https://redcross.eu/positions-publications/externalising-migrant-vulnerabilities-and-rights>.
- Sironi, Alice, Bauhoz, Celine and Emmanuel, Milen, eds. 2019. *Glossary on Migration*. International Migration Law, No. 34. Geneva: International Organization for Migration. https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf.
- Soulet, Marc-Henry. 2014. "La vulnérabilité, une ressource à manier avec prudence." In *La vulnérabilité saisie par les juges en Europe*, edited by Laurence Burgorgue-Larsen: 7–27. Paris: Pedone.
- Trindade, Antônio Augusto Cançado. 2011. *The Access of Individuals to International Justice*. New York: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199580958.001.0001>.
- Tuitjer, Léonie and Emilie Chevalier. 2015. "L'Initiative Nansen: le développement d'un agenda international de protection des populations déplacées à travers les frontières." In *Mobilité humaine et environnement du global au local*, edited by Christel Cournil and Chloé Vlassopoulos: 141–158. Versailles: Éditions Quae.
- UN Committee on the Rights of the Child. 2005. *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (May 17–June 3). CRC/GC/2005/6.
- UN General Assembly. 2013a. *Human Rights of Migrants* (August 7). A/68/283.
- UN General Assembly. 2013b. *Regional Study: Management of the external borders of the European Union and its impact on the human rights of migrants* (April 24). A/HRC/23/46.
- UN General Assembly. 2015. *Transforming Our World: The 2030 Agenda for Sustainable Development*.
- UN General Assembly. 2016. *New York Declaration for Refugees and Migrants* (September 19). A/RES/71/1.

- UN General Assembly. 2017. *Report of the Special Representative of the Secretary-General on Migration* (February 3). A/71/728.
- UN General Assembly. 2018. *Principles and Practical Guidance on the Protection of the Human Rights of Migrants in Vulnerable Situations* (January 3). A/HRC/37/34.
- UN Human Rights Committee. 1986. *The Position of Aliens under the Covenant* (April 11). CCPR General Comments no. 15.
- UNDRR (United Nations Office for Disaster Risk Reduction). 2015. *Sendai Framework for Disaster Risk Reduction 2015–2030*. Geneva: UNDRR.
- UNFCCC (United Nations Framework Convention on Climate Change). 2011. *Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010* (March 15). FCCC/CP/2010/7.
- UNFCCC (United Nations Framework Convention on Climate Change). 2015. *Paris Agreement*. Paris: UNFCCC.
- UNICEF and IOM. 2017. *Harrowing Journeys: Children and youth on the move across the Mediterranean Sea, at risk of trafficking and exploitation*. New York; Geneva: UNICEF and IOM.
- US Department of State. 2020. *Trafficking in persons report 20th edition*. United States of America Department of State. <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>.
- Wihtol de Wenden, Catherine. 2013. *Le droit d'émigrer*. Débats. Paris: CNRS Éditions. <https://www.cairn.info/le-droit-d-emigrer--9782271078827.htm>.