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The Global Compacts' Response to Large Movements of Refugees and Migrants: Addressing the Gaps?

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ABSTRACT

Sin dall'antichità le migrazioni hanno contraddistinto l'attività umana. Ad oggi sono circa 258 milioni le persone che non risiedono nel Paese di origine, un numero che cresce ad una velocità maggiore rispetto a quello della popolazione mondiale.

Nonostante la maggior parte delle migrazioni avvenga in modo sicuro e regolare, si stima che attualmente siano ben 68.5 milioni le persone sfollate, di cui 25.4 milioni rifugiati, 3.1 milioni richiedenti asilo e 40 milioni sfollati interni.

L'aumento del numero delle persone che si vedono costrette a lasciare il proprio Paese di origine non è l'unico sviluppo che il fenomeno migratorio ha recentemente conosciuto: ad esempio, il 52% della popolazione sfollata è oggi costituita da minori e si stima che, tra i minori che hanno attraversato il Mediterraneo nel 2017 per raggiungere l'Europa, 9 su 10 fossero non accompagnati.

Benché la percentuale delle donne sia invece rimasta sostanzialmente stabile nel tempo (attorno al 50% della popolazione migrante), donne e minori sono contraddistinti da specifiche esigenze e vulnerabilità che raramente sono tenute in considerazione nell'elaborazione di politiche migratorie e di asilo.

In risposta all'aumento delle persone sfollate, gli Stati hanno adottato politiche di immigrazione ancora più restrittive, manovra che ha però spesso condannato le persone a ricorrere ai servizi offerti dai trafficanti. Nonostante sia riconosciuto che le vittime di tratta possano necessitare di protezione e assistenza a causa delle violazioni dei diritti umani subite, di per sé non può essere loro concessa la protezione internazionale ai sensi della Convenzione di Ginevra relativa allo Status di Rifugiato del 1951.

Inoltre, il numero di persone sfollate a causa di disastri naturali, degradazione ambientale e degli effetti negativi legati al cambiamento climatico è in costante aumento. In assenza di un quadro normativo internazionale che regoli questi specifici casi, la

concessione di una qualche forma di protezione internazionale è ancora lasciata alla discrezione del singolo Stato.

Altra categoria di sfollati che ha subito una crescita nel corso degli anni è quella degli sfollati interni. Questi ultimi non sempre hanno accesso a protezione e assistenza. Essi ricadono infatti sotto la giurisdizione del Paese di origine e quindi, in virtù del rispetto della sovranità nazionale, la loro protezione è responsabilità dello Stato in questione. Tuttavia, quando quest'ultimo non riesce a proteggere i suoi stessi cittadini e altre popolazioni residenti nel suo territorio, gli sfollati interni si trovano in una situazione del tutto simile a quella dei rifugiati, con l'unica differenza di non aver attraversato un confine internazionale. Il rischio che possano alimentare il flusso di rifugiati ha portato il loro problema all'attenzione della comunità internazionale.

Ci sono altre due situazioni che hanno suscitato l'attenzione degli Stati e la loro spinta verso un nuovo modo di gestire il fenomeno migratorio in tutti i suoi aspetti: i flussi misti nel contesto di alto numero di migranti e rifugiati e le situazioni di asilo protratte. Queste esercitano ulteriore pressione sui sistemi già fragili dei pochi Paesi in via di sviluppo che da soli portano la responsabilità economica, ambientale e umana relativa all'accoglienza dell'85% della popolazione rifugiata mondiale.

In particolare, le migrazioni miste si caratterizzano per la compresenza di rifugiati e altre categorie di migranti che non possono a nessun titolo ricevere protezione internazionale. Nel contesto di grandi flussi migratori, questo tipo di migrazioni forzate esercita un'eccessiva pressione sui sistemi di accoglienza mettendo così a rischio la possibilità dei rifugiati di chiedere asilo in un altro Paese, come sancito nell'articolo 14 della Dichiarazione Universale dei Diritti dell'Uomo.

Dall'altro lato, i rifugiati in situazioni protratte cui non venga data la possibilità di provvedere al sostentamento proprio e della propria famiglia, sono spinti a cercare condizioni di vita migliori in un Paese diverso da quello di accoglienza, dando origine a movimenti secondari che, poiché spesso irregolari, aggravano le loro vulnerabilità.

Quando la cosiddetta "crisi dei rifugiati" scoppiò nel 2015, l'Europa iniziò a farsi promotrice della necessità di trovare un nuovo metodo di gestione delle migrazioni e dell'asilo a livello internazionale. Così, il 19 settembre 2016, l'Assemblea Generale delle

Nazioni Unite adottò, tramite consenso, la Dichiarazione di New York sui Rifugiati e i Migranti cui fecero seguito, nel dicembre del 2018, il Patto Mondiale sui Rifugiati e quello per le Migrazioni Sicure, Ordinate, e Regolari.

Questi due documenti, ampiamente approvati dagli Stati riuniti all'Assemblea Generale delle Nazioni Unite, non sono legalmente vincolanti. Essi si pongono come obiettivo quello di rafforzare la solidarietà internazionale nel contesto di grandi flussi migratori, di promuovere il rispetto dei diritti umani universali di cui ognuno è titolare indipendentemente dallo status migratorio in cui si trova, e di prevenire la migrazione irregolare, valorizzando l'apporto di quella regolare.

Questa tesi si propone di analizzare il contributo di questi due accordi in relazione alla gestione dei flussi migratori e a valutare la capacità dei Patti di colmare le lacune esistenti nel sistema di protezione internazionale.

A tal fine, verrà dapprima introdotto il quadro normativo che regola la protezione internazionale, tenendo in considerazione non solo la Convenzione di Ginevra relativa allo Status di Rifugiato del 1951 e il relativo Protocollo, adottato a New York nel 1967, ma anche la cosiddetta "protezione complementare" garantita dall'applicazione dei trattati sui diritti umani. Inoltre, per comprendere la diversità degli approcci regionali in merito, verranno presentati i tre maggiori sistemi di protezione internazionale regionali, vale a dire quello Africano, quello Latino-Americano e quello Europeo. Verrà anche brevemente trattato il tema della protezione tramite la prevenzione, che è stato rafforzato dall'adozione dell'Agenda 2030 per lo Sviluppo Sostenibile. Seguirà poi una sezione dedicata ad alcune delle esistenti lacune di carattere giuridico e attuativo che permangono nel sistema: le esigenze delle persone in situazioni di vulnerabilità, tra cui i cosiddetti "rifugiati ambientali", gli sfollati interni, le migrazioni miste e le situazioni di asilo protratte.

Nel secondo capitolo verrà presentata la Dichiarazione di New York, documento in cui sono poste le fondamenta dei due Patti Mondiali, e si discuterà della decisione di non adottare strumenti di *hard law* bensì di *soft law*, quindi non legalmente vincolanti. In particolare, si punterà l'attenzione sulla capacità di questi ultimi di fungere da linee guida per l'implementazione di obblighi già esistenti e sulla loro flessibilità, che permette

l'adattamento delle risposte alle diverse situazioni in cui vanno applicati. Verranno inoltre introdotti alcuni dei principi guida dei due Patti Mondiali basati sugli impegni assunti nella Dichiarazione di New York: la cooperazione internazionale e la condivisione delle responsabilità; l'approccio multi-stakeholder; il nesso umanitario-sviluppo; la necessità di fondi che siano prevedibili, flessibili, non legati ad un progetto e pluriennali; risposte che siano basate sui diritti umani e che pongano la persona al loro centro.

Dopo una presentazione dei Patti e dei loro meccanismi di revisione e monitoraggio, la tesi si concluderà evidenziando come questi affrontino le lacune presenti nel sistema di protezione internazionale. In particolare, si evidenzierà come nessuna delle sfide ai sistemi di asilo e di immigrazione sia stata adeguatamente trattata da un punto di vista normativo, cosa che tuttavia non sorprende se si considera che nessuno dei due Patti ha l'intento di creare nuovi obblighi sugli Stati.

Ciò nonostante, dalla loro lettura integrale e complementare emerge un nuovo approccio alle sfide attuali, in linea con gli sviluppi che il diritto internazionale sui diritti umani ha conosciuto nel corso degli anni. Entrambi i Patti presentano infatti un forte appello all'elaborazione di risposte e politiche che siano quanto più inclusive possibile e che tengano in adeguata considerazione le specifiche esigenze derivanti da età, genere, disabilità o altra condizione di diversità di migranti e rifugiati, nel pieno rispetto del principio di non discriminazione. Inoltre, le vittime di tratta vengono riconosciute come persone con specifiche esigenze e vulnerabilità a cui concedere protezione temporanea o permanente su base umanitaria, qualora la situazione lo richiedesse.

Si ribadisce poi che coloro che risultano sfollati a causa di eventi naturali non possono richiedere la protezione internazionale, causando il disappunto di molti accademici e organizzazioni internazionali. A dispetto di ciò, entrambi i Patti considerano tale situazione come una sfida umanitaria alla quale è necessario trovare una risposta e propongono a tal fine il rilascio di permessi di soggiorno umanitari o temporanei, l'elaborazione di programmi di ricollocamento e di creazione di visti specifici nel caso in cui il ritorno nel Paese di origine non fosse possibile.

Gli sfollati interni, purtroppo, trovano poco spazio all'interno dei Patti, benché la Dichiarazione di New York avesse fatto appello agli Stati affinché ci fosse un impegno nei

loro confronti, in considerazione della loro forte correlazione con i flussi di rifugiati.

Sorprendentemente, nemmeno il fenomeno delle migrazioni miste trova molto spazio nei due accordi, nonostante sia stato uno dei motivi che hanno portato alla loro adozione. Sebbene la loro lettura complementare dovrebbe provvedere a risolvere le problematiche poste da tale fenomeno, la mancata adesione di un buon numero di Stati al Patto per le Migrazioni rispetto a quello sui Rifugiati rischia di comprometterne il risultato.

Infine, il Patto sui Rifugiati prevede l'impegno degli Stati a rendere disponibili soluzioni durature per coloro che beneficiano di protezione internazionale. Si propone quindi un rafforzamento dei programmi di reinsediamento e di accesso a Paesi terzi, programmi riconosciuti come mezzo tangibile di condivisione delle responsabilità, e l'attuazione di politiche di integrazione locale – tra cui la naturalizzazione – e di altre soluzioni locali. Ciò è di particolare rilevanza per i rifugiati in situazioni protratte, ai quali è preclusa la possibilità di tornare nel proprio Paese di origine.

Per quanto le lacune esistenti nel sistema di protezione non trovino dunque particolare spazio nei Patti, questi ultimi hanno il merito di aver portato la discussione di temi politicamente sensibili al centro dell'agenda delle Nazioni Unite, di aver riconosciuto una correlazione tra le esigenze e le vulnerabilità di rifugiati e migranti, di aver riunito in due documenti rami diversi del diritto internazionale che regolano vari aspetti del fenomeno migratorio e che troppo spesso vengono interpretati e applicati settorialmente.

Sebbene il loro contributo non possa ancora essere valutato a causa del forte focus attuativo che li caratterizza, i Patti rappresentano comunque pietre miliari nel dialogo internazionale sulle migrazioni e sull'asilo e costituiscono il primo vero passo verso un nuovo approccio nella gestione delle migrazioni internazionali affinché possano essere motore di crescita e arricchimento per tutte le parti coinvolte.

LIST OF ACRONYMS

ACHR	American Convention on Human Rights
APRRN	Asia Pacific Refugees Rights Networks
BD	Declaración de Brasil
BRS	Burden- and responsibility- sharing
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Committee against Torture
CEAS	Common European Asylum System
CEDAW	Committee on the Elimination of All Forms of Discrimination against Women
CIREFCA	Conferencia Internacional sobre Refugiados, Desplazados y Repatriados de Centro América
CRC	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities Committee on the Rights of Persons with Disabilities
CRRF	Common Refugee Response Framework
DRR	Disaster Risk Reduction
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
EU	European Union
ExCom	Executive Programme of the United Nations Office for the High Commissioner for Refugees
GCM	Global Compact for Safe, Orderly and Regular Migration
GCR	Global Compact on Refugees
GFMD	Global Forum on Migration and Development
GMG	Global Migration Group
GRF	Global Refugee Forum
HR	Human Right
HRTs	Human Rights Treaties
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenants on Economic, Social and Cultural Rights
ICL	International Criminal Law
ICVA	International Council of Voluntary Agencies
IDPs	Internally-displaced persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMRF	International Migration Review Forum
IOM	International Organization for Migration

IRL	International Refugee Law
MD	Declaración de México Para Fortalecer la Protección de los Refugiados en América Latina
MDGs	Millennium Development Goals
MS	Member States
NGOs	Non-governmental organizations
NYD	New York Declaration
OAU	Organization of African Unity
PoA	Programme of Action of the Global Compacts on Refugees
PRS	Protracted Refugee Situations
RSD	Refugee Status Determination
SDGs	Sustainable Development Goals
SFDRR	Sendai Framework for Disaster Risk Reduction 2015-2030
SG	Secretary-General
SGBV	Sexual and Gender-Based Violence
SJD	Declaración de San José sobre Refugiados y Personas Desplazadas
TEU	Treaty on European Union
UASC	Unaccompanied or Separated Children
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
WHS	World Humanitarian Summit

INTRODUCTION

On December 2018, the United Nations Member States (UN MS) adopted two new documents: the Global Compact on Refugees (GCR)[1] and the Global Compact for Safe, Orderly and Regular Migration (GCM).[2] This thesis proposes to analyse their contribution to the international governance of refugee and migration flows and, in particular, aims at understanding whether they address the gaps currently existing in international protection.

My interest in these very recent documents springs from the chance I had last year to attend to the first three formal consultations leading to the adoption of the GCR while I was interning at the Humanitarian Division of the Italian Permanent Mission to the UN in Geneva. Moreover, since the Global Compacts are complementary, periodic updates were made in Geneva by the two co-facilitators on the negotiations of the GCM, which, instead, took place in New York.

What caught my attention at that time was States' effort to accommodate the language of the Global Compacts to their needs, despite the non-legally binding nature of the agreements is strongly underlined in their texts. This fact dispelled many of the doubts I had concerning their possible implementation. Hence, I started wondering what their

[1] UNITED NATIONS GENERAL ASSEMBLY (UNGA), *Global Compact on Refugees*, Report of the United Nations High Commissioner for Refugees Part II, Supplement No. 12, 17 December 2018, A/73/12 (Part II). Available at: https://www.unhcr.org/gcr/GCR_English.pdf.

[2] The GCM was adopted as outcome document of the International Conference for the Adoption of the Global Compact for Safe, Orderly and Regular Migration, held in Marrakech on December 10-11, 2018. On December 19, it was endorsed by the UNGA: UNGA Res. 73/195, *Global Compact for Safe, Orderly and Regular Migration (19 December 2018)*, 11 January 2019, A/RES/73/195. Available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195 [accessed 20 January 2019]

impact on the international protection regime could be and how they could address, through their complementary reading, the existing gaps, that were the object of much debate during the consultation phase.

In order to answer to these questions, it fundamental to have understand the current legal framework governing these issues. Therefore, the thesis opens with an overview of the international law regulating international protection, starting from an analysis of the refugee definition contained in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees,[3] followed by a reflection on the complementary protection provided by the application of International Human Rights Law (IHRL) and by a brief presentation of what I define protection though prevention, focusing on the contribution of the 2030 Agenda for Sustainable Development.[4]

Moreover, in order to underline the complexity and the diversity of forced displacement phenomena at the regional level, Chapter I presents the innovations advanced by three regional instruments, namely the 1969 Organization of the African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa[5], the 1984 Cartagena Declaration,[6] and the European Union's Directive 2011/95/EU.[7]

Chapter I concludes focusing on the gaps of the international protection regime in light of the changes occurred in forced displacement phenomena and States' consequent reactions.

Firstly, I consider the fact that States have enacted responses that do not take into account the specific needs and vulnerabilities that characterize women and girls, who

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[3] *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954), 189 *UNTS* 150.

[4] UNGA Res. 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development (25 September 2015)*, 21 October 2015, A/RES/70/1. Available at: https://www.refworld.org/docid/57b6e3e44.html [accessed 27 March 2019].

[5] *Convention Governing the Specific Aspects of Refugee Problems in Africa* (adopted 10 September 1969, entered into force 20 June 1974), 1001 *UNTS* 45.

[6] *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984.

[7] *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, *OJ L* 337/09 (2011).

constitute half of the total refugee and migrant population;[8] children, whose number has increased over time reaching the 52% of all refugees today; persons with disability or with other diversity features. In particular, with specific regard to refugees, I will underline that the concept of persecution which stands at the basis of refugee status recognition, has often been applied through an adult male lens. UN Treaty Bodies and the UN Agency charged with refugee protection, the United Nations High Commissioner for Refugees (UNHCR), have provided with authoritative expanded interpretation of such term but cannot impose obligations upon States to comply with it. Consequently, harmful acts which may not amount to persecution for an adult male but could in the case of a woman or a child, or persecutory acts that are gender-, age-, disability- and diversity-targeted may not be considered as such for the purpose of refugee status recognition.

Secondly, the adoption of restrictive migration policies has resulted in displaced persons often resorting to smugglers and human traffickers. However, being victim of one or both crimes does not necessarily lead to international protection as refugee or under IHRL. Nevertheless, persons on the move who have fallen victims of human traffickers and smugglers may be in need of assistance and protection in order to have their fundamental human rights (HR) fulfilled.

Thirdly, disasters-displaced persons are increasing in number, and sometimes they are precluded from the possibility of returning to their country of origin. This notwithstanding, there is still no international legal framework regulating these specific situations and protection challenges. Consequently, there is a fragmented and deeply divergent response to these phenomena depending on the country of arrival and persons affected may thus be in a vulnerable situation, whereby they cannot return but neither can they stay.

Another major protection gap is constituted by internal displacement, that currently affects about 40 million individuals, a figure that almost doubles the refugee population, which counts 25.4 million persons according to the latest data by the UNHCR. By reason

[8] For migrant women data, visit: https://migrationdataportal.org/themes/gender; for refugee women data, visit: http://popstats.unhcr.org/en/demographics.

of the principle of national sovereignty, internally-displaced persons' (IDPs) assistance and protection is responsibility of the country of origin. [9] When the latter cannot successfully protect its own citizens and residents, IDPs may become part of refugee flows. Vice-versa, if irregular migrants or refugees are returned to their country of origin without any assistance or reintegration plan, they may become internally-displaced.

The growing incidence of mixed migrations, whereby persons not entitled to any kind of international protection travel along the same routes as refugees, overburden asylum systems and heighten the risk of preventing refugees to be recognized as such, and, consequently, of exposing them to serious harm.

The last gap to be considered will be the protection granted to refugees living in protracted situations. When they are not provided with the instruments to become self-reliant, they become a burden for host communities and they are pushed to seek better living conditions in another country, originating secondary movements and exacerbating their vulnerabilities since this new migration often takes place in an irregular manner.

The Global Compacts adoption was envisaged in the New York Declaration for Refugees and Migrants[10] (NYD) of 2016, a political declaration whereby the international community acknowledged the need to change its response to refugee and migration flows. In particular, States affirmed that the responsibility to protect could not fall upon few host States and that engaging in responses that are HR-based and people-centred would provide benefits for both displaced populations and host countries and communities. Chapter II will thus analyse the pledges made in this Declaration and will focus on its two Annexes, where the commitment to adopt the two Global Compacts is stated. Particular attention deserves Annex I, which contains the Comprehensive Refugees Response Framework, an integral part of the GCR that is currently being rolled-out in 15 countries.

Moreover, I will reflect on the decision of States to opt for soft law agreements rather than new Conventions – as advocated by some scholars – in order to tackle the major humanitarian and protection challenges they faced. Specifically, I will underline that soft

[9] UNHCR, *Global Trends: Forced Displacement in 2017*, Geneva, 22 June 2018, p. 2.
[10] UNGA Res. 71/1, *New York Declaration for Refugees and Migrants (19 September 2016)*, 3 October 2016, A/RES/71/1. Available at: https://www.unhcr.org/57e39d987 [accessed 13 January 2018].

law is more flexible and operationally focused and, hence, more suitable to fit in a context where the legal framework is already well-established, even if fragmented, and to respond to situations which can require different actions depending on where and with which modalities they take place.

Chapter II concludes with the presentation of the main principles guiding the adoption and implementation of the two Global Compacts and marking a new way of working. Firstly, the GCR and GCM strongly commit to BRS and international cooperation, which are both an aim and a mean to achieve the goals set in the two agreements. Secondly, they call for a multi-stakeholder and whole-of-society approach, in recognition of the fact that responses involve a variety of actors whose expertise and experience need to be taken into account when elaborating solutions. Thirdly, the Global Compacts call for the enhancement of cooperation between humanitarian and development actors, including through the provision of multi-year, unearmarked, flexible, timely and predictable humanitarian funding as well as of development resources additional to those regularly provided, in order to be able to plan for long term and sustainable solutions from the outset of a crisis. Lastly, both documents retain a strong HR approach and call for the elaboration of people-centred responses, acknowledging displaced persons as agents whose aspirations and desires need to be considered if effective solution are to be developed.

The final Chapter will directly focus on the GCR and GCM, presenting an overview of their commitments and paying particular attention to the arrangements of BRS and of international cooperation they propose, as well as on the mechanisms for follow-up and review. In fact, these are fundamental to determining the Global Compacts' success since they could push States to comply with their pledges despite the non-legally binding nature of the two documents.

Ultimately, I will analyse whether and how the Global Compacts address the gaps and challenges previously identified and their potential to improve the situations of all the parties involved in order to make migration work for all.

CHAPTER I

THE INTERNATIONAL PROTECTION REGIME AND ITS GAPS

Contents: 1. The international framework on forced migration 1.1. International Refugee Law 1.2. Complementary Protection: the role of Human Rights 1.3. Protection through prevention: the role of the 2030 Agenda for Sustainable Development 2. Relevant regional frameworks 2.1. Africa: the first extended definition of refugee 2.2. Latin America: the Cartagena Process 2.3. Europe: the novelty of European Union's 'subsidiary protection' 3. The protection gaps 3.1. Vulnerabilities and specific needs 3.1.1. Gender, age, disability and diversity 3.1.2. Victims of smuggling and human trafficking 3.1.3. 'Environmental refugees' 3.2. Internally Displaced Persons 3.3. Mass-influx and mixed migrations 3.4. Protracted Refugee Situations

In light of the highest number of displaced persons since World War II,[11] the international community is faced with the challenge to protect migrants' and refugees' rights while safeguarding its legitimate security concerns. Moreover, during the years new categories of persons considered in need of international protection have emerged in parallel with IHRL development. However, protection gaps still remain due to a clustered application of IHRL and to a too restrictive interpretation of the 1951 Convention Relating to the Status of Refugees (hereinafter, the 1951 Convention or simply the Convention).

In order to understand the current challenges of the international protection regime, this chapter will begin providing an overview of the international legal framework regulating forced migration. In particular, the analysis will start by introducing International Refugee Law (IRL), which is the main tool of international protection, and discussing its validity in today displacement's scenario; then, it will analyse the

[11] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, *Evaluation of the Office of the United Nations High Commissioner for Refugees: Report of the Office of Internal Oversight Services*, 18 March 2015, E/AC.51/2015/5. Available at: https://www.refworld.org/docid/559f9fc34.html [accessed 25 March 2019], para 5.

contribution of IHRL to the institutionalization of complementary protection; thirdly, it will describe the shift from reactive protection to preventive protection through the inclusion of migration in the 2030 Agenda for Sustainable Development.

The chapter continues with a brief presentation of the innovations brought by the three major regional frameworks of international protection, namely those regulating refugee status in the African Union, Central and Latin America, and the European Union.

Lastly, it highlights several important protection gaps existing in the protection regime, some of which constituted the inputs for the adoption of the GCR and the GCM.

1. THE INTERNATIONAL FRAMEWORK ON FORCED MIGRATION

1.1 INTERNATIONAL REFUGEE LAW

The 1951 Convention Relating to the Status of Refugees is still regarded today as the "foundation of the international refugee protection regime."[12] Entered into force in 1954, the Convention "provides a universal code for the treatment of refugees uprooted from their countries as a result of persecution, violent conflict, serious human rights violations or other forms of serious harm."[13]

The 1951 Convention stipulates that refugees are all those persons who had been recognised such status under one of the previous international agreements (Art. 1A(1)); moreover, Art. 1A(2) defines a refugee as any person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a nationality and being outside the country of his former habitual residence as

[12] NYD, para 65.
[13] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, December 2011, HCR/1P/4/ENG/REV. 3, p. 1.

> a result of such events, is unable or, owing to such fear, is unwilling to return to it.[14]

According to this definition, the main features of a refugee are (1) a subjective, but reasonable element, which is the *well-founded fear* to suffer (2) persecution (3) on one of the five Convention grounds, (4) that he/she has crossed an international border, and (5) he/she cannot or does not want by reason of such fear avail himself/herself of the protection of the country of origin/habitual residence. Moreover, the reason compelling the displacement is to be found in events occurring before 1 January 1951 in Europe (Art. 1B(1)(a)) or elsewhere (Art. 1B(1)(b)).

The temporal and geographical limitations provided for are a clear symptom of the historical context in which the Convention was drafted. The main aim at that time was, in fact, to find a solution to the almost 50 million people displaced as a result of World War II; moreover, asylum was used as a political tool to offer protection to the opponents to communists' regimes in the context of the Cold War. In addition, States pushed for the inclusion of these restrictions to avoid a broader and more encompassing definition of refugee.

As a result, one of the main critics to the Convention is that it displays a too strong European character. Indeed, of the 26 UN Member States (MS) participating at the Conference of Plenipotentiaries of 28 July 1951, 17 were European.[15]

Many discussions have arisen during the time as to whether the 1951 Convention is still appropriate to face the current challenges posed by displacement. In order to fully comprehend the nature and content of the Convention, it is useful to recall the evolution it underwent through the years.

First, in light of the growing number of displaced persons in the world due to the

[14] As stated in UNHCR's *Handbook*, the term race was intended as encompassing "all kinds of ethnic groups" (para 68), whereas nationality "equally refers to membership of an ethnic or linguistic group and may overlap with the term race" (para 74).

[15] The States who participated at the Conference of Plenipotentiaries are Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, Yugoslavia.

liberation of former colonies in most of the developing world,[16] it became clear that the limitations laid down in the 1951 Convention were hampering the scope of the Convention. Hence, a Protocol to the Convention was drafted by UNHCR and submitted for adoption on 31 January 1967 in New York.[17]

Of outmost importance is the fact that the Protocol does *not* amend the Convention. They are two separate documents: signing one does not entail the signature of the other. Indeed, many States are only Parties to the Protocol – namely, Cape Verde, United States, Venezuela[18] – while Madagascar, Saint Kitts and Nevis[19] are only bound by the Convention. Overall, 148 States are Parties to the international refugee regime.

The 1967 Protocol establishes the obligation of contracting States to abide by the 1951 Convention from Art. 2 to Art. 35 (general obligations and minimum rights to be granted to refugees) and eliminates the temporal limitation from the definition of refugee. However, it still provides for the maintenance of the geographical limitation, which to date only Congo, Madagascar, Monaco and Turkey still retain.[20]

The basis for the less restrictive definition of the Protocol is to be found in the Statute of the Office of the UNHCR,[21] whose Art. 6B establishes that the mandate of the UN Agency also extends to:

> Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country

[16] A. BETTS and G. LOESCHER, "Refugees in International Relations." In *Refugees in International Relations*, edited by G. Loescher and A. Betts, Oxford University Press, New York, 2011, p. 8.
[17] *Protocol Relating to the Status of Refugees* (adopted 31 January 1967, entered into force on 4 October 1967), 606 *UNTS* 267. Hereinafter, the 1967 Protocol or simply the Protocol.
[18] Annex IV of UNHCR, *Handbook*, op. cit., p. 66.
[19] *Ibidem*.
[20] *Ibidem*.
[21] UNGA Res. 428(V), *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V).

> of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

Interestingly, this definition lacks the "membership of a particular group" ground, which is the one that most permitted a more extensively application of the refugee definition. In fact, it was through this ground that sexual and gender-based violence (SGBV) was first understood as valid reason for the recognition of refugee status.[22]

Furthermore, this wider interpretation was made possible by the evolution in the understanding of persecution. Indeed, despite being one of the determining elements of the refugee definition, the term *persecution* intentionally lacks definition in the Convention, which enabled the amplification of its meaning through the evolution of international law. In fact, in the light of the development of IHRL, International Humanitarian Law (IHL) and International Criminal Law (ICL),[23] UNHCR has come to understand it as encompassing not only a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group but also "human rights abuses or other serious harm, often, but not always, with a systematic or repetitive element."[24]

Besides providing for a refugee definition and for status cessation (Art. 1C) and exclusion clauses (Arts. 1D, 1E and 1F), the Convention further sets the core principles at the basis of the refugee regime, i.e. non-discrimination (Art. 3), non-criminalization of illegal entry (Art. 31), exceptionality of expulsion measures (Art. 32), and the commitment of States to cooperate with the UNHCR in order to achieve effective solutions (Art. 35). Moreover, the Preamble stresses the humanitarian and social nature of the refugee issue, which, consequently, should not lead to tensions among States; recognizes the excessive burden that the grant of asylum could place on certain States; and emphasizes the consequent need for international cooperation.

The aim of the Convention is not only to provide legal status to persons fleeing

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[22] See UNHCR, *Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02.
[23] Cfr. *infra* Chapter I, para 1.2.
[24] UNHCR, *Master Glossary of Terms - Rev. 1*. Status Determination and Protection Information Section, Division of International Protection Services, Geneva, 2006, p. 16.

persecution on one of the grounds stated in its Art. 1A(2), but also to guarantee refugees with minimum rights, such as the right to freedom of religion (Art. 4), right of association (Art. 15), right to public education (Art. 22) right to public relief (Art. 23), freedom of movement (Art. 26), right to identity paper (Art. 27), and travel documents (Art. 28). As better explained in the next paragraph, the rights refugees are entitled to distinguish them from other categories of persons (such as victims of human trafficking, smuggled migrants, victims of torture on basis other than Convention's grounds) who, while may still be beneficiaries of some forms of international protection, find themselves in a legal limbo. It is worth recalling, however, that refugees are also entitled to the whole set of universal rights and freedoms enshrined in IHRL, as other categories of migrants.

Finally, the Convention establishes the fundamental pillar of protection regimes: the principle of non-refoulement (Art. 33). Article 33(1) imposes on States the prohibition to:

> expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It was observed above that IHRL, IHL and International Criminal Law (ICL) have fostered a broader interpretation of what persecution is in order to recognize refugee status. These branches of international law have also had a fundamental role in defining which situations may be considered sufficiently severe to trigger a positive obligation of States to provide protection from forced removal.[25] Hence, according to most scholars, "the Convention's application has been extended through the expansion of non-refoulement under human rights law (and, by analogy, to protection granted in accordance with humanitarian and international criminal law), rather than by the conventional means of a Protocol."[26]

Besides constituting the cornerstone of refugees' protection, the principle of non-refoulement is the "essential corollary to the right to seek asylum as enshrined in the

[25] Cfr. *infra* Chapter I, para 1.2.
[26] J. MCADAM, *The Evolution of Complementary Protection,* Oxford University Press, Oxford, 2007, p. 209.

Universal Declaration on Human Rights" (UDHR).[27] In fact, Article 14(1) envisages that:

> Everyone has the right *to seek* and *to enjoy* in other countries asylum from persecution. [emphasis added]

As evident from the wording, it does exist a right to *seek* and *enjoy* asylum, but there is no right *to be granted* refuge. The same idea is reflected in Art. 33 of the Convention, which indeed:

> does not oblige States to grant refugees asylum, it ensures that such persons must be allowed to stay, even if denied asylum unless they can be sent to a third country where they are safe from persecution and from being returned to the country of persecution. While a right to asylum would create a positive obligation the prohibition of refoulement imposes a negative duty to refrain from certain actions.[28]

The concept of asylum is contemplated also in the 1967 Declaration on Territorial Asylum[29], which, however, does not go further from the UDHR basis. Indeed, here again the focus is not so much on the right of *people* to be *granted* asylum, but on the right of *States* to *concede* asylum[30] to those who invoke it under Art. 14 of the UDHR.

In conclusion, despite the critics that have been moved to the validity of the 1951 Convention to modern challenges, it is evident that it proved to be a document adaptable to changing circumstances.

Finally, it is the only international HR instrument which can be engaged directly and immediately by at-risk persons themselves. Most important of all, it is a fundamentally practical remedy which can be reconciled to the most basic interests of States.[31]

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[27] UNGA Res. 217 A (III), *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
[28] W. KÄLIN, M. CARONI, and L. HEIM, "Article 33, para. 1 1951 Convention." In *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. by A. Zimmermann, Oxford University Press, Oxford, 2011, p. 1335.
[29] UNGA Res. 2312(XXII), *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII).
[30] Art. 1 para 3 of the Declaration states that "[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."
[31] J. HATHAWAY, "Why Refugee Law Still Matters." *Melbourne Journal of International Law,* 8:1, 2007, p. 103.

1.2 COMPLEMENTARY PROTECTION: THE ROLE OF HUMAN RIGHTS

In the previous paragraph, we concentrated on analysing who is a refugee. But what is the regime applicable to people forcibly displaced but not falling under such category? Which rights are they entitled to?

Currently, at the global level there is no internationally agreed document regulating the status and the rights to be granted to forcibly displaced persons, excluding refugees and asylum-seekers, to whom the 1951 Convention applies.

In the face of the new challenges posed by international displacement, the UNGA and the Economic and Social Council expanded the mandate of UNHCR to "persons of concern", including not only refugees, but also "persons who have been forced to leave their countries as a result of conflict or events seriously disturbing public order, asylum seekers, returnees, stateless persons, and, in some situations, internally displaced persons."[32] The criterion adopted to identify them has been the lack of protection of the country of origin, which may stem out of statelessness, persecution for reasons of race, religion, nationality or political opinion, and man-made disasters.[33] As of 2007, the refugee category also includes persons in a refugee-like situations, i.e. "persons who are outside their country or territory of origin and who face protection risks similar to those of refugees, but for whom refugee status has, for practical or other reasons, not been ascertained."[34] In conclusion,

> the class of persons within the mandate of, or of concern to, UNHCR includes: (1) those who, having left their country can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain specified grounds; and (2) those often large groups or categories or persons who, likewise having crossed an international frontier, can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin.[35]

[32] UNHCR, *Master Glossary of Terms*, op. cit., p. 16.
[33] G. S. GOODWIN-GILL, *The Refugee in International Law*, Second Ed., Oxford University Press, Oxford, 1996, p. 15.
[34] UNHCR, *Global Trends 2017*, op. cit., p. 75.
[35] GOODWIN-GILL, *The Refugee in International Law,* op. cit., p. 17.

In addition to UNHCR protection and assistance, further guarantees for persons excluded from refugee status may be deduced from IHRL. Before analysing its contribution to the international protection regime, we must refer once again to the 1951 Convention. Indeed, the Convention is fundamental in the international protection regime because it enshrines "the foundation stone of international protection",[36] i.e. the principle of non-refoulement.

Despite many States held that the principle of non-refoulement does not entail admission to the country's territory due to its negative wording, such an interpretation is misleading. In fact, to the extent that also return to the frontiers is encompassed, it is to be understood in a broad sense.[37] The same interpretation was accepted during the Conference of Plenipotentiaries who adopted the Convention.[38] Moreover, if Art. 33 had only provided for the removal from the territory of an already admitted person, there would have been no sense to separate it from Art. 32 of the 1951 Convention, which affirms the right of States to expel a refugee under specific circumstances.

Art. 33 of the Convention clearly states its applicability solely with regard to refugees as defined in Art. 1A(1) and 1A(2) and it only binds States Parties to the Refugee Convention/Protocol. Thus, how can this principle be important for the scope of defining the so-called complementary protection regime? It is important because the same principle is enshrined in regional refugee Conventions.[39] Despite the fact that several countries are not Parties to any of these instruments, their practice in hosting refugees has proved their alignment with this principle. Moreover, the prohibition of forced removal or return is contained in international and regional Human Rights Treaties

[36] *Ibidem*, p. 30.
[37] For discussions, see KÄLIN *et al*., "Article 33, para. 1 1951 Convention", op. cit., pp. 1363-1368, 1395. Inclusion of non-rejection at the frontiers in the principle of non-refoulement is also consistent with UNHCR interpretation. See ExCom Conclusions No. 6(XXVIII); 22(XXXII); 81(XLVIII), 82(XLVIII); 85(XLIX); 99(LV); 108(LIX).
[38] GOODWIN-GILL, *The Refugee in International Law,* op. cit., p. 117. The English version led to misunderstanding the meaning of the *Ad hoc* Committee draft, in that it talked about "expulsion", a word applying to aliens lawfully staying in the country. However, at the Conference of Plenipotentiaries, several countries (France, the Netherlands, Italy, Sweden Germany, and Belgium) pointed out that the French word "refouler" applied also in case of rejection at the frontiers. See UN Doc. A/CONF.2/SR.16 (1951), p. 6.
[39] Cfr. *infra* Chapter I, para 1.3.

(HRTs),[40] whose near universal ratification has led to conclude that the non-refoulement tenet has reached the status of customary international law,[41] i.e. a norm with validity *erga omnes*. Discussions have also emerged on whether the principle of non-refoulement has acquired *jus cogens* nature. Indeed, already in 1982, the Executive Programme of the UNHCR (ExCom) had found that "the principle was progressively acquiring the character of a peremptory rule of law", [42] while in 1996 it pointed out that "the prohibition of refoulement is not subject to derogation".[43] However, the debate in this regard is still ongoing.[44]

The principle of non-refoulement contained in HRTs had its scope of application broadened. Besides widening the categories to which it refers to every individual, HRTs also expanded the reasons its application. In fact, in addition to barring rejection, return or removal to places where one's life or freedom would be threatened on one or more Convention's grounds, HRTs establish the prohibition of exposure to torture[45] and other cruel, inhuman or degrading treatment or punishment. In the case of HRTs not explicitly mentioning an interdiction to forced rejection or removal, Treaty Bodies' and regional courts' jurisprudence has affirmed that the prohibition of torture or cruel, inhuman or degrading treatment or punishment is to be understood as entailing a duty to prevent every person under State's jurisdiction to suffer such practices.[46] Accordingly, "[i]t is a

[40] Art. 3 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (adopted 10 December 1984, entered into force 26 June 1987), 1465 *UNTS* 85; Art. 19 *Charter of Fundamental Rights of the European Union* (adopted 7 December 2000), OJ C 202/389 (2016); Art. 22(8) *American Convention on Human Rights* (ACHR)(adopted 22 November 1969, entered into force 18 July 1978), 1144 *UNTS* 123; Art. II(3) OAU Convention. The following international and regional tools contain a non-refoulement component: Art. 7 *International Covenant on Civil and Political Rights* (ICCPR)(adopted 16 December 1966, entered into force 23 March 1976), 999 *UNTS* 171; Art. 5 *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 Rev. 5; Art. 3 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) (adopted 4 November 1950, entered into force 3 September 1953), 213 *UNTS* 222.

[41] UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, Preamble recital 4.

[42] UNHCR ExCom Conclusion No. 25 (XXXIII) 1982, recital (b).

[43] UNHCR ExCom Conclusion No. 79 (XLVII) 1996, recital (i).

[44] KÄLIN *et al.*, "Article 33, para. 1 1951 Convention"*, op. cit.*, p. 1346.

[45] For a definition, see Art. 1, para 1 of the CAT.

[46] COMMITTEE AGAINST TORTURE (CAT), *General Comment No. 4 (2017) on the implementation of*

liability incurred by the Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to such treatment."[47]

Therefore, to date the principle of non-refoulement should encompass situations in which the person "(a) has a well-founded fear of being persecuted, (b) faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or (c) faces other threats to life physical integrity, or liberty."[48]

Last but not least, the provisions of non-refoulement included in HRTs are absolute, i.e. applicable to every person without exception to the extent that some have reached the status of *jus cogens*;[49] on the contrary, Art. 33(2) of the 1951 Convention permits derogation in case the refugee constitutes a danger to the security of the country, either because there are reasonable grounds to believe it or because he/she has been convicted by final judgement of a particularly serious crime.

Support to the broadening of the category of persons who must benefit of the protection against forced removal has also been provided by IHL. In this case too "the guiding principle is that individuals have the right to be protected from arbitrariness and abuse".[50] In particular, the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War[51] in Art. 45(4) establishes the obligation of States not to return protected persons[52] to places where they have reason to fear persecution on the ground of political opinion or religious beliefs.

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article 3 of the Convention in the context of article 22, 9 February 2018, para 15.

[47] *Soering v. the United Kingdom*, application no. 14038/88, judgment of 7 July 1989, p. 26, para 88.

[48] E. LAUTERPACHT, D. BETHLEHEM, "The Scope and Content of the Principle of *Non Refoulement*: Opinion." In *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, ed. by E. Feller, V. Türk, and F. Nicholson, Cambridge University Press, Cambridge, 2003, pp. 87, 125.

[49] For instance, Arts. 2 and 3 CAT; Art. 3 ECHR.

[50] J. KELLENBERGER, *Protection through complementarity of the law*. Statement by the President of the International Committee of the Red Cross delivered at 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 4-6 September 2003. Available at: https://www.icrc.org/en/doc/resources/documents/statement/5rfgaz.htm [accessed 27 February 2019].

[51] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950), 75 *UNTS* 287

[52] For a definition, see Art. 4 Fourth Geneva Convention.

Finally, though not explicitly mentioning the prohibition of refoulement, ICL establishes that return of smuggled[53] and trafficked[54] migrants shall comply with the obligations stemming from other treaties governing the return of such categories of persons.

Therefore, in certain cases some individuals who do not match the refugee definition still have the right not to be removed or rejected under the protection of IHRL. They are thus beneficiaries of what is called "complementary protection".[55] Yet, does this protection entail the same rights refugees are entitled to? This question has started many discussions. According to State practice, complementary (or subsidiary) protection has been understood as granting a lower level of protection. Indeed, as observed earlier, there is no State obligation to grant asylum, in the sense of permanent admission. Indeed, IRL is "fundamentally a mechanism of human rights protection, not a mode of immigration."[56] On the contrary, UNHCR asserts that observing non-refoulement without granting any positive status is not enough to allow people to live in dignity.[57] In light of this perspective, the UN Agency for Refugees has provided the basis for many extra-Convention regimes as early as 1975, when it set the minimum standard protection and rights to be accorded to Indo-Chinese displaced persons in countries who were not Parties to either the 1951 Convention or 1967 Protocol. Moreover,

> early extensions of international protection afforded beneficiaries identical rights to Convention refugees, such as arrangements regarding Hungarian refugees in the 1950s. UNGA Resolution 1959 (XVIII) of 12 December 1963 reflected a growing acceptance by States that extra-Convention refugees

[53] *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* (adopted 15 November 2000, entered into force 28 January 2004), 2241 *UNTS* 507, Art. 18, para 8.
[54] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (adopted 15 November 2000, entered into force 25 December 2003) 2237 *UNTS* 319, Art. 8, para 6.
[55] UNHCR, *Master Glossary of Terms*, op. cit., p. 6.
[56] J. MCADAM, "The Enduring Relevance of the 1951 Refugee Convention." *International Journal of Refugee Law,* 29:1, 2017, p. 96.
[57] EXCOM, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, Standing Committee 18th meeting, 9 June 2000, EC/50/SC/CRP.18; cited in MCADAM, *The Evolution of Complementary Protection*, op. cit., p. 200.

> should be entitled to the same standards of treatment as Convention refugees.[58]

Was it otherwise, McAdam maintains, the principle of non-refoulement included in HRTs would "trigger for protection without any corresponding legal status" resulting in a "protection gap". [59] According to her, the non-refoulement clause enshrined in Art. 3 of the CAT constitutes a direct referral to Art. 33 of the Refugee Convention. Since the latter is a HR *lex specialis*, i.e. "an appropriate legal status irrespective of the source of the State's protection obligation",[60] it is assumed that the legal status granted therein should apply also in the cases falling under the protection of Art. 3 of the CAT.[61] In conclusion:

> [t]he failure of human rights law to establish a complementary protection status, as opposed to an eligibility threshold, is not because international law is unconcerned with the legal treatment of such persons, but rather because the Convention already provides an appropriate protection regime.[62]

1.3 Protection through prevention: the 2030 Agenda for Sustainable Development

The international refugee regime was thought as a reaction to the flows of displaced persons.[63] The Preamble to the 1951 Convention and the UNHCR Statute remarked the essential humanitarian and non-political nature of the provision of protection and assistance. Moreover, since the drivers of human displacement were to be found inside the single State, addressing the root causes was regarded as an interference in national affairs and therefore not considered as a relevant international concern. However, the constant generation of flows of displaced persons and the development of an international responsibility to protect, led the international community to realize the

[58] McAdam, *The Evolution of Complementary Protection*, op. cit. p. 210.
[59] *Ibidem*, p. 201.
[60] *Ibidem*, p. 1.
[61] *Ibidem*, p. 210.
[62] *Ibidem*.
[63] G. S. Goodwin-Gill, "Introductory Note to the 1951 Convention/1967 Protocol Relating to the Status of Refugees." *United Nations Audiovisual Library of International Law*, Historic Archives, 2008. Available at: www.un.org/law/avl [accessed 30 January 2019].

importance to create conditions that could prevent the creation of massive flows of people fleeing the country of origin.

Embedded in a misconception of migration and development, with the former conceived as the failure of the latter, States states meglio di IC started to build upon a migration-development nexus.

Evidence showed that among the major displacement drivers were social inequalities, the lack of education, poverty and famine, man-made and natural disasters, and disparities in the development of nations. In order to solve these inequalities, in 2000 the Millennium Development Goals (MDGs) were adopted. However successful, the MDGs nevertheless failed to integrate migration policies in development plans.

In light of the persisting differences on many grounds in the international community and drawing upon the lessons learnt in the previous MDGs, in 2015 the UNGA adopted 17 Sustainable Development Goals (SDGs) enshrined in what is known as the 2030 Agenda for Sustainable Development. Through the adoption of such Agenda, migration has been first explicitly integrated into a global development framework.[64] The central reference to migration is constituted by target. 10.7 which proposes to "[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies".[65] This target also calls for the elaboration of global, regional and national comprehensive policy frameworks in order to achieve well-managed migration, such as safe and regular pathways of admission; mitigating and addressing migrants' vulnerabilities; capacity-building; targeted programmes for refugees and IDPs; taking into account the needs of host communities.[66]

In addition, mention is made to the potential positive contribution of well-managed migration to sustainable development and it is recognized the multidimensionality of migration.[67] According to IOM, every SDG could be linked to a migration aspect.[68] For

[64] IOM, *Migration and the 2030 Agenda. A Guide for Practitioners*, Geneva, 2018, p. 13.
[65] For an articulation of well-managed migration policies, please refer to IOM Council Res. 1310/2015, *Migration Governance Framework*, 4 November 2015, C/106/40. Available at: https://governingbodies.iom.int/system/files/en/council/106/C-106-40-Migration-Governance-Framework.pdf.
[66] IOM, *Migration and the 2030 Agenda*, op. cit., p. 27.
[67] 2030 Agenda, para 29.
[68] IOM, *Migration and the 2030 Agenda*, op. cit., p. 30.

instance, many SDGs address key drivers of migration. For instance, States committed to end extreme poverty (Goal 1); to provide access to free primary education to all children, trying to address the high drop rate that still exists in many parts of the world (Goal 4); take measures to prevent the worsening of climate change (Goal 13) and build resilient societies (Goal 9); expand access to clean water (Goal 6); the continuation of peace-keeping operations and the development of preventive diplomacy to build peaceful and inclusive societies (Goal 16). Moreover, other goals can be used to set new standards in addressing migration flows, such as mainstreaming age- and gender- in migration policies (Goals 3 and 5); providing for quality health and social services throughout the whole migration cycle (Goal 3); recognizing the existence of multiple and intersecting forms of vulnerabilities and try to adequately address them (Goal 5); fostering the promotion of employment (Goal 8); and the facilitation of remittances (target 10.c).

Moreover, the universality of the SDGs entails that the 2030 Agenda should apply to every human being, and, more specifically, para 29 refers to the importance of the full respect for human rights and the humane treatment of migrants *regardless of migratory status*, leaving no-one behind. In addition, in contrast with the MDGs which was designed to be implemented only in developing countries, the 2030 Agenda has a universal scope of application.

The 2030 Agenda aims at the creation of an environment in which irregular migration is prevented from occurring and recognizes that well-managed migration could contribute to the achievement of many SDGs. However, displacement in the 2030 Agenda is still seen as a problem whose drivers are to be found in the incapability of the country of origin to provide its citizens/residents with a high standard of living. This approach fails to recognize the "translocal and de-territorialized characteristics of our global economy or the complex relationships of livelihoods and lifestyle across distant places".[69] IOM, instead, maintains that a comprehensive reading of the SDGs leads to the interpretation of migration as a process to be managed rather than as a problem to be solved.

Despite the critics, the 2030 Agenda constitutes today an important framework in the

[69] G. NIJENHUIS, and M. LEUNG, "Rethinking Migration in the 2030 Agenda: Towards a De-Territorialized Conceptualization of Development." *Forum for Development Studies,* 44:1, 2017, p. 52.

migration field. Its bottom-up and multi-stakeholder approach reflects the interests of the three main stakeholders involved, namely migrants themselves (calling for the full respect of their rights regardless of their migratory status), countries of origin (asking for a reduction of remittances costs), and receiving countries (underlining the necessity for legal channels of entry in order to be able to manage migratory flows).[70]

2. RELEVANT REGIONAL FRAMEWORKS

For the purpose of this thesis, it appears fundamental to also recall the relevant regional protection frameworks currently in force. Indeed, as it is quite often underlined by UNHCR, the refugee issue can better be tackled through cooperation between States. In fact, regional solidarity agreements are usually more easily achieved given that States' interests at stake are more similar and intertwined.

In particular, the paragraph will focus on the innovations advanced by three regional instruments: the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter, 1969 OAU Convention), which is the first and only legally-binding instrument broadening the 1951 Convention's refugee definition; the 1984 Cartagena Declaration, which despite being non-legally binding has provided the template for an extended refugee definition in Central and Latin America; the European Union's Directive 2011/95/EU, that is a unique example of creation of a new status of protection to complement the 1951 Convention's definition.

2.1 AFRICA: THE FIRST EXTENDED DEFINITION OF REFUGEE

Africa has been defined as "the region where there are the most intensive activities and the highest degree of institutionalisation at the regional level in matters relating to refugees."[71] In fact, as anticipated, the 1969 OAU Refugee Convention[72] is the only

[70] *Ibidem*, p. 59.
[71] P.-M. FONTAINE, "Crises, Challenges and Response. The Governance of the Refugee Problem in Africa: A Research Agenda." *Refugee Survey Quarterly,* 25:4, 2006, p. 69.
[72] It is now counting 45 Member States. Four States have signed but not ratified the OAU Convention (Djibouti, Madagascar – not Party to the 1967 Protocol –, Mauritius – not Party to the

regional binding document adopted in the developing world expanding the refugee definition contained in Art. 1(2) of the Refugee Convention, which is recalled in Article I(1). According to Article I(2) of the OAU Convention, refugee is also:

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[73]

In Sharpe's opinion, however, the expansion of the 1951 Convention as of Art. I(2) of the OAU Convention is not as great as it has often been depicted.[74] If it is true that the OAU Convention definition accepts that events of a general nature (external aggression, occupation, foreign domination or events seriously disturbing public order) may cause refugee flows, it is also true that three of the four events mentioned in the Article have little relevance today. Data show that most of the ongoing conflicts are not of international scale.[75] Moreover, as discussed above, the 1951 Convention definition does not prevent the recognition of refugee status to those fleeing conflicts or generalized violence, if the severe violations of HR caused by such events amount to persecution on one or more of the Convention's grounds.

With regards to the case of events seriously disturbing public order, it is true that it has acquired increased relevance over the years and it now constitutes the main source for the extension of the status in the continent. Yet, the lack of a clear definition and of interpretative consensus on its meaning weakens its scope.

Another important distinction between the international and the regional instrument for refugee protection is that the latter "explicitly gave credence to the fact that a refugee

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1951 Convention/1967 Protocol– and Somalia), and 5 have neither signed nor ratified (Eritrea – not Party to the 1951 Convention – , Namibia, Sahrawi Arab Democratic Republic – not Party to the 1951 Convention –, Sao Tome and Principe, South Sudan).

[73] Art. I(2) OAU Convention.

[74] M. SHARPE, "The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions." *McGill Law Journal,* 58:1, 2012, p. 98.

[75] THE WORLD BANK, *World Development Report 2011: Conflict, Security and Development*, Washington DC, 2011, p. 52.

exodus could be the result of factors of a more general nature, intrinsic to the particular country in question, rather than to the individual subjective status or fears of the refugee."[76] However, the wording used underpin the presence of a subjective element that is often ignored in the literature concerning this regional refugee instrument: indeed, Art. I(2) states that in order to be granted international protection a person needs to be compelled to leave one's own place of habitual residence, and to seek refuge outside his country of origin. Sharpe's argues that the word "compel" betrays an individual risk assessment which is influenced by subjective perceptions.[77] In this way, "it reintroduces the problematic question of motive for flight which it is otherwise credited with having disabused from the refugee definition."[78] For others, instead, the conservative reading of the 1951 Convention has been fostered by the mere existence of the OAU Refugee Convention.[79]

The misreading of Art. I(2) refugee definition has led to another wrong assumption, i.e. that the definition is applicable to groups of persons in case of mass-influx. However, as Sharpe demonstrates, it was not meant to apply exclusively to groups, nor does it provide refugee status to a group of persons.[80] In fact, the Article mentions that "every person" will be considered as a refugee if compelled to leave for another country.

Moreover, an individual link also stems from the use of the word "compelled", and a necessary proximity to the event, since the person in question is required to leave the place of habitual residence.[81]

This notwithstanding, it is true that it is easier to apply Art. I(2) to mass-influx situations. The same UNHCR, when assessing refugee status in the continent, recurs to

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[76] J. OLOKA-ONYANGO, "Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva." *International Journal of Refugee Law*, 3:3, 1991, p. 453; cited in SHARPE, "The 1969 African Refugee Convention", op. cit., p. 114.
[77] SHARPE, "The 1969 African Refugee Convention", op. cit., p. 116.
[78] G. OKOTH-OBBO, "Thirty Years On: A Legal Review of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa." *Refugee Survey Quarterly,* 20:1, 2001, p. 116.
[79] R. MANDAL, *Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')*, Legal Protection Policy Research Series, UNHCR Department of Internal Protection, UNHCR, 2005, p. 12; cited in SHARPE, "The 1969 African Refugee Convention", op. cit., p. 115.
[80] SHARPE, "The 1969 African Refugee Convention", op. cit., p. 120.
[81] *Ibidem*, p. 118.

such a definition in *prima facie* recognition because of practical considerations.[82] However, also the 1951 Convention can be applied in case of large numbers of refugees, as happened with those fleeing from ex-Yugoslavia.[83]

The 1969 OAU Convention is not only remarkable for the refugee definition contained therein. It is fundamental in that it devotes one lengthy article on asylum (Art. III). Asylum is defined as a "peaceful and humanitarian act" granting the reception and the settlement "of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality." [84] Nevertheless, the language used is merely recommendatory, advancing while not protecting an individual right to asylum.[85] Though it does not go further than the UDHR and the two-years previous UN Declaration on Territorial Asylum, it is noticeable that such a provision is included in a Convention regulating the status of refugees. The 1951 Convention, in fact, only mentions asylum in the preambular clause on burden-sharing.[86]

Another major innovation brought about by the 1969 OAU Convention is the broadening of the principle of non-refoulement contained in Art. II(3). Accordingly:

> No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

In contrast with Art. 33(1) of the 1951 Convention which envisages protection from refoulement only for refugees and asylum seekers pending adjudication, the principle stated in Art. II(3) of the 1969 Convention applies generally to "persons" (and not to refugees), thus including both asylum-seekers and refugees, as defined in either Art. I(1) or Art. I(2). Furthermore, Art. II(3) of the 1969 OAU Convention clearly states that protection against refoulement entails also non-rejection at the frontiers, which was not

[82] *Ibidem*, p. 120.
[83] *Ibidem*, p. 122.
[84] Art. II(1) OAU Convention.
[85] C. D' ORSI, *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa. The Peregrination of a Persecuted Human Being in Search of a Safe Haven*, Routledge, London, 2016, p. 6.
[86] 1951 Convention, Preamble recital 4.

specified in the 1951 Convention, though even in this latter case States practice "[has] recognized that non-refoulement applies to the moment at which asylum seekers present themselves for entry."[87]

Lastly, the "absolute" character usually attributed to the principle of non-refoulement as of Art. II(3) of the 1969 OAU Convention stems from the absence of any exclusion clause. Sharpe, however, contrasts this last view[88] noticing that Art. I(4)(f) and (g) foresee the non-application of the 1969 Convention, and hence of protection from refoulement, "if the individual concerned commits a serious non-political crime outside the country of refuge after admission as a refugee or seriously infringes the convention's purposes and objectives."

The 1969 OAU Convention is relevant in the international refugee protection regime also because it formalizes the concept of temporary protection, which, however, has been often misconceived. Many scholars have indeed interpreted it as a lower form of protection. However, temporary protection provided for in the OAU Convention is devised as a form of international solidarity whereby a State grants asylum to a refugee whose settlement cannot be taken over by the country in which that person has been recognized. The word "temporary" is used to emphasize the situation in which a refugee, for several reasons, cannot, at that given moment, be granted asylum in the host country and therefore needs to be temporarily settled in another country. Hence, "[i]t is not intended to determine the duration of residence for all refugees who have been recognised and granted asylum".[89] In this way, the 1969 OAU Convention also formalizes the need for responsibility-sharing in the resolution of the refugee issue.

The voluntariness of return posited in Art. V of the 1969 OAU Convention is also fundamental to frame the context for this thesis. Once again, the 1969 OAU Convention results to be the first and only international legal instrument formalizing the voluntary character of return, which is now one of the cornerstones of the international refugee

[87] GOODWIN-GILL, *The Refugee in International Law,* op. cit., pp. 123-124.
[88] SHARPE, "The 1969 African Refugee Convention", op. cit., p. 100.
[89] B. RUTINWA, *Prima Facie Status and Refugee Protection*. New Issues in Refugee Research Working Paper No. 69, UNHCR Evaluation and Policy Analysis Unit, UNHCR, Geneva, 2002, p. 16; cited in SHARPE, "The 1969 African Refugee Convention", op. cit., p. 108.

protection regime. Nevertheless, this principle is referred to in other international instruments.[90] Art. V has also been used to wrongly affirm that voluntary repatriation is the preferred solution in the African continent, a vision that finds no basis on its wording. Moreover, it establishes the necessity for cooperation among countries of origin and asylum, voluntary agencies and international and intergovernmental organizations.

Regrettably, the 1969 OAU Convention presents an important lack: none of its 15 Articles mentions the rights refugees are entitled to, except from the right to travel documents (or better, the obligation of States to issue these documents). Nor is there any provision clearly referring to those contained in the 1951 Convention. The absence of such reference is all the more relevant when considering the rights of refugees recognized under Art. I(2), a category not comprised in the 1951 Convention.

However, several are the reasons supporting the idea that the rights applicable to the latter category are those established in the 1951 Convention.

First of all, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose as of Art. 26 of the 1969 Vienna Convention on the Law of the Treaties, the referral to the rights enlisted in the 1951 Convention stems from the scope of the 1969 OAU Convention, which is not to substitute the 1951 Convention or its 1967 Protocol. Rather, Art. VIII(2) states that:

> The present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.

In addition, the preambular clause encourages OAU MS "who had not already done so to accede to the United Nations Convention of 1951 and to the Protocol of 1967 relating to the Status of Refugees, and *meanwhile to apply their provisions to refugees in Africa*" [emphasis added].

If the 1951 Convention functions as a form of *lex specialis*, it can reasonably be concluded that "[i]f the 1951 Convention provides the rights blueprint for all beneficiaries of complementary protection, then such rights must apply equally to refugees within the meaning of Article I(2) of the 1969 Convention."[91]

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[90] See for instance Art 8(c) of the Statute of the Office of the High Commissioner for Refugees.
[91] SHARPE, "The 1969 African Refugee Convention", op. cit., p. 131.

Finally, and most importantly, the application of the principle of non-discrimination (recalled in Art. IV) as defined in Art. 26 of the ICCPR, under which a differential of treatment among refugees would be possible only if the status of those recognized ex Art. I(2) is considered as inherently more temporary (which is what happens in the case of the subsidiary protection in the European Union).[92] This vision, however, would empty of significance the same Article and would misconceive the status recognized under the 1951 Convention, which is itself based on temporariness.

Although to date only Eritrea among OAU MS is not Party to either the 1951 Convention or its 1967 Protocol, the lack of any provision of minimum standard of rights is still disappointing, especially considering that there is almost no jurisprudence on the application and interpretation of the 1969 OAU Convention.

Despite the positive innovations enshrined in this regional instrument, the principle of non-refoulement is systematically violated in African countries.[93] If it is true that they host a quarter of the world's refugees despite the lack of resources and of the huge impact on the territory of high number of refugees, such violations are not excusable. Moreover, even though the regional normative framework is one of the most advanced, its practical application is many times not consistent.

2.2 LATIN AMERICA: THE CARTAGENA PROCESS

Asylum in Latin America has a long tradition. From the 1889 Montevideo South-American Congress on Private International Law, where the very first provision on asylum appeared in an international treaty,[94] to the most recent Brazil Declaration of 2014[95] adopted during the commemorations for the thirty-years anniversary since the adoption of the Cartagena

[92] *Ibidem*, p. 136.
[93] D' ORSI, *Asylum-Seeker and Refugee Protection in Sub-Saharan Africa,* op. cit., p. 199.
[94] CONFERENCIA INTERNACIONAL SOBRE REFUGIADOS, DESPLAZADOS Y REPATRIADOS DE CENTRO AMÉRICA (CIREFCA), *Principles and Criteria for the Protection and Assistance to Central American Refugees, Returnees and Internally Displaced Persons in Latin America*, January 1990. Available at: https://www.refworld.org/docid/4370ca8b4.html [accessed 28 March 2019], para 10.
[95] *Declaración de Brasil: Un Marco de Cooperación y Solidaridad Regional para Fortalecer la Protección Internacional de las Personas Refugiadas, Desplazadas y Apátridas en América Latina y el Caribe* (BD)*,* 3 December 2014.

Declaration, the countries of the region have demonstrated their commitment and their ability to find innovative ideas and effective proposals to improve their asylum systems through a pragmatic and flexible approach.[96] Moreover, the American continent is the only one which recognizes the right *to be granted* asylum, albeit limited to those who pursue it for political offences or related crimes (Art. 22(7) ACHR).

The fundamental regional instrument in the Central and Latin American system of asylum is constituted by the Cartagena Declaration, which was adopted in 1984 with the aim of providing protection to those persons that, by reason of the new dimensions of refugee flows in the region, were not protected under the 1951 Convention/1967 Protocol (Conclusion III). Similarly to the 1969 OAU Convention, the Cartagena Declaration is meant to complement the definition provided for in these two international instruments, which States recognize as "the only universal instruments on refugee protection",[97] encouraging those who have not done it yet to accede them and to adopt the refugee definition thereby contained without reservations.[98]

Besides those recognized under the 1951 Convention, Conclusion III to the Cartagena Declaration recommends States to consider as refugees:

> persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

This definition is clearly informed by the one adopted in 1969 by the OAU; nevertheless, it presents several differences which render this document unique in the context of regional legal responses to refugee flows. Molto bene Cartagena.

It was argued above that the main problem in the African continent is constituted by the lack of jurisprudence and national implementation of the regional Convention of 1969. The case of the Cartagena Declaration is, instead, quite the contrary. Indeed, the

[96] C. MALDONADO CASTILLO, "The Cartagena Process: 30 Years of Innovation and Solidarity." *Forced Migration Review*, 49*,* May 2005, p. 89.
[97] Cartagena Declaration, Conclusion XI.
[98] Cartagena Declaration, Conclusion I and II.

Cartagena Declaration is a non-legally binding document, which, however, has proved to be effective in providing a response to the refugee problem in Central and Latin America. The definition provided for in the third Conclusion of the Declaration was in fact incorporated in 14 national legislations,[99] to the extent that some scholars talk of multiple Cartagena definitions.[100]

Furthermore, if on the one hand the 1969 OAU Convention has been wrongly interpreted as applying to groups of refugees, on the other hand the Cartagena Declaration has been adopted bearing in mind the Latin American experience of "massive flows of refugees",[101] and the intent of group-protection is further emphasized in the use of the plural in Conclusion III ("refugee*s*", "person*s*"). Moreover, the definition provides protection from "situational or group-based risks…characterized by the indiscriminate, unpredictable or collective nature of the risks they present to a person or *group of persons*, or even to the population at large."(emphasis added)[102] Finally, Conclusion VIII refers to ExCom Conclusion No. 22 on the treatment of mass-influx. Nevertheless, this does not preclude individual application of the Cartagena definition.

A third distinctive element is the Cartagena Declaration's clear reference to the 1951 Convention and to the ACHR as regards the rights to be accorded to those recognized as refugees under the 1984 extended definition.[103] Conclusion XI further calls for States to cooperate with UNHCR in order to ensure the enjoyment of economic, social and cultural rights by refugees, while in Conclusion XII family reunification is mentioned as a "fundamental principle in regard to refugees" which has to be safeguarded both when asylum is provided and when voluntary repatriation takes place.

As the 1969 OAU Convention, the Cartagena Declaration restates the importance of

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[99] UNHCR, *Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration; roundtable 15 and 16 October 2013, Montevideo, Uruguay*, 7 July 2014. Available at: https://www.refworld.org/docid/53c52e7d4.html [accessed 28 March 2019], para 2.

[100] D. CANTOR and D. TRIMIÑO MORA, "¿Una solución simple para los refugiados que huyen de la guerra? La definición ampliada de América Latina y su relación con el derecho internacional humanitario." *Anuario Mexicano de Derecho Internacional,* XV, 2015, p.178.

[101] Cartagena Declaration, Conclusion III.

[102] UNHCR, *Summary Conclusion on the Cartagena Declaration*, op. cit., para 8.

[103] Cartagena Declaration, Conclusion VII, X and XV.

the principle of non-refoulement, which shall include also non-rejection at the frontiers, as the "corner-stone of the international protection of refugees."[104] Yet, it goes further than any other regional document adopted o refugees until that moment in affirming that such principle has *jus cogens* value (Conclusion VII). Art. 22(8) of the ACHR already enshrined the absolute character of such a principle, generally applicable to aliens, while Art. 22(9) prescribed the prohibition of collective expulsion.

The situational events (generalized violence, foreign aggression, internal conflict, massive violations of human rights and other circumstances which have seriously disturbed public order) were delineated in a broad and encompassing way[105] so that States had enough flexibility to apply the definition to new categories of persons in need of international protection. Despite encompassing "the indirect effects of the five situational events – including poverty, economic decline, inflation, violence, disease, food insecurity and malnourishment and displacement"[106], the Cartagena definition does not include victims of natural disasters,[107] unless specific circumstances arise.[108]

It has been pointed out that another limit could be placed when interpreting the Declaration definition. Indeed, the reference to the existing situation in the region (Conclusion III) might prevent its application to refugee fleeing extra-continental conflicts and HR violations.[109]

Unique to the sole Central American region is the process of periodical analysis of current humanitarian challenges that the Cartagena Declaration has triggered.[110] Indeed, on the occasion of the tenth, twentieth and thirtieth anniversary since its adoption, the Central American States have organized inclusive and comprehensive dialogues, opened also to civil society and non-governmental organizations (NGOs) operating in the field,

[104] *Ibidem*, Conclusion VII.
[105] CIREFCA, *Principles and Criteria for the Protection,* op. cit., para 26.
[106] UNHCR, *Summary Conclusion on the Cartagena Declaration*, op. cit., para 9.
[107] *Ibidem*, para 10; CIREFCA, *Principles and Criteria for the Protection,* op. cit., para 33.
[108] CIREFCA, *Principles and Criteria for the Protection,* op. cit., para 38.
[109] CANTOR and TRIMIÑO MORA, "¿Una solución simple?", op. cit., p. 189.
[110] MALDONADO CASTILLO, "The Cartagena Process: 30 Years of Innovation and Solidarity," op. cit., p. 90.

whose result were summarized in the San José Declaration (1994),[111] Mexico Declaration and Plan of Action (2004),[112] and the latest Brazil Declaration and Plan of Action (2014).

These three Declarations, stress in particular the interplay between IHL, IHRL and IRL;[113] the need to balance security interests of States with the needs of protection;[114] the importance of having gender-, age- and diversity-approaches in the reception systems;[115] the need for providing assistance to returnees and IDPs, whose forced displacement has been recognized as having the same causes of refugee flows;[116] the centrality of shared but differentiated responsibility and solidarity; [117] HR violations as causes of displacement;[118] and the voluntariness of return and resettlement.[119]

Moreover, new challenges are increasingly being referred to, such as the increase in accompanied and unaccompanied or separated minors (UASC), particularly those victims of human trafficking; the link with international organized crime; the increase of mixed flows; the multiple drivers that compel displacement from one's place of habitual residence; the burden for reception which falls upon host communities; the importance of including refugee protection in national development plans in order to have locals benefit from international aid; and the positive contribution refugee can make to both countries of origin and of asylum.

The Brazil Declaration also underlines the importance of people-centred responses and the need for facilitation in naturalization procedures given the impact of protracted refugee situations.

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[111] *Declaración de San José sobre Refugiados y Personas Desplazadas* (SJD), 7 December 1994.
[112] *Declaración de México Para Fortalecer la Protección de los Refugiados en América Latina* (MD), 16 November 2005.
[113] SJD, Part I recital 10; Conclusion III; MD, pp. 1, 3; BD, p. 1.
[114] Cartagena Declaration, Conclusion VI; MD, p. 3; BD, p. 2.
[115] SJD, Conclusions XI, XII; MD, p. 3; BD, pp. 4-5.
[116] SJD, Part I recital 15, Conclusion XVI ("la problemática de los desplazados internos ... constituye también objeto de preocupación de la comunidad internacional"); MD, p. 3.
[117] SJD, Part I recital 11, Conclusions VII, XXII; MD, pp. 3-4; BD, pp. 1-3.
[118] SJD, Part I recitals 16-17, Conclusion XIV; MD, p. 4; BD, p. 3-5.
[119] Cartagena Declaration, Conclusion II(f) and (l), Conclusion XII; SJD, Conclusion VI; MD, p. 4; BD, p. 3.

2.3 EUROPE: THE NOVELTY OF EUROPEAN UNION'S 'SUBSIDIARY PROTECTION'

In Europe, a regional legal framework for asylum has been set up by European Union (EU) legislation. On the basis of Art. 80 of the Treaty on the Functioning of the European Union[120] calling for the establishment of a Common European Asylum System (CEAS) based on (1) a uniform "asylum status" and (2) a subsidiary protection status, the EU has adopted the Council Directive 2011/95/EU, substituting the previous Directive 2004/83/EC.

Better known as the Qualification Directive, it is the first legally-binding supranational instrument in Europe establishing criteria for the identification of persons in need of international protection and the rights to which they are entitled.[121] Furthermore, in contrast with the previously analysed 1969 OAU Convention and the 1984 Cartagena Declaration, the Qualification Directive is the only regional instrument whose commitment to complement the 1951 Convention refugee status results in the creation of a new status, namely subsidiary protection.[122] Even though the content of international protection (including both refugees and beneficiaries of subsidiary protection) should have resulted in a *de facto* uniform status,[123] the excessive vagueness of the wordings used and the great margin of discretion accorded to MS have promoted fragmented and differentiated responses.[124]

The European Qualification Directive in Art. 2(f) defines a person beneficiary of subsidiary protection as:

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[120] *Treaty on the Functioning of the European Union* (adopted 13 December 2007), 2008/C 115/01.
[121] M. T. GIL-BAZO, *Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum Under EC Law.* New Issues in Refugee Research Research Paper No. 136, Refugee Studies Centre, Oxford University, November 2006. Available at: https://www.unhcr.org/research/working/455993882/refugee-status-subsidiary-protection-right-granted-asylum-under-ec-law.html [accessed 16 March 2019], p. 1.
[122] F. IPPOLITO, "Establishing the Common European Asylum System: 'it's a long way to Tipperary'." In *Regional Approaches to the Protection of Asylum Seekers. An International Legal Perspective*, ed. by A. Abass, F. Ippolito, Ashgate Publishing Limited, Farnham, 2014, p. 117.
[123] Directive 2011/95/EU, Art. 20(2).
[124] V. TÜRK, "Envisioning a Common European Asylum System." *Forced Migration Review,* 51, January 2016, p. 57.

> a third- country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[125]

Serious harm, as defined in Art. 15 of the Directive, consists of: (1) death penalty or execution; or (2) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (3) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

In contrast with the other two regional instruments analysed, there is no mention in Art. 15 to events seriously disturbing public order, and that may not amount to armed conflict as defined in IHL, nor of "serious violations of human rights" that may not amount to persecution or to inhuman or degrading treatment or punishment. Regrettably, this last element was included in the original draft but was later delated.[126]

Another element of distinction of the European instrument is the lack of mention of durable solutions.

The interpretation of indiscriminate violence as of Art. 15(c), which could have placed the Directive on equal footing with the Cartagena Declaration and the 1969 OAU Convention, has been restricted by the preambular recital 35 which specifies that "[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm." McAdam underlines how this is in clear contrast with the application of european temporary protection, since the latter is accorded in case of mass-influx to persons fleeing

[125] Directive 2011/95/EU, Art. 2 (f).
[126] MCADAM, *The Evolution of Complementary Protection,* op. cit., p. 77.

generalised violations of human rights, without further limitations.[127]

Furthermore, the two statuses thereby created do not entail equal rights and benefits, resulting in a hierarchy of status based on the ground for protection rather than on the needs to be addressed.[128] Though improvements have been made since Council Directive 2004/83/EC, there still are several rights whose enjoyment is differentiated between refugees and beneficiaries of subsidiary protection, such as the length of residence permit (Art. 24), travel documents (Art. 25), and the right to access to social welfare (Art. 29). Due to this hierarchy in the level of benefits to be granted to the two categories, States have demonstrated a tendency to misuse subsidiary protection in order to provide a lower degree of protection to persons falling within the scope of the 1951 refugee definition.[129] Yet, if asylum is the protection granted by a State, it should be irrelevant how that protection is referred to.[130]

Gil-Bazo defines disappointing the way in which subsidiary protection was conceived since it creates "a category of persons protected by [EU] law, in addition to those that shall remain protected by the national legal orders of Member States in fulfilment of their international obligations." [131] Moreover, subsidiary protection has no equals in international law which could be used to juxtapose its interpretation.[132]

Despite the stated aim of subsidiary protection in recital 6 of providing "appropriate status to any person" who, excluded from refugee status recognition under a full and inclusive application of the 1951 Convention (recital 3), is "in need of such protection", the practical result is a protection gap. Indeed, exclusion clauses listed in Art. 17, read together with Art. 3, prevent some categories of persons who cannot be forcibly removed from being recognised any legal status.[133] The affirmation of the possibility for MS to grant protection "on compassionate or humanitarian grounds" (recital 15), which is outside the

[127] *Ibidem*, pp. 73, 77.
[128] *Ibidem*, pp. 65, 93, 104, 105.
[129] TÜRK, "Envisioning a Common European Asylum System," op. cit., p. 58.
[130] GIL-BAZO, *Refugee Status*, op. cit., p. 11.
[131] *Ibidem*, p. 11.
[132] MCADAM, *The Evolution of Complementary Protection,* op. cit., p. 55.
[133] M. NUALA and M. CATHERINE, *Asylum and the European Convention on Human Rights.* Human Rights Files, No. 9 (revised), Council of Europe Publishing, 2010, p. 11.

scope of the Directive, could, in fact, contrast with the reading of Art. 3 according to which any more favourable standard has to be compatible with the Directive. As scholars have rightly observed, however, this implies that all those who are protected by the principle of non-refoulement but who cannot meet the criteria set out in the Directive can be granted asylum at the discretion of the Member State on mere "compassionate and humanitarian grounds".[134]

Importantly, Art. 21(2) echoes Art. 33(2) of the 1951 Convention in providing forcible removal for those refugees whom there are reasonable grounds to consider a danger for the society or who, after being convicted of a particularly serious crime, constitute a danger for the hosting community. This provision is not applicable to beneficiaries of international protection; in fact, a person claiming for subsidiary protection would be directly excluded from status recognition if "he or she constitutes a danger to the community or to the security of the Member State in which he or she is present."[135]

However, the principle of non-refoulement shall be applied according to international law (Art. 21(1)). Accordingly, Art. 3 of the CAT, which has been recognized as a *jus cogens* principle, provides absolute protection regardless of the danger the individual may pose to society.[136] Moreover, Art. 3 (prohibition of torture or inhuman or degrading treatment or punishment) of the Council of Europe's Convention on Human Rights (ECHR, to which all EU MS are Parties), has been interpreted by the Court of Strasbourg (ECtHR) as prohibiting "in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct, however undesirable or dangerous."[137] However, the ECHR can provide only limited protection against refoulement. Regrettably in fact, unless the EU accedes the ECHR, as envisaged in Art. 6(2) of the Treaty on European Union

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[134] MCADAM, *The Evolution of Complementary Protection,* op. cit., p. 109, 110.

[135] Art. 17(1)(d). Please, note that the "reasonable ground to believe" threshold here is deleted.

[136] *Bachan Singh Sogi v. Canada,* Communication No. 297/2006, 29 November 2007, CAT/C/39/D/297/2006, reaffirming *Tebourski v. France*, Communication No. 300/2006, 1 May 2007, CAT/C/38/D/300/2006, para 8.2; cited in NUALA and CATHERINE*, Asylum and the European Convention on Human Rights,* op. cit., p. 89.

[137] *Salah Sheekh v. the Netherlands*, application no. 1948/04, judgment of 11 January 2007, para 135; cited in NUALA and CATHERINE, *Asylum and the European Convention on Human Rights*, op. cit., p. 22. See also *Saadi v. Italy*, application no. 37201/06, [GC] judgment of 28 February 2008.

(TEU),[138] the ECtHR has no jurisdiction to determine whether EU legislation complies with that Convention.

The Qualification Directive is framed within the respect not only of the 1951 Geneva Convention and its 1967 Protocol, but also of the Charter of Fundamental Rights of the European Union. In acquiring the same legal status as the Treaties (*ex* Art. 6 TEU) after the entry into force of the Lisbon Treaty, it has raised to the status of primary EU legislation several provisions concerning asylum issues, by which all EU secondary legislation must abide: prohibition of torture or inhuman or degrading treatment or punishment (Art. 4), right *to* asylum (Art. 18), prohibition of refoulement and of collective expulsion (Art. 19). It must be noted that Art. 19(2) does not explicitly mentions non rejection at the frontiers as an act of refoulement.

Gil-Bazo argues that

> by virtue of its incorporation in an instrument of EC legislation, the obligation of Member States to grant protection and to recognise socio-economic rights to refugees and to other persons in need of international protection confers upon these individuals a subjective right to be granted asylum, protected by the Community legal order and enforceable before national courts and the [European Court of Justice].[139]

In addition to providing for a new status of international protection, the Qualification Directive serves to clarify some concepts of the 1951 Convention definition which had been interpreted differently among EU MS, such as persecution (Art. 9), the acknowledgement that persecution might be carried out by non-State actors (Art. 6(c)) and membership of a particular social group (Art. 10(1)(d)).

Importantly, the EU Directive provides for minimum standards of treatment, which shall be respected in all MS in order to avoid secondary movements. However, discrepancies still exist in national legislations while intra-State cooperation in the spirit of responsibility-sharing is yet to come.[140]

Notwithstanding the progress in cooperation and the development of humane

[138] *Treaty on European Union* (adopted 13 December 2007), 2008/C 115/01.
[139] GIL-BAZO, *Refugee Status*, op. cit., p. 2.
[140] MCADAM, *The Evolution of Complementary Protection,* op. cit., p. 57.

standards of treatment, strong national interests hampers the strengthening of the CEAS. Bold reforms to the current system have been proposed by the European Commission and the European Parliament; however, they were all softened by the activity of the European Council and finally rejected by the Home Affairs Council.

During the years, refugee and subsidiary protection have been harmonized to the point that some scholars talk of one status. However, other HR guarantees have suffered a step back. Particularly, UASC and victims of torture can still be detained; no free legal consulting will be provided to neither UASC or other applicants in case of appeal if there is sufficient ground to believe that the answer will be negative; access to employment will be secondary to nationals of EU countries; and social welfare can be revoked under less stringent criteria. Still, it is the only regional instrument defining common procedures and standards of treatment.

For these reasons, reforms in the CEAS are regarded as an important step towards advancing the global refugee protection regime thanks to European humanitarian values.

Finally, the EU has recently adopted the European Agenda for Migration[141] with the objective of tackling root causes and securing EU external borders. It first acknowledges that no MS can effectively address migration alone and that there is a need for a comprehensive multi-stakeholder approach. In addition, it sets four pillars to manage migration better: (1) reducing incentives to irregular migration, (2) border management, (3) building a CEAS, (4) new policy for legal migration. Despite the important recognition of poverty and climate change as direct root causes of migration, the Agenda falls short from adequately responding to the context of migratory flows that thus emerge, limiting legal access to qualified individuals and investing in border management rather than in the effective address of root causes and the provision of durable solutions.

[141] EUROPEAN COMMISSION, *European Agenda on Migration*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 13 May 2015, COM(2015) 240, final. Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf.

3. THE PROTECTION GAPS

The legal framework that has just been presented is not free from shortcomings. The heterogenous composition of irregular migration flows rarely fits under the clear-cut definitions of the international protection regime. This results in protection gaps, whereby protection is not intended only as the provision of legal status and legal stay, but to the wider possibility to have access to basic services and solutions in order to enjoy and fulfil the HR which everyone is entitled to by reason of their humanity.

Indeed, persons on the move may find themselves in situations of vulnerability or present specific needs that require an equally specific response, even in cases in which they do not fall under the 1951 Convention or regional refugee definition. Persons may be displaced internally, and yet fall short of the protection of their country. Furthermore, in cases of mass-influx of people, mixed migration may overburden reception systems, especially when responsibility for protection is not equally shared among States, and, as a consequence, persons in need may be hindered from acceding to protection and assistance. Finally, especially in countries hosting large number of refugees, the latter are often prevented from becoming self-reliant and, in the case of protracted situations where durable solutions have yet to be achieved, it may lead to onward movements, which often entail relying on smugglers and human traffickers, exacerbating the vulnerabilities of those entitled to international protection.

3.1 VULNERABILITIES AND SPECIFIC NEEDS

According to Betts, persons may be in vulnerable situations either because protection needs arose during the migratory path (such as victims of smuggling or human trafficking), or because of the conditions in the country of origin are not related to conflict or persecution (such as the so-called "environmental refugees").[142] He fails to recognize that there are some categories which are inherently vulnerable (such as unaccompanied children) or present intrinsic characteristics which require specific responses and services,

[142] A. BETTS, "Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants." *International Journal of Refugee Law*, 22:2, 2010, p. 211.

such as women and girls, children, adolescents, youth, the elderly, persons with disabilities.

This section will both present some of the specific challenges faced by persons on the move by reason of their gender, age, disability and other diversity considerations, and include some reflections on issues regarding victims of smuggling and human trafficking, as well as those compelled to leave their country of origin for reasons related to climate change, environmental degradation or natural or environmental disasters.

3.1.1 Gender, age, disability, diversity

In 2017 minors[143] constituted the 52% of refugee population.[144] Moreover, 173,800 UASC were registered as refugees by the UN Agency in more than 60 countries.[145] Finally, half of refugees worldwide were reported to be women and girls,[146] while more or less 15% of forcibly displaced population is made of persons with disabilities.[147]

These figures, which are probably underestimated due to lack of disaggregated data,[148] reveal the existence of specific needs and vulnerabilities that, regrettably, the 1951 Convention fails to mention.

Furthermore, the 1951 Convention is still applied through an adult-male lens,[149] which prejudices the enjoyment of the right to seek and enjoy asylum of more vulnerable groups.[150]

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[143] Intended pursuant Art. 1 of the CRC as every human being below the age of eighteen years.
[144] UNHCR, *Global Trends 2017*, op. cit., p. 3.
[145] *Ibidem*, p. 2.
[146] *Ibidem*, p. 59.
[147] V. TÜRK, *Beyond immediate needs: ensuring disability inclusion in protracted crises*. Statement by the Assistant High Commissioner for Protection at the Global Disability Summit, London, 24 July 2018. Available at: https://www.unhcr.org/admin/dipstatements/5b5721ea7/global-disability-summit-beyond-immediate-needs-ensuring-disability-inclusion.html [accessed 7 April 2019].
[148] In 2016, only 56% of refugee data were disaggregated by sex. Almost no data is available on refugees with disabilities due to their under-identification in situations of displacement, (see TÜRK, *Beyond immediate needs*, op. cit.), while disaggregation by sex is more likely to occur (60% of the data received, see UNHCR, *Global Trends 2017*, op. cit., p. 58).
[149] See A. EDWARDS, "Age and Gender Dimensions in International Refugee Law." In *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, ed. by E. Feller *et al.*, op. cit., p. 2.
[150] In the Committee on Economic Social and Cultural Rights' jurisprudence, vulnerable or marginalized and disadvantaged groups are persons who are denied full and equal enjoyment of

Despite the broadening of the meaning of persecution through IHRL, IHL and ICL, women, children, the elderly, and persons with disabilities are reported to face further difficulties in the enjoyment of the rights they hold as compared to other persons in the same situation. In the case of refugees and asylum-seekers, persons in vulnerable situations face challenges in accessing asylum procedure, in having their status assessed on the basis of persecution on one of the five Convention grounds and, as a consequence, in receiving equal protection. For instance, vulnerable persons may be denied their own right to seek asylum through having their claim be examined in conjunction with the one of the closest adult-male relative.

Specifically, the meaning of persecution for the purpose of Refugee Status Determination (RSD) has often been read without an appropriate age-, gender- and disability-sensitive approach. In this way, the fact that many acts of violence which do not amount to persecution for an adult-male, may reach the threshold of severity necessary to the recognition of refugee status for a child, a woman, or a person with disabilities has been overlooked. Despite UNCHR Guidelines on International Protection – specifically, No. 1 on Gender-Related Persecution and No. 8 on UASC claims – and CAT,[151] Committee on the Elimination of Discrimination Against Women,[152] Committee on the Rights of the Child,[153] and Committee on the Rights of Persons with Disabilities[154] General Comments and Recommendations have shed light on the need for an age-, gender- and disability-sensitive interpretation of the Convention to prevent further exposure to risks, and have identified non-exhaustive lists of age-, gender-, sex-, and disability-specific targeted acts

rights. UNHCR is referring more and more to the concept of persons in vulnerable situations, rather than vulnerable persons, underlining the shift occurred also in refugee law from a "victim-paradigm", which is essentially paternalistic, to a people-centred and human rights-based approach.

[151] CAT, *General Comment No. 4 (2017)*, op. cit.

[152] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW), *General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 14 November 2014, CEDAW/C/GC/32.

[153] COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 6 (2005) on the treatment of Unaccompanied and Separated Children outside their country of origin*, 1 September 2005, CRC/GC/2005/6.

[154] COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD), *General Comment No. 3 (2016) on Article 6: Women and girls with disabilities*, 2 September 2016, CRPD/C/GC/3.

amounting to persecution,[155] States have no obligation to abide by them and all too often rely on a restrictive interpretation of the requisites for being recognized refugee status. Moreover, despite the progresses achieved in some regional provisions, a narrow interpretation of the Convention is still widespread.

The flaws in asylum procedures and the lack of consideration of persons in vulnerable situations' specific needs in reception and durable solutions planning may cause further exposure of persons to risks of human trafficking, abuse, economic or sexual exploitation, and forms of multiple and intersectional discrimination which can then result in cumulative HR violations. Despite noteworthy developments in IHRL, of which IRL is part, lack of interrelation and application of the distinct obligations on the part of States results in the perpetration of protection gaps that hampers the achievement of the international protection goal.

3.1.2 Victims of smuggling and human trafficking

Smuggling and human trafficking are two crimes deeply related with migratory movements. Smuggling is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".[156] That is, an activity which allows a migrant to willingly cross irregularly an international border.

Available data, even if scarce and conservative, highlight that at minimum 2.5 million migrants relied upon a smuggling service in 2016.[157] Indeed, both migrants and refugees sometimes feel compelled to turn to a smuggler because of the lack of legal channels of entry in destination or asylum countries.

Other factors forcing migrants and refugees to cross a border irregularly, which often entails relying on smugglers, are the high costs and requirements set to obtain a visa, as

[155] For instance, child-recruitment (including of girls for sexual services or forced marriages with the military) where based on one or more Convention's grounds and sexual or gender-based violence (SGBV), which includes acts such as rape, female genital mutilation, serious form of domestic violence, repression of homosexuality and the like. See CEDAW, *General Recommendation No. 32*, op. cit., para 15 for more examples.
[156] Protocol against Smuggling, Art. 3 (a).
[157] UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), *Global Study on Smuggling of Migrants 2018*, Sales No. E.18.IV.9., 2018, p. 5.

well as the long waiting time the process demands.

Even if smuggling is an activity that takes place upon the consent of the migrant, the journeys can be deadly or entail severe HR abuses and violations. Moreover, smuggled migrants are at greater risk of falling victim to human traffickers both along the route and in destination countries. Due to these considerations, smuggled migrants deserve a particular attention and further efforts need to be put in place in order to prevent people from undertaking perilous journeys as well as to dismantle this criminal activity.

Noticeably, the approach of closure of borders the international community has undertaken until now has not but shifted the routes smugglers use. Indeed, the flexibility of migration routes has been recognised by history. Moreover, studies on the factors determining the fee migrants pay to the smugglers underline the correlation between the increase in security controls and the inflation of the smuggling fee.[158] Therefore, the strategy adopted fails both to prevent migrants from undertaking the journey and to dismantle criminal networks by reducing the profit they can make out of smuggling.

On the contrary, human trafficking is a crime which does not necessarily occur in a country different from the one of origin. However, research has shown a strong connection between regular migration routes and the trafficking flows.[159] Yet, irregular migrants and refugees are more vulnerable to this crime.

Even though trafficking in persons results in severe violations of fundamental HR, it is worth reminding that not every victim or person at risk of becoming a victim of human trafficking is eligible to be granted some form of international protection. Indeed, to be recognised as refugees, such persons have to satisfy all the requirements envisaged in Art. 1A(2) of the 1951 Convention. Therefore, these persons should demonstrate that there is a reasonable possibility of facing persecution in case of return to their country of origin or of habitual residence, and that this country would be unable or unwilling to protect them.

Considering the severity of HR violations involved in human trafficking, re-trafficking

[158] *Ibidem*, p. 86.
[159] UNODC, *Global Report on Trafficking in Persons 2016,* Sales No. E.16.IV.6, 2016, p. 9.

should be regarded as persecution.[160] Yet, if a trafficked person does not qualify for international protection, he/she must be returned to the State of nationality or habitual residence, which should accept him/her "without undue or unreasonable delay".[161]

Nevertheless, having the requirements to qualify for international protection does not imply safety from trafficking. Indeed, individuals may not have access to asylum procedures or may have to wait a long time before their application for international protection is examined. Furthermore, even if the protection is recognised by the host State, refugees may face limitations in job and education opportunities. In this case, the refugee is considerably more vulnerable to trafficking or exploitation. Moreover, UNODC noted in its *Global Report on Trafficking in Persons* that the lack of State protection increases people's vulnerability.[162] As a result, not only persons fleeing armed conflict – with a consequent lack of rule of law and weak institutions – but also stateless persons are at higher risk.

Irregular migrants, who have been victims of smuggling, are more vulnerable to fall prey to human traffickers. If they manage to stay irregularly in destination countries, the difficulties in finding a regular job expose them to the risk of being trafficked. Moreover, the very same journey from home to destination country can start as a smuggling process but ends up with being a trafficking one.

If smuggled persons are usually men who go first with the purpose of bringing their relatives through family reunification mechanisms, in the case of trafficking the majority of the victims are women.[163] This data shall not surprise since the main form of exploitation is the sexual one. However, the United Nations Children's Fund reports that a third of the trafficked persons is constituted by minors.[164] Furthermore, the percentage

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[160] UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07.
[161] Protocol against Smuggling, Art. 18(1).
[162] UNODC, *Global Report on Trafficking in Persons 2016*, op. cit., pp. 61, 63.
[163] *Ibidem*, p. 6.
[164] UNITED NATIONS CHILDREN'S FUND, *Children account for nearly one-third of identified trafficking victims globally*. Press Release, 29 July 2018. Available at: https://www.unicef.org/press-releases/children-account-nearly-one-third-identified-trafficking-victims-globally [accessed 9 January 2019].

of men and boys being trafficked has increased in the past few years.[165]

UNODC has noted positively that over the past years the number of countries with legislations that criminalize most forms of human trafficking in line with the on Trafficking in Persons[166] has increased. This notwithstanding, the figure of convictions is still low and that of the victims does not appear to decrease.

Lastly, it is worth mentioning that, even if the Statute of the International Criminal Court does not expressly include trafficking in person as a crime upon which the Court can judge, several of the practices involved in human trafficking can, under specific conditions, be identified as both war crimes and crimes against humanity.[167]

3.1.3 'Environmental refugees'

No international or regional binding instrument on international protection recognizes the existence of the so-called "environmental" or "climate refugees", despite the numbers of displaced persons due to the onset of disasters in their own country outnumbers that of conflict-induced displaced persons (see *Figure 1*).

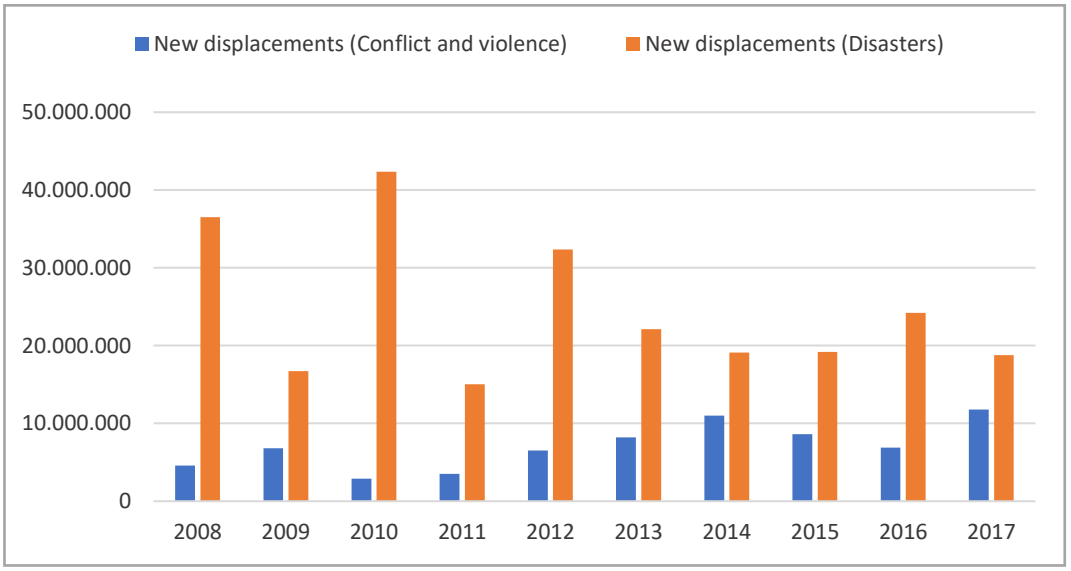

Figure 1: Total annual new displacements since 2008 (Source: www.internal-displacement.org)

[165] UNODC, *Global Report on Trafficking in Persons 2016*, op. cit., p. 6.
[166] *Ibidem*, p. 12.
[167] IOM, *Addressing human trafficking and exploitation in times of crisis: evidence and recommendations for further action to protect vulnerable and mobile populations*, 2015; cited in UNODC, *Global Report on Trafficking in Persons 2016*, op. cit. p. 65.

The 1951 Convention applies only to man-made persecution, and regional refugee agreements, with the exception of the non-binding 2014 Brazil Declaration, fail to mention natural or environmental disasters as root causes of refugee movements or as a potential ground on which international protection may be granted, even though they are considered as contributory factors that may lead to migration or even as direct drivers of migration[168] and climate change as an impact multiplier and accelerator.[169]

Persons who feel compelled to leave their country of origin due to natural events are usually referred to as environmental migrants, i.e.:

> persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move within their country or abroad.[170]

The definition is indeed very similar to that of refugee (they are *obliged to* leave their habitual homes) with the addition of temporal clauses that go beyond the temporality embedded in the refugee definition. For these reasons, proposals have been advanced to amend the 1951 Convention in order to include such cases. However, some scholars have underlined the difficulty in attributing to climate change alone the cause of displacement.[171] Building upon the case of Bangladesh and the so-called sinking islands in the Pacific, McAdam argues that climate change is a factor that exacerbates existing socio-economic or environmental vulnerabilities. It follows that "it would be practically impossible and conceptually arbitrary to attempt to differentiate between those displaced people who deserve 'protection' on account of climate change, and those who

[168] See for instance: European Agenda for Migration; Cancun Adaptation Framework; Agenda for Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change.
[169] UNHCR, *Summary of Deliberations on Climate Change and Displacement*, April 2011. Available at: https://www.refworld.org/docid/4d9f22b32.html [accessed 25 March 2019], para 2.
[170] IOM, *International Migration Law No. 25: Glossary on Migration,* Second ed., Geneva, 2011, p. 33.
[171] J. McAdam, "Swimming Against the Tide: Why a Climate Change Displacement Treaty is not 'The' Answer." *International Journal of Refugee Law,* 23:1, 2011, p. 10.

are victims of 'mere' economic or environmental hardship."[172]

The same definition of disaster provided by the UN Office for Disaster Risk Reduction aligns with this view. Accordingly, disaster is indeed "[a] serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts." [173] Vulnerability is here defined as "[t]he conditions determined by physical, social, economic and environmental factors or processes which increase the susceptibility of an individual, a community, assets or systems to the impacts of hazards." [174] Therefore, it is the interlinkage among socio-economic factors with the inability to be disaster- and climate-change resilient that may determine a person's choice to leave his habitual residence as an adaptive measure.

The Nansen Initiative's Agenda for Protection of 2015 tried to fill the gap, encouraging States to consider a cross-border disaster-displaced person as in need of international protection:

> where he/she is seriously and personally affected by the disaster, particularly because (i) An on-going or, in rare cases, an imminent and foreseeable disaster in the country of origin poses a real risk to his/her life or safety; (ii) as a direct result of the disaster, the person has been wounded, lost family members, and/or lost his/her (means of) livelihood; and/or (iii) in the aftermath and as a direct result of the disaster, the person faces a real risk to his/her life or safety or very serious hardship in his/her country, in particular due to the fact that he/she cannot access needed humanitarian protection and assistance in that country, (a) because such protection and assistance is not available due to the fact that government capacity to respond is temporarily overwhelmed, and humanitarian access for international actors is not possible or seriously undermined, or (b) because factual or legal

[172] *Ibidem,* pp. 10-11.
[173] https://www.unisdr.org/we/inform/terminology [accessed 25 March 2019].
[174] *Ibidem*.

> obstacles make it impossible for him/her to reach available protection and assistance.[175]

It also calls for States to take into account specific vulnerabilities when assessing the seriousness of the risk to suffer one of the events listed above. Despite the positive contribution of this definition to the international protection regime, the Nansen Initiative does not create new legal obligations to protect upon States.

A positive legal obligation to protect persons in the event of natural disasters may be derived from Art. 11 of the Convention on Persons with Disabilities (CRPD),[176] which envisages that:

> States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of … natural disasters.

It is the only binding provision in IHRL enshrining the duty of a State to protect persons in case of disasters. Even though the Article refers to the protection of persons with disabilities, the marked referral to the principle and right to non-discrimination throughout the text of the CRPD and to the importance to reach substantial equality in society, opens the application of the CRPD provision to all persons as long as it is necessary to achieve such equality.

Furthermore, recalling the other HRTs and the universality, indivisibility, interdependence and interrelatedness of all HR and fundamental freedoms in its Preamble, it can reasonably be concluded that the HR provisions included in the CRPD should be read in a complementary and all-encompassing way with those included in other HRTs.

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[175] THE NANSEN INITIATIVE, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, December 2015. Available at: https://nanseninitiative.org [accessed 5 April 2019], p. 22.

[176] *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006, entered into force 3 May 2008), 2515 *UNTS* 3.

Finally, the CRPD Committee has pointed out that no discrimination on the basis of disability is allowed, entailing that persons with disability shall not only be granted lower levels of rights on the sole basis of their disability, but neither higher ones, unless necessary for the achievement of an equal society.[177] Hopefully, the upcoming General Comment on Art. 11 by the CRPD will shed further light on its scope and applicability.

The obligation stemming from Art. 11 is borne by the State of nationality and not by the international community, which can be deemed appropriate if considering that most of the movements pulled by natural or environmental disasters occur internally. In the period 2008-2016, about 228 million people were internally displaced in response to such events.[178]

Nevertheless, cross-border movements can be triggered by the lack of protection and humanitarian assistance or the impossibility to access it in one's own country.[179] Failure of States to protect their own citizens from the negative impacts of disasters can disproportionately affect persons lacking the resources necessary for planned migration and may feed in irregular migration channels dominated by smugglers and human traffickers.[180] Vulnerable environmental migrants would thus be exposed to risks of violations of HR which may reach the threshold of severity necessary to be classified as inhuman or degrading treatment or punishment, consequently triggering States' obligation to non-refoulement under the 1951 Convention or other regional instruments.

The applicability of instruments of IRL may be reinforced by the definition of disaster adopted by the International Law Commission in the Draft Articles on the Protection of Persons in the Event of Disasters, that is "calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby *seriously disrupting the functioning of*

[177] CRPD, *General Comment No. 6 (2018) on equality and non-discrimination*, 26 April 2018, CRPD/C/GC/6, para 17.
[178] INTERNAL DISPLACEMENT MONITORING CENTRE, *GRID 2018: Global Report on Internal Displacement.* Geneva, 2018. Available at: http://www.internal-displacement.org/global-report/grid2018/ [accessed 23 March 2019].
[179] W. KÄLIN, "Disaster Displaced Persons in the Age of Climate Change: the Nansen Initiative's Protection Agenda." In *Routledge Handbook of Human Rights And Disasters*, ed. by F. Zorzi Giustiniani, E. Sommario, F. Casolari, and G. Bartolini, Routledge, New York, 2018, p. 347.
[180] *Ibidem*, p. 347-348.

society" (Art. 1; emphasis added). The highlighted words recall indeed the expanded definition of refugee included in the 1969 OAU Convention ("events seriously disturbing public order") and in the 1984 Cartagena Declaration ("other circumstances that have seriously disturbed public order").

It was stressed above that not all persons who are protected from forced removal are granted formal legal status, which still rests at the discretion of the host State, and that this may result in vulnerability to further HR violations and abuse, especially in the case of multiple vulnerabilities, which, in turn, States are obliged to prevent. Once again, if from a legal perspective protection may be derived from the complementary reading of IRL-IHL-IHRL, States' differentiation on the drivers of displacement rather than on the needs of the persons on the move results in a protection gap.

3.2 INTERNALLY DISPLACED PERSONS

IDPs fall out of any international organization mandate, even though their number almost doubles that of refugees (respectively 40 million and 25 million people).[181] This is mainly due to the fact that they constitute primarily a responsibility of the State concerned. However, it has been acknowledged that IDPs face challenges and carry needs which are similar, if not more severe, to the ones of refugees, calling for similar measures of prevention, protection, assistance and solution.[182]

The only protection that can be afforded to IDPs is the one derived from IHL and IHRL. In fact, although the needs are similar to those of refugees, IRL cannot apply due to the lack of the fundamental requirement of alienage.[183] However, since the IDPs issue has been seen by States and policy-makers as part of the refugee problem,[184] IDPs' protection and assistance has been included under the scope of UNHCR's humanitarian action[185] and

[181] UNHCR, *Global Trends 2017,* op. cit., p. 2.
[182] ExCom Conclusion No. 75 (XLV)1993, para (b).
[183] J. HATHAWAY and M. FOSTER, *The Law of Refugee Status*, Second Ed., Oxford University Press, Cambridge, 2014, p. 17.
[184] C. PHUONG, "Internally Displaced Persons and Refugees: Differences and Similarities." *Netherlands Quarterly of Human Rights,* 18:2, 2000, p. 216.
[185] Such a possibility was envisaged in Art. 9 of UNHCR Statute. See also UNGA Res. 53/125, para

have been the object of several international and regional protection instruments, such as the UN Guiding Principles on Internal Displacement,[186] the Kampala Declaration[187] and the Protocol for the Protection of Internally Displaced Persons.[188] However, international humanitarian assistance, which acts in complementarity to sovereign responsibilities,[189] cannot always be provided because of lack of access to the territories concerned, due to either conflicts or other endangering situations, or State's hostility towards what is perceived as external interference with internal affairs. Thus, assistance delivery to IDPs can be more challenging than in refugee situations.[190]

Furthermore, UNHCR's neutral mandate is more difficult to be maintained in situations of internal displacement, since there is the necessity to engage in talks with parties to conflicts and civilians may not be deemed as such by one of the parties. The risk is to be curtailed access to the population in need of international assistance, both IDPs and refugees that may be hosted there, as well as endangering the life of UNHCR's and other agencies' personnel.[191]

Importantly, IDPs' assistance has been linked to the shift towards containment undertaken by the international community with regards to asylum policies. The danger is, therefore, that UNHCR's assistance to IDPs may undermine refugee protection or the right to seek and enjoy asylum, which is a precondition for UNHCR's involvement in activities in favour of the population internally displaced.[192]

16, which is considered as the foundation of UNCHR involvement in IDPs protection.

[186] UN COMMISSION ON HUMAN RIGHTS, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, E/CN.4/1998/53/Add.2. Available at: https://www.refworld.org/docid/3d4f95e11.html [accessed 27 February 2019].

[187] *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (adopted 23 October 2009, entered into force 6 December 2012), AU Doc. Ext/Assembly/AU/PA/Draft/Decl.(I)Rev.1.

[188] *International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons* (adopted 30 November 2006, entered into force 21 June 2008).

[189] UNHCR, *The Protection of Internally Displaced Persons and the Role of UNHCR*. UNHCR Informal Consultative Meeting, 27 February 2007. Available at: https://www.unhcr.org/50f951df9 [accessed 22 February 2019], para 6.

[190] *Ibidem*, para 39.

[191] *Ibidem*, para 48.

[192] The importance of such principle was underlined in several ExCom Conclusions related to internal displacement, such as ExCom Conclusion No. 75(XLV) of 1993.

Humanitarian assistance can be delivered to IDPs only with the consent of the State. In case of civil strife, however, this could result in prohibiting access to international humanitarian organizations in order to prevent them from providing assistance to a part of the population which may be persecuted by the government itself. Yet, the international community has the right and the duty to intervene in another State without violating the latter sovereignty in cases where massive and severe violations of fundamental human rights are allegedly taking place.

It has been rightly observed that IDPs can turn themselves into migrants or refugees if the lack of protection compels them to. They could resort to human traffickers or smugglers in order to cross the border and claim for international protection, in the perspective of improving their lives. Therefore, the cause of IDPs protection has been mainly regarded not as much as a humanitarian issue, rather as a political one since through their protection refugee flows are prevented from arising.

Even though the reasons to engage with IDPs are all but humanitarian, their protection in their country of origin could be regarded as the best solution, if the enjoyment of fundamental HR and their empowerment is achieved. To reach this objective, it is necessary that humanitarian and development agencies work together for comprehensive responses and strategies to be implemented in the short and long-term.

3.3 MASS-INFLUX AND MIXED MIGRATIONS

Increasingly refugee flows are characterized by their large-scale and their mixed composition. Mass-influx of persons as defined in ExCom Conclusion No. 100(LV) 2004 are characterized by four elements: (1) a considerable number of persons; (2) rapid rate of arrival; (3) host State inadequate absorption or response capacity; (4) inability of asylum procedures to deal with those assessments. They are often characterized by the irregularity of entry and constitute one of the greatest challenges to State sovereignty and integrity.[193]

As the number of forcibly displaced persons increases, so does the number of persons

[193] R. CHOLEWINSKI, *Irregular Migration and Mixed Flows.* Background Paper WMR 2010, IOM, 2010, p. 5.

who migrate for reasons not considered worthy of international protection. People flee from famine, poverty, prospects of better life, etc. Migrants leaving their country irregularly for such reasons are usually grouped under the label of 'economic migrants,' that is "[any] person leaving his or her habitual place of residence to settle outside his or her country of origin in order to improve his or her quality of life."[194] In the context of large-scale migration, economic migrants are often found to follow the same routes as refugees, asylum seekers, and other migrants, such as environmental migrants, victims of trafficking, smuggled migrants, and stranded migrants, giving rise to what is usually referred to as mixed migration.

Mixed migration increases the difficulty to distinguish persons who are in need of international protection to those who are not. High number of requests of asylum filed to the authorities of host countries, restrictive asylum policies and host countries' security concerns may hamper the ability of refugees and other categories of persons to be granted protection and assistance. An individual assessment may prove impossible to take in a reasonable time and States have been encouraged to resort to temporary protection as a practical tool to ensure those who are in need of protection minimum standards of treatment, while awaiting RSD.[195] Yet, since it only guarantees "respect for basic human rights, protection against refoulement, and safe return when conditions permit to the country of origin",[196] it may result in the exposure of vulnerable persons to risks of abuse, trafficking, exploitation, and other HR violations.

Mixed migration is often understood as a migration in which the motivations to migrate are different, rather than one in which more than one legal category of migrant (refugees, asylum seekers, irregular migrants, stateless persons, victims of trafficking, etc.) is involved.[197] Differentiating between reasons for leaving does not advance humanitarian objectives[198] and may prevent protection and assistance from being

[194] IOM, *Glossary on Migration*, op. cit., p. 32.
[195] ExCom Conclusion No. 68(XLIII)1992; No. 71(XLIV)1993; No. 74(XLV)1994; No. 103(LVI)2005.
[196] ExCom Conclusion No. 74(XLV)1994.
[197] M. SHARPE, "Mixed Up: International Law and the Meaning(s) of 'Mixed Migration'." *Refugee Survey Quarterly,* 37:1, 1 March 2018, p. 121.
[198] *Ibidem*, p. 117.

granted to those in need. Moreover, it deviates from States' obligations under IHRL, IHL and ICL, which apply to all individuals. In particular, IHL encompasses the protection of all those in countries where armed conflicts are going on, whereas ICL is used to define the protection through prevention of human trafficking and smuggling. It is only IRL that is dependent upon one's motivation to flee from the country of origin. [199]

In addition, in the spirit of the fundamental principles of equality and non-discrimination, individual treatment should be differentiated only for purposes that are reasonable and objectives for a goal deemed legitimate under the ICCPR.

Finally, it is worth recalling that the principle of non-refoulement requires States not to reject individuals to countries where their life or security may be at risk. Thus, border controls to which States resort in response to security concerns in the event of mass-influx of migrants shall be applied in a protection-sensitive manner.

The UNHCR's *10-Points Plan in Action* attempts to fill the gap through a comprehensive response to mixed migration movements that focuses on the identification of vulnerabilities and protection gaps at all stages of migratory movements.[200] However, scholars have pointed out that this is not sufficient and that it would be wise to consolidate a:

> soft law framework to protect vulnerable groups of irregular migrants such as so-called 'survival migrants', including a mechanism to respond adequately to their needs and coordinate collaboration among relevant international agencies and other stakeholders.[201]

Lastly, the compresence of persons not deemed worthy of international protection and refugees puts substantial pressure on asylum systems. Considering that the 85% of the total refugee population is hosted in developing countries [202] and much of irregular migration flows occur inside the region of origin, such countries are disproportionately

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[199] HUMAN RIGHTS COMMITTEE, *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para 13.
[200] UNHCR. *Refugee The 10-Point Plan in Action, 2016 Update*, December 2016, chapter 3. Available at: Available at: https://www.refworld.org/10pointplaninaction2016update.html [accessed 25 March 2019].
[201] CHOLEWINSKI, *Irregular Migration and Mixed Flows,* op. cit., p. 9.
[202] UNHCR, *Global Trends 2017*, op. cit., p. 2.

affected by the burdens of reception. They lack the resources to adequately deal with high numbers of refugees and migrants, who, on the other hand, exert pressure on environment and compete with locals for the limited resources. Moreover, the lack of solidarity from the international community and the legitimate security concerns of States result in the adoption of restrictive asylum policies, which further negatively impact on individuals States are bound to protect.

3.4 Protracted Refugee Situations

Protracted refugee situations (PRS) encompass all refugee situations that have lasted for 5 or more years and that involve more than 25,000 persons of the same nationality in a given country of origin.[203] Currently, this corresponds to two-thirds of refugee situations (13.4 million refugees), over half of which are stuck in a PRS from more than 10 years.[204]

The reasons underpinning such situations are mainly constituted by the non-resolution of conflicts, lack of political will among the parties involved or absence of international support.[205] Furthermore, the scarcer availability of durable solutions other than voluntary repatriation impairs refugees' ability to exercise their rights at the fullest.

Although they are legally protected under IRL, refugees in PRS have passed the emergency phase, in which humanitarian assistance is delivered and yet they are still waiting for a durable solution. Repatriation is impossible due to conditions in the country of origin. Although UNCHR stressed in its ExCom Conclusion No. 109(LX)2009 that voluntary repatriation shall not be conditioned on the accomplishment of a political solution, even when the conflict is over land mining and other issues can be regarded as dangers for the life, security and liberty of the individuals. In these cases, return would thus violate the principle of non-refoulement.

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[203] UNHCR, *Global Trends: Forced Displacement in 2016*, Geneva, 21 June 2017, p. 22.
[204] *Ibidem*, p. 22.
[205] UN Human Rights Council, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum: High-level conference on "Ten years of the Guiding Principles on Internal Displacement - achievements and future challenges" (Oslo, 16 and 17 October 2008). Summary of the Conference Chair*, 11 February 2009, A/HRC/10/13/Add.3. Available at: https://www.refworld.org/docid/49abc00d2.html [accessed 27 February 2019], p. 4.

If voluntary return is thus not a feasible possibility, other durable solutions should be given due attention in order to allow refugees to become self-reliant and reduce their dependence on international aid. However, difficulties arise because both resettlement and local integration are seen respectively as too costly and as putting excessive burden on already strained communities. In fact, resettlement involves only the 1% of the refugee population, which, on its part, is concerned of the failure to take into account the refugees' choice on resettlement, of the unclear UNCHR prioritization criteria and the lack of transparency in rejection decisions.[206]

On the other hand, local integration is perceived by host countries as a "burden shifting" on the part of the international community and a breach of their sovereignty.[207] This perception may be corroborated by the constant lack of funds for long-term assistance and repatriation programmes, as well as from the failure to address the needs of host communities. The latter can exacerbate discriminatory and xenophobic attitudes by the locals against refugees and migrants, who are perceived as benefitting of more rights and services as compared to them.

As a result, refugees in PRS often experience a deterioration in the quality of their lives and the denial of rights they are entitled to under IRL and IHRL, and exposes them to vulnerabilities. For instance, children are not able to access education, women and girls have been reported of suffering SGBV and be discriminated against due to absence of separated sanitation; persons with disabilities may be limited in their freedom of movement and in accessing information and basic services, in between other things. Refugees are prevented from accessing the labour market, thus impeding their self-reliance and compelling them to depend on humanitarian aid, which decreases as the crisis goes on.

Refugees have tried to fill the gap and engaged in activities that are often beyond State's control, as informal economic activities; they have resorted to onward migration,

[206] UN ECONOMIC AND SOCIAL COUNCIL, *Evaluation*, op. cit., para 27.
[207] J. MILNER, "Protracted Refugee Situations." In *The Oxford Handbook of Refugees and Forced Migration Studies*, ed. by E. Fiddian-Qasmiyeh, G. Loescher, K. Long, K, and N. Sigona, Oxford University Press, Oxford, 2014, p. 155.

regardless of how dangerous the journey could be; or they have relied upon transnational networks, whereby resettled refugees send remittances to those left behind. Yet, these do not constitute durable solutions and they expose refugees to new risks.[208]

In conclusion, although a legal framework for refugees' and migrants in vulnerable situations' protection does exist, States' security concerns and lack of international cooperation result in harsher asylum policies and restrictive interpretation of the law applicable, leading to protection gaps. Moreover, communities hosting huge numbers of refugees and vulnerable migrants face excessive burden which may result in heightened local tensions, not only hampering the achievement of durable solutions and rights' enjoyment on the part of refugees, but also threatening international peace and security.

[208] *Ibidem*, p. 159.

CHAPTER II

TOWARDS THE GLOBAL COMPACTS

Contents: 1. The New York Declaration 1.1. The commitments 1.2. Annex I: the Comprehensive Refugee Response Framework 1.3. Annex II: towards the Global Compact for Safe, Orderly and Regular Migration 2. A soft approach to a global phenomenon 2.1. Hard law and soft law: their suitability in addressing the protection gaps 2.2. Context-specific responses: the call for flexibility 3. The guiding principles 3.1. Burden- and responsibility-sharing and international cooperation 3.2. The multi-stakeholder and whole-of-government approach 3.3. The humanitarian-development nexus 3.4. Predictable, flexible, unearmarked and multi-year funds 3.5. Human rights-based and people-centred approach

In 2015, the European "refugee crisis" and the tragedy of the Syrian carnage led States to acknowledge that action was needed to close the perennial solidarity gap in the protection regime. Hence, discussions started over the possibility of adopting a new legal tool to better defining States' obligations towards refugees and migrants in large movements situations, which are the most challenging to the solidity of the international protection regime because of the overburden placed on host countries and communities.

A revision of the 1951 Convention was not deemed possible though; thus, a proposal to adopt a brand-new international convention regulating such issues was advanced. However, this option was rejected due to the unwillingness of States to be bound by new obligations. Therefore, the international community reunited at the 71st UNGA session on 19 September 2016 adopted the NYD, a political declaration which in its two Annexes sets the way forward to achieve more equitable burden- and responsibility-sharing (BRS) through the adoption of the GCR and the GCM.

This chapter introduces the NYD and its commitments and considers the choice of the international community to adopt a soft law rather than hard law instrument for enhancing international cooperation and solidarity, as well as migrants' and refugees' rights. Finally, it presents the guiding principles which informed the drafting of both Global

Compacts and whose basis is to be found in the NYD.

1. THE NEW YORK DECLARATION

Pursuant UNGA Decision 70/539 of 2015,[209] for the first time ever a High-Level Plenary Meeting on refugees and migrants was convened on 19 September 2016. On that occasion, the 193 UN MS adopted by consensus the NYD, a political declaration whose aim is to address the challenges posed by large movements of persons, uphold to HR of both refugees and migrants and achieve equitable BRS.

Defined by the UNHCR as "a milestone for global solidarity and refugee protection at a time of unprecedented displacement across the world,"[210] it was informed by a Report issued by the Secretary-General (SG)[211] according to which the Summit should have concluded with the adoption of a Global Compact on Responsibility-Sharing for Refugees and the commitment to endorse a GCM by 2018.[212] However, given the concerns raised by some MS as regards the possibility that in this way a hierarchy would have been established in which refugees would have been deemed more important than migrants, the adoption of what became the GCR was postponed to 2018 as well.[213]

The NYD is composed of five parts and two Annexes. It opens with an introduction (I), followed by a section on commitments relating to both refugees and migrants (II); one on commitments concerning only migrants (III) and refugees (IV); and it concludes with the follow-up and review section (V). Annex I is constituted by the Comprehensive Refugee

[209] UNGA Decision 70/539, *High-level plenary meeting of the General Assembly on addressing large movements of refugees and migrants*, 22 December 2015, A/70/49 (Vol. II). Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/70/49(vol.ii) [accessed 3 April 2019].
[210] UNHCR, *Bringing the New York Declaration to Life. Applying the Comprehensive Refugee Response Framework (CRRF)*, January 2018. Available at: https://www.unhcr.org/593e5ce27.pdf, p. 1.
[211] UNGA, *Report of the Secretary-General: In safety and dignity: addressing large movements of refugees and migrants*, 21 April 2016, A/70/59. Available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/59&=E%20 [accessed 5 April 2019].
[212] *Ibidem*, paras 102, 105.
[213] E. FERRIS, *Policy Brief 3 - In Search of Commitments: the 2016 Refugee Summits,* Andrew & Renata Kaldor Centre for International Refugee Law, November 2016. Available at: https://www.kaldorcentre.unsw.edu.au/publication/policy-brief-3-search-commitments-2016-refugee-summits [accessed 5 April 2019], p. 11.

Response Framework (CRRF), while Annex II sets a non-exhaustive list of elements that should be discussed in the negotiation process towards the adoption of the GCM.

As States affirmed that large movements are "global phenomena that call for global approaches and global solutions" (para 7), the NYD sets the basis for equitable and predictable BRS, underlining the disproportionate impact that they large movements have on host countries; calls for the respect for HR at all stages of migration; recognizes the added value that refugees and migrants may bring to host countries' development and sustainable economic growth; and reaffirms the need to address the drivers of migration.

1.1 THE COMMITMENTS

Through the adoption of the NYD, MS have sought to find a new approach to best respond to large movements of refugees and migrants.[214] However, no satisfactory explanation is provided in the text of the Declaration as to what large movements are. It is only indicated that in order to define large movements factors that must be considered include not only the absolute number of people arriving, but also the context of the host country (economic, social and geographical) and its capacity to effectively and sustainably respond to mass inflows or PRS (para 6). In fact, the NYD acknowledges the political, economic, social, developmental, humanitarian and HR's impact on host countries and communities of large movements of migrants and refugees, especially PRS.

The Declaration opens recognizing that human mobility is an integral part of human history and setting out a list of drivers of migration. Among them is poverty; food insecurity; terrorism; HR violations; abuses; adverse effects of climate change; natural disasters; and other environmental factors.[215]

States established their commitment to counter the root causes of displacement, a pledge that the UN SG, Ban Ki-moon, retained "the cornerstone of all efforts." [216] According to the SG, "[r]ather than 'preventing' large movements of refugees and

[214] NYD, para 2.
[215] *Ibidem*, para 1.
[216] Report of the SG, *In safety and dignity*, para 52.

migrants, the factors that force refugees and migrants to abandon their homes and communities must be addressed."[217] In this context, the NYD identifies the 2030 Agenda as providing a framework through which many of the causes of displacement can be countered. Moreover, as regards migration induced by climate change and environmental disasters, the NYD recalls the guidance provided by the Sendai Framework for Disaster Risk Reduction 2015-2030 (SFDRR)[218] and the Paris Agreement on Climate Change.[219]

Prevention of internal displacement and IDPs protection is also considered to be important in order to address large movements of refugees and migrants (para 20). However, no clear commitment was reached on this topic. Specifically, in contrast with what was envisaged in the SG's Report, there is no mention of the pledge to incorporate the UN Guiding Principles on Internal Displacement in national legislation.[220]

The 2030 Agenda is not only mentioned with regards to addressing root causes. Indeed, States recalled the acknowledgement of migrants' positive contribution to sustainable development and inclusive economic growth and their pledge to leave no-one behind and to facilitate safe, orderly and regular pathways of migration contained therein.[221] The 2030 Agenda is further used to frame many of the commitments relating to migrants, such as the reduction of labour mobility's and remittances' costs, the promotion of ethical recruitment policies and practices, and the facilitation of interaction between diasporas and the communities of origin (para 46).

The NYD reaffirms the principles and purposes of the Charter of the UN, the UDHR and the core HRTs.[222] In particular, of outmost importance is the strong proclamation to

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[217] *Ibidem*.
[218] UNGA Res. 69/283, *Sendai Framework for Disaster Risk Reduction 2015-2030,* 23 June 2015, A/RES/69/283, Annex II.
[219] UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, *Paris Agreement,* 12 December 2015, FCCC/CP/2015/L.9/Rev.1, Annex.
[220] Report of the SG, *In safety and dignity*, para 101(a)(iii).
[221] NYD, para 4.
[222] Namely, the ICCPR, International Covenants on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child, CRPD, Convention in the Elimination of All Forms of Discrimination against Women, CAT, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, International Convention on the Elimination of All Forms of Racial Discrimination, International Convention for the Protection of All Persons from Enforced Disappearance.

"fully protect the HR of all refugees and migrants, *regardless of status: all are rights holders*" [emphasis added] (para 5).

Relating to what was observed in the previous Chapter, in fact, those migrants who are not eligible for refugee status recognition are often not granted the protection of their HR and fundamental freedoms. The commitment to respect the paramount principle of universality of HR notwithstanding the legal status hold by an individual is thus significant.

The NYD also recognizes that large movements of people often entail mixed migration, defined as groups of refugees and migrants that "move for different reasons but who may use similar routes" (para 6), reiterating a distinction based on why a person moved rather than what are than on her needs.

Nonetheless, MS recognized that refugees and migrants experience "common challenges and have similar vulnerabilities" (para 6) and committed to ensure that the needs of persons in conditions of vulnerability are adequately met, independently from the individuals' legal status (paras 26-32). This is noteworthy if considered that the distinct legal frameworks governing refugees and migrants, including migrants in vulnerable situation, entail different legal obligations, by virtue of which assistance has many times been refused to migrants despite their vulnerabilities. Recognizing that they may face similar needs, instead, paves the way for the legitimation of assistance and protection delivery to those categories of migrants who require it. Furthermore, despite the fact that the NYD mainly refers to irregular migration as it is irregular migrants who may resort to the same routes as refugees posing challenges to States, this does not impede the application of some of the provisions included therein in situations of regular migration which may require similar actions.[223]

The NYD further acknowledges the interconnection between international law, IHRL, and, where applicable, IRL and IHL. This should not be underestimated since MS have demonstrated the tendency to abide by international obligations in a clustered approach.

Moreover, aware of the higher risk that refugees and migrants in large movements are exposed to, States agreed to strengthen the fight against smuggling and human trafficking, inviting those who had not done it yet to accede to the UN Convention against

[223] NYD, para 21.

Transnational Organized Crime (UNTOC) and the Protocols thereto. They praised global and regional initiatives to such an end, recognizing the importance to enhance cooperation among countries of origin, transit and destination, and committed to invest more in supporting the victims of such crimes and to develop measures for the early identification of victims or persons at risk (paras 35-36).

MS underlined the importance of having a comprehensive approach to large movements' governance and pledged to incorporate protection- and vulnerability-sensitive reception mechanisms, while upholding to HR and fundamental freedoms (para 22); they also reaffirmed the importance of the principle of non-refoulement, described as the prohibition to return any individual (in line with IHRL's development) at borders (para 24). These provisions are dampened, however, by the affirmation of States' right to take measures to prevent irregular border crossing. Indeed, the text lacks clarity in defining how such a right would ensure the respect of the prohibition of forced removal.

Furthermore, in light of the heightened xenophobic and discriminatory attitudes manifested in various national contexts, MS reaffirmed the principle of non-discrimination and agreed to take measures to improve migrants' and refugees' integration and inclusion. Specifically, they accepted to give access to education, health care, social services, justice and language training (para 39). To do this, the NYD envisages the collaboration with relevant civil society organizations, including refugees' and migrants' organization among others.

Importantly, States have committed to improve data collection, especially with regard to disaggregated data by sex, age, disability, legal status, and reasons for leaving, and to cooperate internationally through capacity-building, financial and technical assistance to achieve this end (paras 25, 40).

Deceitful are the provisions on the engagement to find alternatives to detention. Particularly, in contrast with the bold affirmation contained in the SG's Report as regard the absolute prohibition of child detention, the NYD retains a softer approach. MS only agreed on recurring to child detention "as a measure of last resort, in the least restrictive setting, for the shortest period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of

the child" (para 33). Even though MS committed to work towards the ending of such practice, no deadline was fixed.

As relates to commitments specifically concerning migrants, the NYD opens with the promise to secure safe, orderly and regular channels of migration, including return and readmission which States have the duty to ensure (paras 41-42). Such a promise is referred to continuously throughout the whole NYD's part relating to migrants, in addition to the decision to engage in migration policies that are respectful of HR and of the principle of non-refoulement. This mirrors SG's consideration that the basis for the GCM should be the principle that all migrants, regardless of their migratory status, are entitled to the respect, protection and full enjoyment of the rights they are recognized in the nine core HRTs and other international law instruments.[224]

In addition, MS have recognized the contribution of the Global Migration Group (GMG) to the development of guidance on the protection of the HR of migrants in vulnerable situations (para 51) and agreed to consider the development of non-binding principles and voluntary guidelines on their treatment (para 52). The latter are meant to complement (not to substitute) national policies in this regard and they would be drafted through a State-led negotiation process and would be informed by the expertise in protection provided by the UNCHR.

Temporary protection against return has been a praised instrument to provide protection to migrants who do not qualify as refugees and yet are unable to return in their countries of origin due to the conditions existing there (para 53). Though such a clause is important for it could be used to provide climate change- or environmental-induced migrants with temporary protection, it is not as bold as the SG's praise of the good practice of conceding *at a minimum* temporary protection to certain categories of vulnerable migrants, in particular victims of trafficking and smuggling, enacted by some States and which all the others were encouraged to follow.[225]

The NYD also envisages the consideration of reviewing migration policies, in order to fix their possible unintended negative consequences (para 45).

[224] Report of the SG, *In safety and dignity*, para 88.
[225] *Ibidem*, paras 93-94.

Migration is defined as a "multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses" (para 46). It is thus fundamental to identify and tackle the drivers of migration. Among them, MS have recognized lack of educational opportunities as a push factor. Thus, they have engaged in strengthening local institutional capacities in educational institutions and providing for employment opportunities (para 44). Furthermore, the NYD establishes the delivery of impartial and need-based assistance in countries affected by natural or environmental disasters and signals the relevance of the Nansen Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change and the Migrants in Countries in Crisis Initiative's Guidelines to Protect Migrants in Countries Experiencing Conflicts or Natural Disasters [226] in this regard (para 50).

With regard to return, the NYD surprisingly takes a softer approach compared to the stance taken by the SG in his Report. Indeed, the NYD lacks referral to States' right to removal, which is instead affirmed in para 92 of the SG's Report. However, they both share the commitment to recur to voluntary return as preferred means of action.[227]

Acknowledging IOM's leading role in the migration field, States have also committed to bring the international organization into a closer legal and working relationship with the UN. Indeed, though IOM is already working in strict cooperation with UNCHR and other UN Agencies on the field, it is not yet full part of the UN system.[228] This is of particular concern since as long as it is independent from the UN it is not bound to respect UN standards on HR. In this regard, during the workshops held in 2017 on the GCM, IOM was asked to consider modifying its Constitution in order to have an official HR protection function, and to include a reference to the UN HR framework. In the words of the spokesman of the NGO Committee on Migration, "[t]his would allow IOM to measure

[226] MIGRANTS IN COUNTRIES IN CRISIS INITIATIVE (MCIC), *Guidelines to Protect Migrants in Countries Experiencing Conflicts or Natural Disasters*, June 2016. Available at: https://micicinitiative.iom.int [accessed 5 April 2019].
[227] NYD, para 75; Report of the SG, *In safety and dignity*, para 84.
[228] IOM became an UN-Related Agency through UNGA Res. 70/296, *Agreement concerning the Relationship between the United Nations and the International Organization for Migration*, 25 July 2016, A/RES/70/296.

policies and practices against a clear, binding normative framework and ensure that all projects funded by States and implemented by IOM are negotiated in accordance with that framework." However, a closer relationship to the UN on the part of IOM is still under consideration.

The first commitment specifically concerning refugees relates to addressing root causes, through means such as preventive diplomacy and early response to conflict. Furthermore, it is recognized that failure to abide by IHL could lead to displacement (para 64). Interestingly, there is no referral to persecution, which is the constitutive element of the 1951 Convention's definition, and conflict is the only cause mentioned concerning refugees.

The UNGA also reaffirmed "the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto as the foundation of the international refugee protection regime" and invited those States who are not yet Parties to such instruments to accede (para 65). Yet, it recognizes the contribution made by those States who, though not Parties to the international refugee protection regime, have hosted and continue to host large numbers of refugees (para 65).

Furthermore, mention is made to regional instruments governing refugee protection (para 66), the commitment to respect the institution of asylum and the principle of non-refoulement "in accordance with international refugee law" (para 67).

Regrettably, the prohibition of non-refoulement is not linked to IHRL, neither when referring to migrants. Indeed, para 58 (relating to migrants) does not refer to IHRL when enouncing the respect for such tenet, while para 67 (relating to refugees) clearly confines the application of the protection from forced removal and return only to that defined in IRL, which is more restrictive than the one provided by IHRL. Although the NYD strengthens the need for parallel application of IRL, IHRL and IHL in refugee situations in order to provide effective protection (para 66), the provision is anyway disappointing in its scope.

States committed also to ease and make more rapid and effective the policies relating to refugee admission, as well as ensuring that prompt registration and documentation is provided (paras 70-71).

Moreover, the NYD also envisages the necessity to find alternatives to camps and ways to deliver assistance and protection in urban setting, where the 60% of the total refugee population lives (para 73).

In the merits of solutions, the NYD enshrines the promise of States to work for durable solutions from the outset of a crisis. In particular, States undertook to ensure that return in safety and dignity can be timely available (para 74). In line with several ExCom Conclusions, the NYD reiterates that States will not need to wait that political solutions are reached in the country of origin in order to have voluntary repatriation (para 76). The risk is however that, as a result, premature return would be encouraged.[229]

Importantly, States have agreed to expand the legal pathways of admission, notably through resettlement programmes or measures such as humanitarian admission programmes, temporary evacuation programmes, flexible arrangements for family reunification, private sponsorship for individual refugees, or labour mobility (para 79). Such pledges have been praised as "stepping stones to longer term solutions"[230] and proofs of solidarity. However, the omission of the commitment to resettle at least 10% of the refugee population annually, as foreseen in the SG Report at para 83, was deceitful.

Education is considered as a fundamental tool for protection, reason for which quality primary and secondary protection should be ensured to refugee and host communities' children. However, the importance of the provision is dampened by the absence of a specific timeframe within which to grant refugee children access to it, establishing a vague "within a few months of the initial displacement" (para 81). Furthermore, the suggestion of the SG to have compulsory primary education for refugee children[231] is replaced by a simple commitment to support early childhood education (para 82).

Other important pledges are constituted by the opening of health and social care systems to refugees. In particular, such services will be delivered, where possible, through national systems, thus benefitting not only refugees but also host communities (para 83).

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[229] ASIA PACIFIC REFUGEES RIGHTS NETWORKS (APRRN), *Reflections on the Significance of the New Declaration on Refugees and Migrants for the Pacific Region*, 12 June 2017. Available at: http://www.unhcr.org/events/conference/595e2aac7, para 44.

[230] V. TÜRK, "Prospects for Responsibility Sharing in the Refugee Context." *Journal on Migration and Human Security,* 4:3, 2016, p. 56.

[231] Report of the SG, *In safety and dignity*, para 82.

Furthermore, labour opportunities are recognized as fundamental to enhance refugee self-reliance, avoid aid-dependency and achieve durable solutions, both in and outside the hosting country (para 84).

In order to ensure that the commitments undertaken will not be implemented and remain just "abstract principles" as many other declarations of intent, the NYD foresees a system of periodic review and follow-up through existing mechanisms. Specifically, assessment will be made in occasion of the report to the GA with reference, when appropriate, to the 2030 Agenda, at the High-level Dialogues on International Migration and Development, and at the Annual Report of the UNHCR to the GA (paras 88-89).

In light of the commitments proposed in the SG's Report, critics have been advanced against the NYD. According to some, it represented a missed opportunity to enhance international cooperation and to achieve practical commitments.[232] The disappointment towards what was seen as a "historic opportunity"[233] is mainly the consequence of the failure of MS to agree upon the Global Compact on Responsibility-Sharing for Refugees, as envisaged in the second pillar identified by the SG in his Report. Indeed, such a Compact was praised as the "centrepiece of humanitarian action for future engagement in mass influx situations as well as in situations of protracted displacement."[234] However, the international community's decision to postpone the adoption of the GCR as wise. Indeed, it signals a shift in the global vision of migration and refugee flows from distinct to interconnected phenomena having equal importance, and which have to be considered in a parallel and complementary way. In addition, if a Compact had to be adopted already in 2016, there would have been little time for consultations among States and a broad range of stakeholders and would have thus weakened its scope. The same NYD was criticized for having been negotiated in the span of few months.[235]

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[232] J. MCADAM, "Filling up or emptying the glass? Musings on the 19 September refugee summit." *Andrew & Renata Kaldor Centre for Refugee Law*, 5 September 2016, Available at: https://www.kaldorcentre.unsw.edu.au/publication/filling-or-emptying-glass-musings-19-september-refugee-summit [accessed 4 April 2019].

[233] G. S. GOODWIN-GILL, "2017: The Year in Review." *International Journal of Refugee Law,* 30:1, 2018, p. 7.

[234] TÜRK, "Prospects for Responsibility-Sharing", op. cit., p. 49.

[235] A. BETTS, "U.N Refugee Summit: Abstract Discussions in the Face of a Deadly Crisis." *News Deeply*,

Furthermore, scepticism on the adoption of the NYD moved around the failure to set concrete targets (such as the commitment to resettle at least the 10% of the refugee population annually), the absence of clear mechanisms for action and accountability, and the lack of innovative pledges.[236] According to some, the NYD was a mere reaffirmation of existing abstract principles that did not address the need for institutional transformation.[237]

On the other hand, others have not failed to notice that given the political climate of heightened xenophobia and intolerance against refugees and migrants, and the intransigence to respond in a genuine spirit of solidarity,[238] the NYD is to be regarded as a "minor miracle".[239]

Ultimately, critics stemmed from the scarce attention paid to internal and climate-induced displacement and from the problematic language regarding child detention.[240]

1.2 Annex I: The Comprehensive Refugee Response Framework

Annexed to the NYD is the CRRF, a comprehensive response plan informed by UNHCR in close cooperation with all other relevant stakeholders, including host countries and other UN Agencies, which should be applied in situations involving large movements of refugees as an integral part of an overall humanitarian response (paras 1, 2, 4). However, the text lacks definition of what is the threshold for its application. This could be detrimental for its success. Indeed, the risk is that it will never be implemented, or that it will be

12 September 2016 Available at: https://www.newsdeeply.com/refugees/community/2016/09/12/u-n-refugee-summit-abstract-discussions-in-the-face-of-a-deadly-crisis [accessed 4 April 2019].

[236] McAdam, "Filling up or emptying the glass?", op. cit.

[237] Betts, "U.N Refugee Summit," op. cit.

[238] McAdam, "Filling up or emptying the glass?", op. cit.

[239] V. Türk, *A Minor Miracle: A New Global Compact on Refugees*. Statement by the Assistant High Commissioner for Protection at the Andrew & Renata Kaldor Centre for International Refugee Law, University of New South Wales, Sidney, 18 November 2016, Available at: https://www.unhcr.org/583404887 [accessed 7 April 2019].

[240] International Council of Voluntary Agencies (ICVA), *The Global Compact on Refugees Explained: An ICVA Briefing Paper*, June 2017. Available at : https://www.icvanetwork.org/resources/global-compact-refugees-explained-icva-briefing-paper [accessed 4 April 2019], p. 4.

implemented in all or randomised situations, without due consideration to the principles of equity and BRS that underpin the framework.[241] In fact, the CRRF is not meant to apply every time a country is affected by large movements; quite the opposite, if other working mechanisms are in place, the CRRF should not be operationalized.[242]

As UNCHR has stated, the CRRF is not a new coordination model.[243] It builds on existing mechanisms and it has been already used to tackle large movements of refugees in recent history. A similar plan was adopted already in 1989 to respond to the Indochinese refugee crisis. However, in that case as in those that followed, it was mainly conceived as a reaction to the mass-influx of persons rather than as a preventive tool.[244] The CRRF, on the other hand, also includes early warning mechanisms that need to be put in place whenever there is the risk of a large movement of refugees and migrants to take place. It thus mirrors the call made by the scholar Goodwin-Gill to "move beyond reactive solutions and deal comprehensively with causes" in order to avoid repeated cycles of displacement.[245]

The CRRF is conceptualized as a new thinking for UNHCR, whose main innovative features are the consultative and operational multi-stakeholder and whole-of-government approach; the planning for solutions from the outset of an emergency; and the support for refugee inclusion as a means for easing pressure on host countries.[246]

Reaffirming the importance of the 1951 Convention and 1967 Protocol and recognizing that there is no "one size fits all" solution and that each situation is different, the CRRF sets the elements that should be flexibly included in a comprehensive and people-centred response (para 3). These are divided into the so-called 4 pillars: (1) reception and admission; (2) immediate and ongoing needs; (3) supporting the needs of host communities; (4) durable solutions. The CRRF is designed to (1) ease pressure on host countries; (2) enhance refugee self-reliance; (3) expand third-country solutions; (4)

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[241] APRRN, *Reflections on the Significance of the New York Declaration*, op. cit., para 46.
[242] ICVA, *The Global Compact on Refugees Explained,* op. cit., p. 7.
[243] UNHCR, *Bringing the New York Declaration to Life,* op. cit., p. 2.
[244] G.S. GOODWIN-GILL, "Editorial. Asylum: The Law and Politics of Change." *International Journal of Refugee Law*, 7:1, 1995, p. 9; cited in MCADAM, "The Enduring Relevance of the 1951 Refugee Convention," op. cit., p. 5.
[245] *Ibidem*.
[246] ICVA, *The Global Compact on Refugees Explained,* op. cit., p. 5.

support conditions in countries of origin for return in safety and dignity.

With regard to the reception and admission pillar, the CRRF envisages measures for the prompt identification of persons in need of international protection and with specific needs. Particularly, it establishes gender-mainstreaming in all practices regarding women and girls, including involving them in planning elaboration. Furthermore, the CRRF calls for refugee early registration and provision of documentation, while supporting host countries that require assistance in areas such as biometric technology. It ensures civil registration, especially birth registration to avoid statelessness, and the adoption of measures that uphold refugees' HR as well as address host communities' security concerns. It also reaffirms the civilian and humanitarian nature of camps and settlement; however, in contrast with the NYD, there is no mention to the need to find alternatives to refugee camps.

In the reception and admission section, the CRRF also envisions support to the credibility of asylum systems through enhanced cooperation among States of origin, transit and destination and facilitated readmission and return processes for those who do not qualify for international protection (para 5).

Relating to immediate and ongoing needs, the focus is on the offering financial and other kinds of support to host countries in a timely, predictable, flexible and innovative manner. Moreover, the CRRF guarantees the support in environment's protection and the strengthening of infrastructures affected by refugee flows.

The third pillar specifically addresses the first objective of the CRRF: ease pressure on host countries and communities. It indeed commands for risk and/or impact assessment as early-warning mechanism, incorporating the CRRF in national development planning, providing adequate resources without prejudice to official development assistance with programmes that should benefit refugees and host communities alike (para 8).

The longest part of the CRRF is dedicated to durable solutions. To begin, it is acknowledged that the current lack of solutions for refugees mainly stems from scarce international cooperation and support (para 9). Then, durable solutions are identified as voluntary repatriation, local solutions, resettlement and complementary pathways of admission. It is interesting to note the order in which they are laid out. Indeed, although

the CRRF is conceived as a tool meant to enhance international cooperation, resettlement and other pathways of admission, despite representing one of the greatest demonstrations of solidarity, are enunciated only after local solutions.

Unsurprisingly, long provisions are made on voluntary repatriation (paras 11-12). The CRRF recalls the centrality of addressing root causes and of the provision of Art. 14 of the UDHR as regards the right to leave and return to one's own country, from which stems the obligation of States to readmit their own citizens. Countries of origin should also provide identification and travel documents, facilitate socio-economic reintegration and consider measures of property restitution for those refugees willing to return (para 11). On its part, the international community should guarantee that the return is voluntary and well-informed, support reintegration and reconciliation, facilitate refugee participation, including women, in reconciliation process, and ensure that development planning take into consideration the needs of returnees (para 12).

As to local solutions, the CRRF envisages the provision of legal stay to those recognized as seeking and in need of international protection as refugees (para 13). However, such a provision embeds the risk of being interpreted as entailing only temporary protection, that is protection from refoulement and the grant of minimum rights only.[247] It is further limited by the affirmation that "any decision regarding permanent settlement in any form, including possible naturalization, rests with the host country" (para 13(a)). The CRRF also envisages the commitment of host States to foster refugee self-reliance, including providing the possibility for refugees, including women and girls, to make the best use of their skills and capacities, as well as occasion for investment in human capital, self-reliance and transferrable skills.

Finally, third countries would just *consider* making available or expanding resettlement and other pathways for admission and broadening the criteria for such programmes in mass displacement and PRS (paras 14-15). These should be put in place at a scale that would allow to fill the annual resettlement needs identified by the UNCHR (para 16). Yet, it still does not mention the quota of 10% of the refugee population as envisaged in the SG's Report.

[247] APRRN, *Reflections on the Significance of the New York Declaration*, op. cit. para 45.

The closing paragraphs of the CRRF sets out the modalities of adoption of the GCR, envisaging its endorsement at the 73rd session of the UNGA, at the time of UNCHR's Annual Report (para 19). Indeed, the CRRF is an integral part of the GCR, which should establish provisions on its operationalization in a Plan of Action.

In addition, it is established that CRRF's implementation in roll-out countries will inform GCR's negotiations as it will allow to identify the areas in which more commitment is needed. The NYD does not specify how roll-countries and situations will be selected, but UNHCR reports that relevant elements that are taken into consideration for the choice are, among others, the agreement and active engagement of the host State; the potential for progress and lessons learned on one or more of the four CRRF's objectives; the availability of a broad range of actors to engage with; the "range of situations", including regional diversity and the variety of operational phases (emergency, established or protracted situation).[248]

So far, the CRRF is being implemented in fifteen countries, namely: Afghanistan, Belize, Chad, Costa Rica, Djibouti, Ethiopia, Guatemala, Honduras, Kenya, Mexico, Panama, Rwanda, Somalia, Uganda, and Zambia. It also has two regional approaches: the MIRPS (CRRF in Spanish), which is applied in Central America and Mexico; and the African regional response to the Somali situation under the leadership of the Intergovernmental Authority on Development (IGAD).[249] The United Republic of Tanzania was also a roll-out country until February 2018, when its refused to borrow money from the World Bank in order to implement the negotiated CRRF.[250]

The joining of Afghanistan in the implementation process in July 2018 discarded the fear advanced by the Asia Pacific Refugee Rights Network that the CRRF was not design to be carried out in Asia[251] ignoring the fact that some of the most urgent situations involving huge numbers of refugees and migrants are indeed located in that region.

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[248] UNHCR, *Bringing the New York Declaration to Life,* op. cit., p. 3.
[249] See www.globalcrrf.org.
[250] A. BETTS, "Don't Make African Nations Borrow Money to Support Refugees." *Foreign Policy*, 21 February 2018. Available at: https://foreignpolicy.com/2018/02/21/dont-make-african-nations-borrow-money-to-support-refugees/ [accessed 10 April 2019].
[251] APRRN, *Reflections on the Significance of the New York Declaration*, op. cit., paras 41-42, 50.

1.3 ANNEX II: TOWARDS THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION

The second Annex to the NYD defines the guidelines for GCM negotiation and adoption process, although precise rulings should be set up through UNGA resolution (paras 9, 11). A special role for the UN Secretariat and IOM is envisaged, whereas the Special Representative of the SG for International Migration and Development is called to coordinate the contributions made by the Global Forum on Migration and Development (GFMD)and the GMG. The negotiations were envisaged to involve contributions from civil society, the private sector, diaspora communities and migrant organizations. Furthermore, regional consultations through existing mechanisms were warmly welcomed (para 14).

According to Annex II, the GCM:

> would make an important contribution to global governance and enhance coordination on international migration. It would present a framework for comprehensive international cooperation on migrants and human mobility. It would deal with all aspects of international migration, including the humanitarian, developmental, human rights-related and other aspects of migration. It would be guided by the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, and informed by the Declaration of the High-level Dialogue on International Migration and Development adopted in October 2013. (para 2)

The Annex goes on providing a non-exhaustive set of elements that should be included in the GCM. They are not as specific as those contained in the CRRF, and many of them overlap with commitments undertaken with the adoption of the 2030 Agenda, such as the recognition of the multidimensionality of migration phenomena; the positive contribution made by migrants to sustainable development; the facilitation of safe, orderly and regular migration; and the respect HR and fundamental freedoms of all migrants (para 4-6).

Furthermore, it is stated that holistic approaches that consider both the causes and consequences of migration should be adopted in order to put in place well-managed

migration policies. For this reason, Annex II enumerates some of the major drivers of migration. If the CRRF listed conflict as main cause, Annex II mentions all other situations that may lead to migration, such as poverty, lack of opportunities or environmental factors, which could also be found in combination with other drivers (para 7).

States are called to discuss about ways to address the drivers of migration, but the provision fails to mention the need to prevent climate change- or environmental-induced migration, contrary to the commitment undertaken in the NYD. UN MS should also define the scope of international cooperation, the impact of migration on countries of origin, and cooperation in border control.

With regards to protection and assistance, the GCM should envisage the elements already presented in the NYD: the guarantee of effective protection of human rights and fundamental freedoms; ways to address the specific needs of migrants in vulnerable situations; the combat of smuggling and human trafficking; and the identification of victims of such crimes and the possibility to provide them with assistance, including temporary or permanent residency and work permits.

Parallel to the fostering of safe, orderly and regular migration pattern and in line with the need to combat transnational organized crime, States should also establish strategies to reduce the impact of irregular migration. Furthermore, they should consider regularizing migrants' status and promote their inclusion and integration in host countries, which entails combat racism, xenophobia and intolerance, qualifications' recognition and the respect of labour rights and safe environment.

Finally, the GCM should also refer to return and readmission policies the harnessing of the contribution of diasporas in countries of origin, and the collection of disaggregated data in order to elaborate evidence-based responses.

2. A SOFT APPROACH TO A GLOBAL PHENOMENON

Some concerns regarding the potential success of the two Global Compacts stem from their non-binding nature. In fact, the detractors of the soft approach assert that there was the possibility to achieve the necessary consensus to adopt an almost universal convention on responsibility-sharing and that the decision to endorse non-binding

instruments denote the lack of willingness to abide by obligations of this kind.

However, few considerations shall be made: what is the real impact of soft law in the refugee and migration fields? Was BRS the only aim to be achieved?

2.1 HARD LAW AND SOFT LAW: THEIR SUITABILITY IN ADDRESSING THE PROTECTION GAPS

In 2016, over 65 million people were forcibly displaced, both internally and externally, putting pressure on international protection regimes.[252] Moreover, the solidity of the latter was endangered by the increasing incidence of mass-influx of persons and mixed migration flows, whose impact had to be considered in conjunction with that of PRS.

As noted above, the world has also witnessed an increase in the number of persons in need of protection who, however, fall outside the scope of the 1951 Convention. Furthermore, the political climate characterized by heightened intolerance towards refugees and migrants had brought to more restrictive measures of asylum and scarcer legal pathways of admission.

Perceived shortcomings of the 1951 Convention have been used to justify the resulting protection gaps.[253] The "responsibility deficit"[254] stemming from the omission of any resettlement clause from the 1951 Convention is one of the causes of the perception that asylum is a "costly burden which is not equally distributed."[255] For this reason, if a solution had to be found, it had to be global.

Yet, the possibility to reach a universal binding agreement on a sensitive topic such as that of refugees and migrants, whether in the form of a Protocol to the 1951 Convention or a brand-new international treaty, was quite unrealistic. Indeed, States would have hardly been able to justify the choice to be bound by new obligations relating

[252] Notably, there were 22.5 million refugees, 40.3 million IDPs and 2.8 million asylum seekers. UNHCR, *Global Trends 2016*, op. cit., p. 2.
[253] TÜRK, "Prospects for Responsibility Sharing", op. cit., p. 46.
[254] MCADAM, "The Enduring Relevance of the 1951 Refugee Convention," op. cit., p. 5.
[255] E. FELLER, *The Refugee Convention at 60: Still Fit for Purpose? Protection Tools for Protection Needs.* Statement by the Assistant High Commissioner for Protection, Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity, Prato, 2 May 2011. Available at: https://www.refworld.org/docid/4ddb6e052.html [accessed 25 February 2019].

to migration issues in front of their public opinion. Besides, the process of negotiation would have taken too long, requiring national scrutiny after signature in order to deposit the ratification necessary for the agreement to enter into force.

Furthermore, amending the 1951 Convention to include those categories of migrants falling outside the scope of its refugee definition yet protected by the principle of non-refoulement – as informed by developments in IHRL, IHL and ICL – as well as to enhance international solidarity, entailed risks. In fact, the Assistant High Commissioner for Protection, Volker Türk, held that amending the Convention could lower the level of protection, undermining its scope instead of supporting it,[256] as well as hardly encounter the necessary consensus for adoption.

Besides, the possibility of signing a new *ad hoc* Convention was explored. However, it faced several constraints too. Firstly, States were and still are not willing to be bound by new international obligations, especially in the field of migration. A clear symptom of the lack of political will of creating new norms in this field is constituted by the scarce ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which only counts 54 States Parties.[257] Secondly, the risk would have been to have a new document with a list of obligations defined in an abstract and vague manner, with States using their discretionary interpretation to restrict their duties, exactly as happened with the 1951 Convention. Thirdly, there would have been the risk to exclude forthcoming categories of persons in vulnerable situations, without any improvement in international protection in the long-term.

Both these options are based on the misunderstanding of the scope of the 1951 Convention: in fact, the latter is often regarded as a mere migration management tool, rather than a protection tool.[258] Moreover, both proposal would have failed in addressing the deeper issue: the lack of political will to enact existing obligations and the use of the Convention to restrict States' obligations to the maximum extent, together with the

[256] TÜRK, "Prospects for Responsibility Sharing", op. cit., p. 47.
[257] See https://treaties.un.org.
[258] MCADAM, "The Enduring Relevance of the 1951 Refugee Convention," op. cit., p. 9.

absence of any preventive plan and the systemic lack of funding.[259] For these reasons, there is high consensus that what is needed is not new norms, rather operational guidance to effectively implement those currently in force.[260]

Therefore, the possibility of adopting soft law, i.e. non-legally binding agreements, was explored. Even though a universal definition of soft law does not exist, it is usually understood as "vague legal norms"[261] that can prescribe conduct or establish standards in a specific field.[262] Importantly, soft law shall not be considered as "non-law", [263] rather it is:

> A system of international commitments or obligations that are not regarded by those concerned as binding in the sense that can be enforced in the same way as those imposed by international law proper, but yet are considered as something more than a political duty.[264]

Moreover, when soft law is transposed into domestic legislation, it can produce stronger legal effects as compared to international treaties, as the difference in compliance between the 1969 OAU Convention (hard law) and the Cartagena Declaration (soft law) exemplifies. Furthermore, soft law had already proved its potential in other contexts of international law, such as environmental law and IHRL. It is, thus, misleading to think that soft law tools do not have any normative impact on States.

Soft law can also constitute the first step towards the adoption of an international treaty. The same UDHR has been the blueprint for the development of legally binding HR obligations and it is still so important that it has been recalled in the text of the NYD. Many are indeed confident that the GCR – but the same is true for the GCM – would provide the

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[259] *Ibidem*, p. 5.
[260] BETTS, "U.N Refugee Summit," op. cit.
[261] T. GRUCHALLA-WESIERSKI, "A Framework for Understanding 'Soft Law'." *McGill Law Journal*, 30, 1984, p. 44.
[262] S. LAGOUTTE, T. GAMMELTOFT-HANSEN, and J. CERONE, "Tracing the Roles of Soft Law in Human Rights." In *Tracing the Roles of Soft Law in Human Rights*, ed. by S. Lagoutte, T. Gammeltoft-Hansen, and J. Cerone, Oxford University Press, Oxford, 2016, p. 5.
[263] D. CARREAU, and F. MARRELLA, *Diritto Internazionale*, Giuffrè, Milano, 2016, p. 181.
[264] H. THIRLWAY, *The Sources of International Law*, Oxford University Press, Oxford, 2014, p. 164; cited in S. DE VIDO, "Soft Organizations, Hard Powers: The FAFT and the FSB as Standard-Setting Bodies." *Global Jurist*, 2018. doi: 10.1515/gj-2018-0030, p. 6.

basis from which to develop a Protocol to the 1951 Convention,[265] even though others are sceptical in this regard.[266]

Soft law tools can also be useful tools in determining States' practice and in consolidating the *opinio juris* needed for customary law to originate.

In addition, it was observed above that IRL, IHRL and IHL already provide for minimum standard of treatment. What is missing is implementation and diffusion of best practices in this regard, which soft law is more apt to cover by reason of its flexible nature.

In this sense, the choice to adopt two Compacts is wise for they are conceived as "package deals" that involve a wide range of actors and are based on a broad portfolio of technical and material support.[267] Moreover, the compact approach "tends to place emphasis on political and practical cooperation as opposed to legal commitments" while it can provide "detailed rules and more technical standards required for the interpretation and implementation of existing bodies of international law."[268]

Another international treaty, indeed, would have likely failed in filling the gap for the difficulties inherent in providing operational and technical obligations that every State Party could comply with and, at the same time, that could easily adapt to the context of application.

The importance of soft law is all the more evident when the topic to be regulated is of particular sensitivity to the public opinion. Indeed, the non-binding nature makes it more practical to achieve consensus at the international level since it does not formally create new legal obligations upon States; rather, it allows States to choose which commitments to pursue on the basis of their national priorities.

Lastly, States had acknowledged that, in order to tackle large movements of refugees and migrants, there was the need to improve global migration governance. However, the likelihood that an agreement would be reached on migration, was low. Indeed, even

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[265] V. TÜRK and M. GARLICK, "From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees." *International Journal of Refugee Law*, 28:4, 2016, p. 673.
[266] T. GAMMELTOFT-HANSEN, "The Normative Impact of the Global Compact on Refugees." *International Journal of Refugee Law*, 2019. doi:10.1093/ijrl/eey061, p. 6.
[267] *Ibidem*, p. 2.
[268] *Ibidem*.

consolidated regional entities such as the EU are facing challenges in agreeing upon a binding document on this issue. The proposed Convention on Responsibility-Sharing would have failed to address such a need, or it would have risked putting into hierarchy refugees and migrants, adding binding responsibilities for States with regard to the former category and resulting in greater marginalization of migrants in situations of vulnerability.

2.2 CONTEXT-SPECIFIC RESPONSES: THE CALL FOR FLEXIBILITY

Legal characteristics and practical reasoning are not the only arguments favouring the choice of soft law over hard law in the merits of refugees' and migrants' protection and international cooperation. Indeed, through the 60 years of activity of the UNHCR in the field of international protection, it was evidenced that there is "no one size fits all": each situation is different and requires a context-specific response. Not only the needs of persons considerably differ depending on the context, but also the legal obligations pending on States do, as well as their financial and technical resources. For this reason, any response to large movements adopted so far had to be reinvented anew. [269] However, such a system is not predictable, nor in terms of financial support nor in responsibility-sharing, at the detriment of host countries.

In Chapter I, due consideration was paid to the three more relevant regional frameworks relating to international protection. The analysis underlined that different regions, namely Africa, Latin America and Europe, have reacted differently to what is commonly understood as a homogenous phenomenon. Causes may differ, as well as the impact on specific territories and communities. Moreover, as commented by the Asia Pacific Refugee Rights Network, international financial and humanitarian support, including through the availability of resettlement opportunities, vary over time depending on the interests of donors' countries.[270]

A binding treaty would have neglected the needs that specific situations may entail, as well as the specific challenges that host countries may face. For instance, a host country may have shortcomings in biometrics technology, while another could be struggling for

[269] TÜRK, "Prospect for Responsibility-Sharing", op. cit., p. 48.
[270] APRRN, *Reflections on the Significance of the New York Declaration*, op. cit., para 31.

economic growth and would need more investments to open the labour market to refugees and migrants.

For this reason, Türk, referred to the need for "tailored responses",[271] i.e. responses elaborated taking into consideration the variety of factors that characterize a situation of large movement. This constitutes the basis for the Global Compacts: they set more practical standards that interact with the different legal regimes. Some have indeed compared the Comprehensive Refugee Response Framework [272] to the UN Guiding Principles on Internal Displacement, since both are designed as documents gathering best practices and obligations deriving from different legal regimes.[273]

Besides situations differing across space, humanitarian needs may change across time. One situation may be in the emergency phase, whereas another may be a protracted one. The response needs to be adequate to the specific context of application, and a single treaty would hardly envisage all the actions necessary for a comprehensive response to any foreseeable situation.

In addition, new categories of persons in need of international protection may emerge; thus, in a context subject to evolution, such as forcible displacement has demonstrated to be, it is useful to have a flexible framework that enunciates general principles that may be further subject to extensions. In fact, a soft law tool may also be more easily amendable, if required.

Furthermore, the NYD stresses quite often the necessity for shared but differentiated responsibilities. Though international responsibility-sharing could have been stronger were it binding, it would have been challenging to define responsibilities on the basis of a country's capacities and resources and their status as countries of origin, transit and destination without incurring into legal vagueness that would have hampered the fulfilment of BRS.

Ultimately, the NYD acknowledges the need for a multi-stakeholder approach in order for the GCM and GCR to be successful. Relevant actors must be engaged in the planning and implementation of the response, thus requiring them to be accountable for

[271] TÜRK, "Prospects for Responsibility-Sharing", op. cit., p. 51.
[272] NYD, Annex I. Cfr. *infra* Chapter II, para 2.2.
[273] GAMMELTOFT-HANSEN, "The Normative Impact of the Global Compact on Refugees," op. cit., p. 4.

their actions. In this sense, "the more flexible character of a soft law instrument … may help to overcome the traditional boundaries associated with international law in terms of allocating accountability to a broader set of actors, including the private sector, international organizations, and non-governmental organizations."[274]

3. THE GUIDING PRINCIPLES

Besides commitments, the NYD sets, though not explicitly, a series of principles on which the GCR and GCM would need to build.

What follows is brief presentation of the most important of them. They are all interconnected and necessary for the Global Compacts to be successful.

3.1 BURDEN- AND RESPONSIBILITY-SHARING AND INTERNATIONAL COOPERATION

The CRRF recognizes that through international cooperation and BRS "we are better able to protect and assist refugees and to support host States and communities involved."[275] Furthermore, the aim of the GCM is to enhance international cooperation on all aspects of migration.[276] Therefore, BRS and international cooperation are both the aim and the necessary means to achieve the objectives set out in the Compacts. However, this is not to be done through the creation of new normative frameworks. What is needed is a new and practical consolidated approach of responsibility-sharing in order to alleviate tensions among and within States and reduce potential negative consequences for refugees and host communities.[277]

The UN High Commissioner for Refugees, Filippo Grandi, hailed the NYD for "[marking] a political commitment of unprecedent force and resonance. It fills what has been a perennial gap in the international protection system – that of truly sharing responsibility for refugees, in the spirit of the UN Charter."[278]

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[274] *Ibidem*, p. 3
[275] CRRF, para 1.
[276] NYD, Annex II, para 2.
[277] TÜRK, "Prospects for Responsibility Sharing", op. cit. 48.
[278] F. GRANDI, *Opening of the High-level meeting to address large movements of refugees and*

According to McAdam and other scholars, there has never been a greater capacity to achieve the objective of enhanced BRS and cooperation.[279] Perhaps for this reason the missed agreement on a Global Compact on Responsibility-Sharing caused much unsatisfaction on the part of academia towards the NYD.

The NYD call for international BRS stems from the acknowledgement of the disproportionate impact that large movements of refugees and migrants have on hosting communities. Indeed, around 85% of the world refugee population is hosted in developing or least developed countries. Cooperation and BRS is not only referred to destination countries, but also to hosting communities, whose needs are also to be addressed.

The NYD reaffirms "the principles and purposes of the Charter of the United Nations" (para 5), which establishes in its Articles 55 and 56 the centrality of international cooperation, and frames any action towards refugees into "a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States" (para 68). This is restated even further in the CRRF, whose para 1 reads as follow:

> The scale and nature of refugee displacement today requires us to act in a comprehensive and predictable manner in large-scale refugee movements. Through a comprehensive refugee response based on the principles of international cooperation and on burden-and responsibility-sharing, we are better able to protect and assist refugees and to support the host States and communities involved.

Although the commitments towards migrants also include migrants in vulnerable situations which may require the same assistance and protection granted to refugees, the language used obviously change from BRS (which refers to "a fairer distribution among States of the costs and disadvantages – as well as the potential benefits – of hosting refugees on their territory")[280] to that of international cooperation[281] (i.e., separate but

migrants. Remarks by the United Nations High Commissioner for Refugees, New York, 19 September 2016. Available at: https://www.unhcr.org/57dfe7ee4 [accessed 7 April 2019].

[279] MCADAM, "Filling up or emptying the glass?", op. cit.

[280] TÜRK and GARLICK, "From Burdens and Responsibilities to Opportunities", op. cit., pp. 663-664.

[281] NYD, Annex II, para 2.

concerted actions towards a common objective). This is unsurprising, since the aim of the GCM is the creation of a framework for enhancing safe, orderly and regular pathways of admission and thus not a protection one. The difference in language, which may imply less international solidarity when it comes to support host countries with regard to migrants in vulnerable situations, should be overcome through the complementarity between the two Compacts. This should lead to a convergence in actors involved and actions taken to fulfil migrants' and refugees' protection while easing pressure on host States.

The NYD further recalls pledges made during a variety of high-level meetings on enhancing solidarity and responsibility-sharing in the governance of refugee flows that took place in 2016. Probably following the success of the three major international conferences held in 2015 which ended with the adoption of the 2030 Agenda, the SFDRR and the Paris Agreement on Climate Change, in 2016 States decided to convene into four summits other than the high-level meeting of 19 September in order to find a solution to the plight of large movements of refugees and migrants, specifically to the so-called "European refugee crisis" and the persistent situation of violence in Syria. These were, in chronological order: (1) Supporting Syria and the Region;[282] (2) High-Level Meeting on Global Responsibility Sharing through Pathways for Admission of Syrian Refugees;[283] (3) World Humanitarian Summit (WHS);[284] (4) UN Leaders' Summit.[285] However, in addition to the NY Summit of 19 September, only two of them did not focus only on that situation.

[282] The meeting convened in February 2016 in London gathered over 60 representatives of States and international organizations. It focuses on three main areas: 1) raising humanitarian funding (it pledged over USD$11 billion); 2) long term strategies; 3) enhance civilians' protection. Its most important commitment regarded education, with the goal of having 1.7 million Syrian refugees in school by the end of the 2016-17 academic year.

[283] Organized under the auspices of the UNHCR, it was a ministerial-level meeting held in Geneva on 30 March 2016 on the expansion of the traditional understanding of refugee resettlement to other pathways for admission. It concluded with a pledge for other 15,000 resettlement places for Syrian refugees and increased funding for these programmes.

[284] The WHS took place on May 23-24, 2016 in Istanbul.

[285] This meeting held in NY on 20 September 2016 was attended by 32 heads of States, who committed an increase of US$4.5 billion in humanitarian funding, a doubling in resettlement places, the provision of access to labour markets to 1 million refugees.

The first one is the WHS, a multi-stakeholder but not State-driven meeting,[286] which brought together over 9,000 participants, States, NGOs, and financial institutions among others, and successfully gathered over 3,000 commitments.[287] Its most important outcome is the so-called "Grand Bargain". It is a pledge of humanitarian funding that involves 30 donors, including States and NGOs, but also financial institutions, *in primis* the World Bank. It constitutes a new and innovative way of providing the financial support needed to tackle emergency situations and the search of durable solutions. Besides the Grand Bargain, the WHS is noteworthy for its restatement of the important principle of leaving no one behind, i.e. the core principle of the 2030 Agenda, and for taking into consideration the needs of IDPs in its Agenda for Humanity.[288]

Secondly, the Leaders' Summit on Refugees was called for by Barack Obama on the day after the NYD's adoption, which it was meant to complement. It had a "pay-to-play" format, so that States and other stakeholders were invited to participate only if they had the intent to pledge for new commitments on refugees, thus excluding both IDPs and migrants. It focused on the immediate actions to be undertaken for the cause of refugees and increase refugees' access to labour markets.[289]

In line with the Leaders' Summit and the WHS, the NYD recognized that BRS does not amount to financial support only. Solidarity can indeed be shown also through the provision of technical expertise and the sharing of best practices, technology and know-how. States also recognized that most of them are at the same time countries of origin, transit and destination and thus hold similar responsibilities. Moreover, they acknowledged that resettlement and other pathways of admission constitutes other important means for BRS available to them.

However, as already observed, the NYD's wordings fell short of the boldness of the SG's Report, which promoted the achievement of resettlement of at least 10% of the refugee population annually.

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[286] FERRIS, *Policy Brief 3,* op. cit., p. 2.
[287] *Ibidem*, p. 8.
[288] To know more, see: www.agendaforhumanity.org.
[289] FERRIS, *Policy Brief 3,* op. cit., p. 12-13.

Furthermore, there is no practical method to assess State's capacity nor a rigorous method to measure equitable BRS in both the short- and long-term. [290]

The hope is that, by declaring the urgency of solidarity and recognizing the impact that large movements of people may pose on host countries, such a cooperation would be soon achieved.

3.2 THE MULTI-STAKEHOLDER AND WHOLE-OF-GOVERNMENT APPROACH

The NYD establishes that both Compacts should be negotiated and implemented through a multi-stakeholder, whole-of-society and whole-of-government approach, which is deemed necessary to elaborate effective and comprehensive responses. It marks a shift from the often-preferred top-down approach, and it is meant to give proper attention to specific aspects of large movements governance that may otherwise be neglected.

Specifically, the multi-stakeholder approach envisages the co-participation of "national and local authorities, international organizations, international financial institutions, regional organizations, regional coordination and partnership mechanisms, civil society partners, including faith-based organizations and academia, the private sector, media and the refugees themselves."[291] Furthermore, the NYD urges the inclusion of both humanitarian and development actors in comprehensive planning, in order to combine both emergency and long-term responses (para 12).

The need for a multi-stakeholder approach stems from the recognition that local actors are often the first responders to inflows of refugees and migrants and for responses to be effective it is necessary that the reality on the ground is taken into account. Furthermore, involving a broad range of stakeholders at all levels could be useful to reframe the public discourse on migration in positive terms.[292]

The risk was that a multi-stakeholder approach would not to respect the needs of

[290] APRRN, *Reflections on the Significance of the New York Declaration*, op. cit., para 35.
[291] NYD, Annex I, para 2.
[292] IOM, *Strengthening International Cooperation on and Governance of Migration: Towards the Adoption of a Global Compact for Safe, Orderly, and Regular Migration in 2018.* Vol. International Dialogue on Migration No. 27, Geneva, 2017, p. 24.

States during the consultation phase, as it had been the case for the WHS negotiations. In that case, it was indeed observed that many UN MS disregarded it due to the lack of State leadership in the process, to the extent that some of them opposed any referral to it in the NYD.[293] As a result, the NYD underlines the importance for State ownership in the process of planning and implementation of any response, so that this would be aligned with national priorities and exigencies.

The whole-of-government approach, instead, focuses its attention on the layers of States' apparatus and claims for the constant dialogue between national and local authorities in order "to ensure horizontal and vertical policy coherence across all sectors and levels of government."[294] In particular, the involvement of parliaments is relevant in order to engage on a more open and informed public debate on the opportunities and challenges of migration governance.[295]

Such an approach could contribute to more comprehensive, equitable and predictable responses and BRS. This is not only due to stakeholders' potential financial contributions but also to the delivery and planning of service supply in both the short- and long-term that stems out of cooperation between humanitarian and development actors.[296]

Furthermore, as already noticed above, services should be distributed through local and national rather than parallel and emergency systems, in order to strengthen host States' and communities' capacities, to the benefit of not only refugees and migrants, but also local populations.

3.3 THE HUMANITARIAN-DEVELOPMENT NEXUS

The need for diverse actors to be involved in the response planning and trial phase is complemented by the necessity of what is referred to as the humanitarian-development nexus, that is the cooperation between humanitarian and development actors in a way that is complementary and reinforcing. Such a nexus is to be achieved also through joint

[293] FERRIS, *Policy Brief 3,* op. cit., p. 10.
[294] GCM, para 15.
[295] IOM, *Towards the Adoption of a Global Compact*, op. cit. p. 21.
[296] ICVA, *The Global Compact on Refugees Explained,* op. cit., p. 5.

planning and budgeting, in order to avoid any kind of overlapping in the actions of the different actors involved as well as to prevent protection gaps from creating.

In the framework of comprehensive responses that look at both causes and consequences of displacement, the humanitarian-development nexus is envisaged as a way to provide assistance and protection to refugees from the outset of the emergency until durable solutions are achieved, while contemporarily addressing host communities' needs and concerns. Through this approach, many of the shortcomings of protection would be overcome.

Indeed, the SG declared that the humanitarian approach used until now has failed because it cannot adequately address the needs of displaced persons in a post-emergency phase.[297] Currently, in fact, most of humanitarian agencies' budget is allocated to food and other in-kind assistance.[298] Despite most of the refugee situations are protracted, humanitarian financing is granted on annual basis, which hinders the predictability and effectiveness of responses. Furthermore, aid is largely supplied through non-State actors and is not included into development plans and strategies. Thus, accountability is diffused, mainly held between NGOs and the donors, who require reports on how the money they had lent was spent.[299]

On the other hand, development actors face difficulties in delivering their services to displaced persons since they are used to work in strict connection with governments and citizens. They have scarce expertise in dealing with threat and conflict analysis; they hardly have familiarity with refugees' and migrants' rights and needs; and they are not fully comfortable with the dynamics existing between hosted and host populations.[300] Yet, they do work jointly with governments to elaborate national development plans. As a result, funding is used through national institutions and infrastructures and accountability is strengthened by the relationship citizen-State, while being monitored by donors. [301]

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[297] Report of the SG, *In safety and dignity*, para 38.
[298] FERRIS, *Policy Brief 3,* op. cit., p. 4.
[299] CENTRE FOR GLOBAL DEVELOPMENT & INTERNATIONAL RESCUE COMMITTEE (CDG &IRC), *Refugee Compacts. Addressing the Crisis of Protracted Displacement*. Final Report of the Forced Displacement and Development Study Group, Washington, 2017. Available at: https://www.cgdev.org/sites/default/files/Refugee-Compacts-Report.pdf, p. 4.
[300] FERRIS, *Policy Brief 3,* op. cit., p. 4.
[301] CDG & IRC, *Refugee Compacts,* op. cit., p. 4.

Therefore, a humanitarian-development approach would not only better address refugees' and migrants' rights and needs, but also ensure social cohesion in host communities. Indeed, humanitarian organizations are often bound to deliver their services only to persons under their mandate for the sake of neutrality. Especially in PRS, this may cause heightened hostility towards the beneficiaries of international aid for the perceived preferential treatment they are offered. Consequently, host governments may react to the internal pressure posed by the citizens barring international organizations access to their territory.

Furthermore, development actors' cooperation with humanitarian organizations is fundamental to help sustainable and durable return to take place. Indeed, development funds should also be used in reconstruction and rehabilitation to create the conditions favouring voluntary return.

3.4 PREDICTABLE, FLEXIBLE, UNEARMARKED AND MULTI-YEAR FUNDS

One of the major challenges of humanitarian assistance and protection delivery has been constituted by the constant lack of funding. Even though States have increased their support over the years, 40% of humanitarian appeals remains unfunded.[302] Furthermore, funding is usually provided in case of emergency situations, where the needs are most acute and visible, then declining as the crisis persists. This disproportionately affects host communities, who cannot count on predictable and timely funds and could thus react with harsher asylum and protection systems.

It was also evidenced that proper long-term plans towards solutions are limited by the earmarking of funds and their annual provision. Together with the unpredictability of international financial support, the achievement of durable solutions is thus hampered. Indeed, local solutions require investments that host countries may decide not to take if there is no guarantee that there will be funds to cover the costs.

The NYD calls for States to provide flexible, predictable, unearmarked and multi-year

[302] FINANCIAL TRACKING SERVICE, *Appeals and Response Plans 2019*, Financial Tracking Service, 2019. Available at: https://fts.unocha.org [accessed 14 April 2019].

funding in order to close the gap.[303] It further seeks the involvement of financial institutions, such as the World Bank, and of the private sector in humanitarian and development financing, as well as the elaboration of innovative ways to make resources available.[304]

Such a solution was brought forward also at the WHS. In fact, the Grand Bargain envisages through its 10 goals the reduction of duplication and bureaucratic costs through periodic and harmonized reports; the inclusion of aid beneficiaries in the decision-making process concerning them; the provision of support and funding instruments for local and national service suppliers; the increase of unearmarked and multi-year financial support; the enhancement of the humanitarian-development nexus; the strengthening of cash-based programmes; and increased transparency.[305] This last point is fundamental since donors need to have guarantees that, although unearmarked, their funding are being properly used.

3.5 HUMAN RIGHTS-BASED AND PEOPLE-CENTRED APPROACHES

The NYD calls for a humane and people-centred response to large movements of refugees and migrants. That is, States have committed to put the individuals' rights and needs at the core of any action directed to improve migration governance and assistance supply. This is deemed fundamental for the success of any policy and legal response.[306]

The NYD contains over 100 references to the centrality of the respect, protection and fulfilment of HR and fundamental freedoms of all refugees and migrants, *regardless of the migratory status*, to IRL, International Labour Law and the Conventions relating to statelessness.[307] Furthermore, States pledged to use a human rights-based approach and people-centred approach through all the stages of the migration process, thus recognizing the responsibilities of States of transit and of origin in this respect. Indeed, often countries

[303] NYD, para 86.
[304] NYD, paras 38, 85-86.
[305] See https://www.agendaforhumanity.org/initiatives/3861#init-resources.
[306] MCADAM, "Filling up or emptying the glass?", op. cit.; GOODWIN-GILL, "The Year in Review", op. cit., p. 7.
[307] IOM, *Towards the Adoption of a Global Compact*, op. cit., p. 31.

of transit's obligations are not even mentioned, whereas the duties of countries of origin are usually limited to the readmission of their citizens.

The text of the NYD recalls several times the UDHR and the paramount principle of human dignity; in addition, references are made to the respect of IHRL, IHL and IRL. In contrast with the SG's Report, the final version of the NYD omits the emphasis on States' obligations deriving specifically from the 9 core HRTs and their interconnection with those stemming from IRL, IHL, ICL, International Labour Law, and the Law of the Sea.[308] As a result of the referral to a non-binding – though universal – document setting the fundamental rights of any human being, and the scarce mention of the duty to non-discrimination, which is of outmost importance in policies regarding refugees and migrants', the HR protection dimension of the NYD is weakened.

States committed to involve refugees, migrants and diasporas communities in the decision-making process concerning them. It is particularly important, since policies elaborated so far have neglected the needs and aspirations of the persons to which they were directed and have resulted in failures. For instance, the mere provision of emergency assistance and the lack of livelihood opportunities may generate onward movements, exposing refugees and migrants to risks of abuse and HR violations feeding into criminal organizations of smugglers and human traffickers. On the contrary, "the collective insights derived from meaningful engagement" with persons concerned "enable responses to be more effective, building on the resilience, knowledge, and skills of communities".[309]

Participatory engagement also leads to refugees' and migrants' empowerment[310] and to peace and security.[311] Instead, failure to respect HR and to take into consideration persons' needs, skills and aspirations inevitably leads to heightened unsatisfaction, higher tensions between hosted and host communities and security risks.

Finally, the importance of the human being in planning and implementation is at the

[308] Report of the SG, *In safety and dignity*, para 100(a) and (f).
[309] L. AUBIN, E. EYSTER, and D. MACGUIRE, "People-Centred Principles: The Participation of IDPs and the Guiding Principles." *International Journal of Refugee Law,* 30:2, 2018, p. 288.
[310] *Ibidem*, p. 289.
[311] *Ibidem*, p. 290.

core of the 2030 Agenda's leave no-one behind principle and was reaffirmed in the Agenda for Humanity adopted at the WHS, which are both regarded as implementation frameworks in the NYD.

CHAPTER III

THE GLOBAL COMPACTS: ADDRESSING THE GAPS?

Contents: 1. The Global Compact on Refugees 1.1. An introduction to the Refugee Compact 1.2. Addressing the 'perennial gap' of burden- and responsibility-sharing 1.3. Areas in need of support: towards a new approach to refugee protection 2. The Global Compact for Safe, Orderly and Regular Migration 2.1. Distinguishing features 2.2. A cooperative framework 2.3. Making migration work for all 3. Addressing the gaps: a complementary approach 3.1. Persons in vulnerable situations 3.1.1. Gender, age, disability and diversity 3.1.2. Victims of smuggling and human trafficking 3.1.3. 'Environmental refugees' 3.2. Internally Displaced Persons 3.3. Mixed movements 3.4. Protracted Refugee Situations

After two years of consultations, on December 2018 both the GCR and GCM were adopted. Both have been defined as historic processes, even though for different reasons. The GCR represents the "political will and the ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries".[312] Moreover, it "represents a milestone in international refugee protection, and it is the first agreement of such significance since the adoption of the 1951 Refugee Convention."[313] On the other hand, the GCM represents the first inter-governmentally agreed framework on migration management that tackles migration in all its dimensions.

To ensure complementarity between the two Compacts, updating meetings on the consultation process on the GCR were held in NY and, vice-versa, on the GCM in Geneva.

Generally, in academia there has been high enthusiasm towards the GCM, whereas the GCR has often been perceived as deceitful. However, it is worth recalling once again the intolerant climate in which the GCR was adopted and the solid framework on which it

[312] GCR, para 4.
[313] V. TÜRK, "The Promise and Potential of the Global Compact on Refugees." *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey068, p. 7.

is built.

Furthermore, the GCM is innovative per se as the first agreement of this kind elaborated under the auspices of the UN and covering all dimensions of international migration in a holistic and comprehensive manner.[314] What is more, it does not have any comprehensive normative framework it can be compared to or framed in. Situation completely opposed to that of the GCR which is for sure not the first ever document adopted in the field of international protection nor moves in a completely fertile terrain. As a result, the attention of the academia has been focusing more on the GCR rather than on the GCM.

Keeping this in mind, in order to understand whether they succeeded in developing the premises included in the NYD, it is useful to analyse the commitments made by States in the GCR and GCM. Particular emphasis will be placed on arrangements to enhance international cooperation and BRS in both Compacts, given the fact that cooperation is an integral and crucial element of the success of the responses to migratory flows, as well as on mechanisms of follow-up and review, which retain particular relevance in ensuring the implementation of the commitments contained therein.

Ultimately, the potential effectiveness of both the GCR and GCM in addressing the gaps previously identified will be explored.

1. THE GLOBAL COMPACT ON REFUGEES

The GCR was adopted after a series of both informal and formal multi-stakeholder consultations led by UNHCR in Geneva. To appreciate the nature of the GCR and how the issue is treated as compared to migration it is important to underline where it was elaborated. Geneva is, in fact, the UN base which retains the strongest humanitarian character. Almost all humanitarian agencies are Geneva-based, and this permitted the GCR to be informed by their active contributions. Moreover, this is consistent with the humanitarian and non-political nature of the refugee issue – in contrast with the migration one – which is underlined in the text of the Compact.

[314] https://www.iom.int/global-compact-migration [accessed 22 May 2019].

However, the GCR was to be adopted in New York, in occasion of the UNHCR's Annual Report to the UNGA, as envisaged in para 19 of Annex I to the NYD. Thus, the UNHCR was challenged with the elaboration of an instrument which could encounter the full support of States reunited in New York, considering that the Omnibus Resolution is usually adopted through consensus and not by vote. As a result, the GCR is a "compromise text", that carefully balances the two faces of the same coin.

In the end, though, the United States requested the Omnibus Resolution to be voted upon.[315] This signals the political and legal importance the GCR retains and it is also the emblem of its success. In fact, the GCR was adopted on December 17, 2018 with 181 votes in favour, three abstentions (Dominican Republic, Eritrea, Libya) and only two votes against (Hungary and the United States).[316] Considering that only 148 States are Parties to the 1951 Convention and/or to the 1967 Protocol, the GCR succeeded in linking those major host countries which are not yet Parties to any of these instruments to the international protection regime.

1.1 AN INTRODUCTION TO THE REFUGEE COMPACT

The GCR is structured into four sections: introduction (I); the CRRF (II); Programme of Action (III); and follow-up and review (IV). The text went through massive modifications, in the substance rather than in the structure, and the final text can overall be considered a huge improvement since the Zero Draft. Türk, Assistant High Commissioner for Protection and moderator of the consultations, defined it a "compromise text",[317] in which different interests had to be balanced without undermining the scope of the GCR.

The GCR has four interlinked and interdependent objectives: (1) ease pressure on

[315] K. CURRIE, *Explanation of Vote in a Meeting of the Third Committee on a UNHCR Omnibus Resolution*. Statement by the U.S. Ambassador at the Third Committee, 73rd session, 55th Plenary Meeting, New York, 13 November 2018. Available at: https://usun.state.gov/remarks/8744 [accessed 22 May 2019].

[316] UNGA, *Reports of the Third Committee*, 55th Plenary meeting, 73rd session, 17 December 2018, A/73/PV.55. Available at: https://www.un.org/en/ga/73/resolutions.shtml [accessed 15 April 2019], p. 10.

[317] V. TÜRK, *Opening remarks to the fourth formal consultation on the global compact on refugees.* Statement by the Assistant High Commissioner for Protection, Geneva, 8 May 2018. Available at: https://www.unhcr.org/admin/dipstatements/5af18c8e7 [accessed 27 April 2019].

host countries; (2) enhance refugee self-reliance; (3) expand access to third country solutions; (4) support conditions in countries of origin for return in safety and dignity (para 7). Throughout the consultation process, they have been aligned to those of the CRRF, which the GCR's Programme of Action (PoA) is meant to operationalize.

All the four objectives are underpinned by the need for predictable and equitable BRS among UN MS together with all relevant stakeholders. However, this principle is not new in refugee and humanitarian matters. Indeed, it is framed in the UN Charter and the 1951 Convention, which were promptly recalled in the introduction to the GCR.[318]

The Refugee Compact further specifies that:

> The global compact is not legally binding. Yet it represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries.[319]

It is interesting to note that although the GCR is the representation of the *political* will of UN MS, it is entirely *non-political* in nature (para 5). This is in line with the language of the UNHCR's Statute and ExCom Conclusions; yet, it can be considered a limitation, too. Many of the causes of displacement are indeed political and thus require political actions to be solved. Furthermore, this specification may be seen as paradoxical since the term *political* appears several times in the text: among the objectives of the GCR is the mobilization of *political* will (paras 7, 17, 23); there is a call for coordination among different actors, including *political* actors (para 8, 24); it is underlined the relevance of regional mechanisms in addressing the *political* aspects of the root causes (para 28); the importance of *political* cooperation is emphasized (para 85); return is not made conditional to the accomplishment of *political* solutions (para 88), whereas reintegration assistance may require contributions to *political* capacity (para 89).

In addition, it is worth noticing that despite the non-political nature of the GCR is in line with the language of UNHCR's Statute, the latter's referral to the humanitarian and

[318] GCR, para 2.
[319] *Ibidem*, para 4.

social character of the Agency's work[320] was omitted in the final text of the GCR.[321] Such a specification could have reinforced the idea that the commitments contained therein would be primarily people-centred and human rights-based and since many of the modifications through which the text underwent were justified by the need to adjust the language to that of UNHCR's Omnibus Resolutions, ExCom Conclusions or other UNHCR-related documents this omission may raise some concerns over the interpretation and operationalization of the GCR.

The reiteration of the non-political nature of the GCR also serves to guarantee States that the support they will receive will by no means violate their sovereignty, whose primacy is referred to both directly and indirectly in the text. For instance, it is stated several times that support will be provided upon the request of the State concerned and will serve the primacy of national ownership and leadership, which is key for the successful implementation of the actions contained therein.[322]

The focus on national ownership is important also to correct the "donor bias" in humanitarian assistance[323] and to strengthen the nexus with development actors. In fact, humanitarian assistance is often delivered under earmarked funds that take into account the interests of the donors and not those of the host country. On the other hand, development actors work closely with concerned governments, respecting their policies and priorities. The complementarity of humanitarian-development action under the leadership of the host country will thus be a concrete step towards the achievement of the first objective of the GCR, i.e. ease pressure on host countries.

Although its non-binding nature is explicitly affirmed, the GCR builds upon a well-

[320] UNHCR's Statute, para 2; 1951 Convention, Preamble recital 5.
[321] Draft 1 (available at: https://www.unhcr.org/events/conferences/5aa2b3287/official-version-draft-1-global-compact-refugees-9-march-2018.html) and 2 (available at: https://www.unhcr.org/events/conferences/5ae758d07/official-version-draft-2-global-compact-refugees-30-april-2018.html) of the GCR referred to its humanitarian character. On the contrary, the Zero Draft (available at: https://www.unhcr.org/Zero-Draft) did not even mention its non-political nature.
[322] GCR, paras 5, 23, 32, 35, 50, 65.
[323] G. S. GOODWIN-GILL, "The Global Compacts and the Future of Refugee and Migrant Protection in the Asia Pacific Region." *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey064, p. 8.

established binding legal framework, from which it cannot be entirely divorced.[324] It is indeed "grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol" (para 5). Surprisingly, such a reference was made only in footnote in the Zero Draft, albeit the latter affirmed that the GCR would build on "the foundation of the international protection regime" already in its first paragraph. Moreover, throughout the formal consultation process, the reference to IRL moved from the background subsection to end up in that regarding the guiding principles.

In fact, the reference to the 1951 Convention made in para 2 only serves to provide the legal basis for enhanced cooperation on refugee issues and not to reaffirm the rights and obligations contained therein.

Moreover, despite Drats 1, 2 and 3 made in-text reference to the regional instruments adopted on refugee protection, the GCR relegates them to footnote. The same happened to Article 14 of the UDHR on the right to seek asylum, as well as to the core HRTs, the two Protocols to the UTOC and the 1954 and 1961 Conventions related to statelessness, which complete the normative architecture underpinning the GCR. It is noteworthy that the NYD – barely referred to in the GCR – contained a much stronger reference to the international protection regime and the various international and regional instruments relating to refugees than the Refugee Compact, in particular to the institution of asylum, which, regrettably, has no mention in the text of the Compact.[325]

The decision to only rapidly referring to the normative framework may stem from the idea that:

> the global compact is not intended to be a standard-setting exercise. Rather, it builds on the existing refugee protection regime that has been established over decades, including international and regional instruments, resolutions of the General Assembly, conclusions adopted by UNHCR's Executive Committee, State practice, and judicial interpretation. It does not seek to

[324] G. GILBERT, "Indicators for the Global Compact on Refugees." *International Journal of Refugee Law*, 2018. doi: 10.1093/ijrl/eey053, p. 2.
[325] See NYD, paras 65-67.

> replace any of this, nor does it reiterate it all. Rather, the compact seeks to ensure the better functioning of the existing regime in the particularly challenging circumstances of large refugee situations, through enhanced burden- and responsibility-sharing.[326]

Therefore, the GCR does not seek to change the system, which is the reason why it has been defined "modest in scope and ambition".[327] On the contrary, it has a technical scope, focusing on the operationalization of the commitments made and existing obligations. It is indeed informed by successful past experiences, the contributions and expertise of all stakeholders,[328] including refugees and host communities, as well as on good practices stemming from the CRRF's roll-out in pilot countries.

Lastly, the GCR is guided by the humanitarian principles of humanity, neutrality, impartiality and independence and the paramount principle of protection (para 5).

The introductory section also includes two paragraphs on prevention and addressing root causes, which was completely absent in the Zero Draft. Their presence is remarkable for it signals the recognition of the international community that, although refugee responses have always been reactive in nature, it is crucial to take preventive actions to avoid refugee flows from arising.

It is interesting to note, however, that while the Draft 1 and 2 presented a list of the root causes of refugee movements,[329] such a list is completely overlooked in the final text. According to Türk, this is the result of approaching the GCR to the language used in the annual Omnibus Resolutions.[330] This choice was also taken to respond to the protests of some States against the perceived attempt to expand UNHCR's mandate through the

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[326] V. TÜRK, *Opening remarks to the fifth formal consultation on the global compact on refugees*. Statement by the Assistant High Commissioner for Protection, Geneva, 12 June 2018. Available at: https://www.unhcr.org/admin/dipstatements/5b1fc72a7 [accessed 27 April 2019).

[327] A. BETTS, "The Global Compact on Refugees: Towards a Theory of Change?" *International Journal of Refugee Law*, 2018. doi: 10.1093/ijrl/eey056, p. 3.

[328] For instance, Latin American and Caribbean countries presented *The 100 Points of Brasilia*, (available at: https://reliefweb.int/100-points-brasilia), a document illustrating the progress made by these countries since the adoption of the Brazil Declaration and listing a series of 100 best practices and experiences which were deemed of interest to the international community in the context of the adoption and implementation of the GCR.

[329] Draft 1, para 1; Draft 2, para 1.

[330] TÜRK, *Opening remarks to the fifth formal consultations*, op. cit.

inclusion of references to natural disasters, environmental degradation and climate change, which are instead recognized as mere *interacting* factors with root causes of refugee flows in the adopted version (para 8). Even though it was hoped that they would be identified as root causes, their mention signals the growing interest the international community has addressed to these phenomena and their impact on migratory flows.

The primary responsibility to address the drivers of forced displacement rests on countries of origin; nonetheless, it is acknowledged that the concerted efforts of the international community as a whole, as well as increased cooperation among political, humanitarian, development and peace actors are required (para 8). Most of the actions States committed to undertake to effectively prevent and address root causes are linked to compliance with international law, including IHRL and IHL, which strengthens their link to IRL. In fact, States are called to promote, respect and fulfil the HR and fundamental freedoms of all; to respect IHL; and to end exploitation and abuse in all its forms, as well as discrimination of any kind.

Other actions are highly connected with the 2030 Agenda, whose thoroughly reference had been asked by most of stakeholders during the consultation process. For instance, States commit to take measures such as poverty alleviation, disaster risk reduction (DRR) and development assistance to countries of origin (para 9).

The strong reference to the 2030 Agenda follows the path already undertaken in the NYD, on which States committed to report with reference to progress in the achievement of the SDGs, as appropriate,[331] and further recognizes the interdependence between development and causes of *refugee* flows – not only *migration* flows.

The focal point of the GCR is its PoA, whose aim is "to facilitate the application of a comprehensive response in support of refugees and countries particularly affected by a large refugee movement, or a protracted refugee situation".[332] It is composed of two interlinked parts, which will be better analysed below, i.e. arrangements for BRS (Part III.A) and areas for timely contributions in support of host countries and, where appropriate, countries of origin (Part III.B). Furthermore, in compliance with the guiding

[331] NYD, para 88.
[332] GCR, para 11.

principles presented in Chapter II, the PoA "is underpinned by a strong partnership and participatory approach … as well as age, gender, and diversity considerations" (para 13).

Among its most important and most discussed issues is the inclusion of para 12 on the composition of refugee flows, which happened quite late in the consultation process[333] to accommodate the requests of some delegations to ensure response's coherence with the operational realities on the ground.[334] Para 12 indeed acknowledges the heterogeneity of large movements, affirming that they may involve persons "on the move" other than refugees, including IDPs. Moreover, it affirms the possibility of forced displacement to be generated from sudden-onset natural disasters and environmental degradation. This assertion is of relevance because, while it does not contradict the identification of natural disasters as mere "interacting factors" to refugee flows previously made,[335] it mirrors the idea that disasters-displaced persons may be in need of some forms of protection and assistance since they may travel along the same routes as refugees.

The decision to maintain this paragraph in the final text despite the vigorous protests raised by some States stemmed from the need to ensure a connection between the two Compacts.[336] It is, in fact, established that the operational coordination of a variety of actors, especially between UNHCR and IOM, is key to effectively address the challenges brought by differing legal statuses and legal frameworks governing migratory flows.

1.2 ADDRESSING THE 'PERENNIAL GAP' OF BURDEN- AND RESPONSIBILITY-SHARING

It was abundantly observed that many academics expected the GCR to address the shortcomings of international protection from a normative point of view. However, others

[333] It was added in Draft 3.
[334] V. TÜRK, *Closing remarks to the sixth formal consultation on the global compact on refugees.* Statement by the Assistant High Commissioner for Protection, Geneva, 4 July 2018. Available at: https://www.unhcr.org/admin/dipstatements/5b3e38c77 [accessed 27 April 2019].
[335] See GCR, para 8.
[336] V. TÜRK, *Opening remarks to the Informal Exchange with Member States on the Global Compact on Refugees.* Statement by the Assistant High Commissioner for Protection, Geneva, 22 June 2018. Available at: https://www.unhcr.org/admin/dipstatements/5b4f16857 [accessed 27 April 2019].

admitted that refugee protection and equitable and predictable BRS are strictly interdependent.[337] The same CRRF embraces this perspective,[338] reflecting the wide consensus that normative protection is already well-established and that what is missing was implementation.

The Zero Draft, capturing this perception, opened stating that:

> The global compact addresses a *perennial* gap in the international system for the protection of refugees: the need for more predictable and equitable burden- and responsibility-sharing among States, together with other stakeholders.[339] [emphasis added]

Although it is not state as clearly, the GCR recognizes the "urgent need"[340] for more equitable[341] BRS and the imperativeness "to translate this long-standing principle into concrete and practical action"[342] in order to provide tangible support to host countries, who, in receiving refugees, "make an immense contribution … to the collective good, and indeed to the cause of humanity."[343]

What is more, all the four opening paragraphs of the GCR present a reference to either BRS or international cooperation. Moreover, the four stated objectives of the GCR require cooperation and solidarity in order to be achieved. It is thus evident that BRS and international cooperation are the necessary fundamental element to be reached if the actions envisaged in Part III.B are meant to be operationalized. In this way, the GCR recalls the idea of a Global Compact on Responsibility-Sharing proposed in the SG's Report.[344]

Opinions on the arrangements of BRS envisaged in Part III.A of the GCR are divergent. According to some, they do have the potential to enhance international cooperation,[345]

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[337] GILBERT, "Indicators for the Global Compact on Refugees," op. cit., p. 1.
[338] CRRF, para 1.
[339] Zero Draft, para 1.
[340] GCR, para 1.
[341] Interestingly, the predictability element has been omitted in the final text.
[342] GCR, para 2.
[343] *Ibidem*, para 14.
[344] Report of the SG, *In safety and dignity*, para 102.
[345] D.J. CANTOR, "Fairness, Failure, and Future in the Refugee Regime." *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey069, p. 2.

while others define them as a "guideposts for a never-ending series of discussions."[346] Both opinions share part of the truth. In fact, for how much vague the language used in Part III.A of the PoA is, the GCR establishes strong mechanisms of follow-up and review (Part IV). This is of enormous significance in strengthening the potentiality of its normative and operational impact given the non-binding nature of the document. Specifically, the GCR envisions mechanisms for yearly, biennial and quadrennial follow-up and review (paras 103-105), as well as the commitment to adopt indicators against which to measure the progress towards the achievement of the its stated objectives (para 102).

The potential of the arrangements is enhanced by the complementarity of their actions at the global, region or country-specific levels (para 15) and their streamlining within existing processes and mechanisms in order to avoid duplication (para 16).

Specifically, the GCR envisions national arrangements, whose composition and working methods will be determined by the State concerned, following the principle of State ownership and leadership called throughout the whole text. They shall be designed to support the development of a comprehensive national plan to operationalize the GCR (paras 20-21).

Another tool available to host countries is the Support Platform, which can be activated (or deactivated) with UNHCR assistance and in consultation with relevant stakeholder in order to provide context-specific support, when deemed necessary. According to one of the most fervent critics of the GCR, Alexander Aleinikoff, Support Platforms can provide the foundation for a BRS system that is truly global.[347]

These Platforms' functions mostly relate to advocacy activities to mobilize contribution and catalyse political commitments. For instance, among their tasks is the initiation of solidarity-conferences, such as those organized in 2016 for Syrian refugees,[348] and to gather support for the comprehensive plan if they provide added value and do not duplicate other processes (para 27).

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[346] J. HATHAWAY, "The Global Cop-Out on Refugees." *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey062, p. 3.

[347] A. ALEINIKOFF, "The Unfinished Work of the Global Compact on Refugees." *International Journal of Refugee Law*, 2018. doi: 10.1093/ijrl/eey57, p. 3.

[348] Such as the London Conference on Supporting Syria and the Region and the US Leaders' Summit on Refugees held in 2016.

Triggers for the activation of Support Platforms would be either (1) a large-scale and/or complex refugee situation where the response capacity of a host State is or is expected to be overwhelmed; or (2) a PRS where the host State requires considerable additional support, and/or a major opportunity for a solution arises (para 24). Regrettably, not even in this case are "large movements" defined. Furthermore, the text fails to clarify how the capacity of a State to respond to refugee flows will be assessed. Therefore, especially with respect to the first criteria of activation, the GCR remains vague and risks to undermine the functioning of the Support Platforms themselves.

Drawing on the success of past regional cooperation on refugee issues, the GCR encourages the complementary and active participation of existing regional and sub-regional cooperation mechanisms to global and national arrangements, upon the request of concerned States (para 29).

The main international mechanism for BRS envisaged in the GCR is the institutionalization of a Global Refugee Forum (GRF), a ministerial-level meeting to be held every four years with other relevant stakeholders (para 17). Its aim is twofold: beside its function as a mechanism for BRS (paras 17-19), it will constitute an occasion in which to take stock of the progress made and to review the efficacy of the arrangements in force (paras 19, 103).

The first GRF will be held on 17-18 December 2019 in Geneva,[349] on the occasion of the first anniversary of the adoption of the GCR. In its BRS arrangement capacity, the GRF provides a forum in which States and other stakeholders will "announce *concrete* pledges and contributions towards the objectives of the global compact" and "consider opportunities, challenges and ways in which burden- and responsibility-sharing can be enhanced."[350] As envisaged in the NYD, it is reiterated that contributions will take different forms other than financial assistance, such as technical and material support; resettlement places and complementary pathways for admission to third countries; and

[349] The first GFR will focus on arrangements for burden and responsibility-sharing, education, jobs and livelihoods, energy and infrastructure, solutions, and protection capacity. For more information, visit: https://www.unhcr.org/global-refugee-forum.html.
[350] GCR, para 17, emphasis added.

national policies' review (para 18). Although not in the GCR, the UNCHR has specified that such pledges can be made either individually or jointly with other actors.[351]

Furthermore, at the GRF stock will be taken of the implementation of previous commitments and best practices will be exchanged, both with respect to specific country and regional situations, as well as to global level. The exchange of action-oriented, implementable and sustainable practices facilitates learning, as well as incentivizes and supports other countries and relevant stakeholders to develop forward-looking and evidence-based programming that would enable the improvement of the lives of both refugees and host communities. To facilitate the exchange of good practices, the GCR further establishes the development of a digital platform by UNHCR (para 106).

Alternating every two years with the GRF, a mid-term review will be ensured through high-level officials' meetings opened to all stakeholders (paras 19, 104). In line with the commitment of avoiding duplication of existing mechanisms, these meetings will be organized in conjunction with the High Commissioner's Dialogue on Protection Challenges (para 104), which will not be held in the years in which GRFs take place (para 17). Additional update will be provided by UNHCR in its Annual Report to the UNGA (para 105).

However, it is not explained what review will consist in nor is it specified which will be the outcome document of the GRF and the high-level officials' meetings, in the case there will be one.

In line with the guiding principles previously introduced,[352] the arrangements for BRS shall be underpinned by timely, predictable, adequate and sustainable public and private funding; multi-stakeholder cooperation, in particular between humanitarian-development actors; a whole-of-government approach; and the collection of reliable, timely, comparable data on both refugees and returnees, disaggregated by age, gender, disability and diversity in order to elaborate evidence-based policies (paras 31-48).

In particular, emphasis is placed on expanding the support base beyond traditional donors, as well as on the involvement of the private sector to close the technology gap – an issue sensitive to developing and least developed countries – as well as on

[351] See https://www.unhcr.org/global-refugee-forum.html.
[352] See *supra* Chapter II, para 3.

infrastructure strengthening and job creation (para 32).

Moreover, the text clarifies the additionality of development funding dedicated to complement humanitarian assistance (paras 32, 65) and establishes that it should be provided in the form of grants or loans with a high degree of concessionality (para 32). However, funds will not be made conditional upon the respect of refugee rights by host countries[353] in contrast with the significant stress on HR that characterizes the tex.

The section on data is particularly relevant for three main reasons.

Firstly, to ensure the comparability of data, States and relevant stakeholders commit to develop harmonized or interoperable standards (para 46). However, the GCR fails to define a timeframe in which this development should take place, nor does it indicate a forum in which discussions on data will occur, even though it is likely that they will emerge during the first GRF, and that they will be based upon the indicators to be adopted ahead of it.

Secondly, the GCR calls for gathering data on both refugees and *returnees* (para 46).[354] So far, few if none data has been collected on the conditions in which returnees are living after return. This follows the fact that, once returned, refugees are under the country of origin's jurisdiction and thus fall outside the mandate of humanitarian agencies, with the exception of UNHCR. In the GCR, instead, the international community recognized that it is necessary to understand the challenges faced by returnees and host communities to prevent further displacement to occur and reach sustainable solutions.

The GCR finally provides that States together with UNHCR and other relevant stakeholders will work to gather, analyse and disseminate disaggregated data on resettlement and complementary pathways for admission in third countries "of those with international protection needs", in order to identify and share good practices and lessons learned (para 47). This is crucial both to evidence the improvement of the solidity of the international protection regime through effective international solidarity and responsibility-sharing. Moreover, the intentional referral to persons with international needs, thus recalling the GCR's subsection relating to the identification of international

[353] HATHAWAY, "The Global Cop-Out on Refugees," op. cit., p. 9; ALEINIKOFF, "The Unfinished Work," op. cit., p. 2.
[354] The Zero Draft also included asylum seekers in the process of data collection.

protection needs (section 1.6 of Part III.B of the PoA), implies that such strategies of BRS are not exclusively available to refugees, but also to other categories of migrants in need, such as those forcibly displaced by natural disasters.

The GCR further envisages increased accountability through the creation of mechanisms to receive complaints, and to investigate and prevent fraud, abuse and corruption (para 34). However, no detail is provided on how these mechanisms will be constituted and work, nor if they will be created at either national, regional or global levels.

1.3 AREAS IN NEED OF SUPPORT: TOWARDS A NEW APPROACH TO REFUGEE PROTECTION

According to some, the GCR has the potential to galvanize change.[355] It offers, at least potentially, mechanisms for translating "crisis" into "opportunity" for both refugees and host communities.[356] However, its scope could be weakened for it allows for cherry-picking issues of interest in which to invest, rather than contributing where needs are identified.[357]

In fact, Part III.B provides a non-prescriptive and non-exhaustive guide of areas where States could best channel their support for comprehensive and people-centred response to large movements of refugees. These are grouped in sections that mirror the CRRF's four pillars: reception and admission, meeting needs and supporting communities, and solutions.[358] Each of these areas contains targeted commitments and recommendations on specific topics.

There was great expectation that this part would have addressed most of the shortcomings of the international protection regime. However, the need for consensus left these discussions out of the negotiations' table. The choice to exclude some issues

[355] BETTS, "Towards a Theory of Change?" op. cit., p. 4.
[356] GOODWIN-GILL, "Protection in the Asia Pacific Region," op. cit., p. 3.
[357] *Ibidem*, p. 7.
[358] Draft 2 specified in footnote n. 32 that "[i]n the interests of ensuring that the needs of refugees and host communities are addressed equally, the actions that would support the application of "support for immediate and ongoing needs" and "support for host countries and communities" have been grouped together."

from discussions was also a strategic one: UNHCR was not willing to jeopardize what was already envisaged in international law and policy.[359]

The vagueness and conditionality of the language used in this section, full of "where appropriate", "would", "where considered relevant", and the like, contributed to the disappointment felt by many representatives of the academia, NGOs and civil society towards the GCR. In the words of one of the most important scholars on refugee law, the GCR:

> Is not really even a (quasi-) menu for a restaurant; it's more about what might be offered in a special function dining hall that will only open if a truly large group of hungry people arrives (although we're not sure how many have to show up before the chef and serving staff will come in to work).[360]

The same UNHCR and major host countries wanted a stronger document, indeed.[361] Yet, the challenge faced by the GCR was that, as a non-binding instrument, it could not aspire to create legal obligations towards States and stakeholders.[362] The document specifies, in fact, that nothing in the GCR is intended to create additional burdens or obligations on host countries (para 50). On the contrary, it is meant to ease the pressure upon them through the contributions from *other* States and stakeholders (para 50).

Furthermore, the conditionality of the language and the broadness of the actions envisaged, for how deceitful they may be, reflect the idea of the GCR as a guide to States' and other stakeholders' contributions and that the proposed actions will require adjustment depending on to the different contexts in which they would be applied. In fact, according to some, the emphasis is exactly where it should be, i.e. on the concretization

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[359] GOODWIN-GILL, "Protection in the Asia Pacific Region," op. cit., p. 3.
[360] HATHAWAY, "The Global Cop-Out on Refugees," op. cit., p. 2.
[361] V. TÜRK, *Remarks to the informal exchange with Member States on the global compact on refugees.* Statement by the Assistant High Commissioner for Protection, Geneva, 17 July 2018. Available at: https://www.unhcr.org/admin/dipstatements/5b4f485b7 [accessed 27 April 2019].
[362] The Assistant High Commissioner for Protection when closing the consultations' phase on the GCR recognized that "there is inherent tension between a voluntary and legally non-binding document and an aspiration for it to create, in effect, obligations for everyone." See TÜRK, *Closing remarks to the sixth formal consultation*, op. cit.

of BRS.[363] In the words of the Assistant High Commissioner for Protection, the GCR is an "organic process", [364] which finds in the agreed text its foundation, rather than its ending.

Moreover, it should also be considered that, despite the recommendatory tone adopted, the fact that it envisages mechanisms for follow-up and review provide some guarantees that, at least in part, the GCR will not remain just words on paper. As the same GCR makes clear, the success of the measures indicated depends on having "robust and well-functioning arrangements for burden- and responsibility-sharing" (para 49).

Most importantly, given the absence of detailed obligations on commitments' operationalization, the decision to elaborate a set of indicators against which progress can actually be measured, becomes fundamental to avoid that States do nothing and still claim compliance with the GCR.[365]

Getting more into depth on the measures proposed, States and other stakeholder reaffirmed the NYD commitment to harness early warning, preparedness and contingency planning, in line with the SG's prevention agenda.[366] Contributions in these areas shall be without prejudice to countering root causes of displacement (para 52) and could help reduce the impact of large movements of refugees and migrants on host communities.

In the event of the outbreak of a crisis that leads to large movements, it is recognized that host countries will need technical and financial support for adequate reception or transit areas, in a way that should be age-, gender-, disability- and diversity-sensitive, as well as for providing basic humanitarian assistance and essential services in reception areas. The PoA also mentions the possibility to establish alternative to camps assistance mechanisms, an option that was present in the NYD but omitted in the CRRF. However, such alternatives will be sought only "where considered relevant by the concerned host country" (para 55).

The GCR acknowledges the interdependence and complementarity of security considerations and international protection (para 56). In fact, it is declared that security

[363] GOODWIN-GILL, "Protection in the Asia Pacific Region," op. cit. p. 2.
[364] TÜRK, *Closing remarks to the sixth formal consultation*, op. cit.
[365] C. COSTELLO, "Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?" *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey060, p. 2
[366] GCR, paras 52-53.

can be achieved through the promotion of national integrated approaches aimed at refugee and HR protection. it is also underlined the importance to uphold to the civilian and humanitarian character of international protection, including in the case of PRS. To this aim, resources and expertise should be provided at the request of the State concerned to train local authorities; to develop protection-sensitive screening mechanisms; to combat SGBV, human trafficking and smuggling; and to identify fighters and combatants.

Expectations were particularly high on the subsections relating to specific needs (paras 59-60) and to international protection needs (paras 61-63). The wording "specific needs" was preferred to that of "vulnerability" probably for the sake of clarity. Indeed, vulnerability is usually referred to migrants; hence, it could have posed problems of interpretation and could have encountered the reluctance of many States. This notwithstanding, persons with specific needs are defined as persons who, by reason of their identity or of the circumstances they are faced to, require the delivery of targeted services. In this category of persons fall, for instance, minors; women at risk; victims of abuse, exploitation and human trafficking; and the like.

Despite individual assessment is at the basis of RSD, the GCR allows for group-based protection in the context of large movements, though only if the State concerned consider it appropriate (para 61).

Regarding the identification of international protection, the GCR makes a leap forward. In fact, it defines disasters-induced forced displacement as a protection and humanitarian challenge where measures and guidance shall be developed.[367] Among the best practices referred to in this section are temporary protection and humanitarian stay arrangements. Despite complementary and subsidiary protection references were omitted in the final text,[368] this section constitutes one of the greatest achievements of the GCR.

The Refugee Compact also envisages the establishment by UNHCR upon the request of the concerned State of an Asylum Capacity Support Group, which will see the

[367] Cfr. *supra* Chapter III, para 3.2.
[368] Cfr. Zero Draft, para 47; Draft 1, para 55.

participation of experts on different fields (para 62). It will draw upon the pledges made at the GRF and it is conceived as a tool aimed at strengthening specific aspects of the asylum system of the State concerned to ensure fairness, efficiency, adaptability and integrity of the whole RSD process. This could be achieved, among others, through the sharing of best practices on all aspects of asylum systems.

Predictably, the 2030 Agenda is strongly referred to when devising actions for meeting needs and supporting communities to underline the importance of integrated and inclusive reception systems (para 64).

It is worth noticing that the GCR affirms that humanitarian assistance should be *needs-driven* (para 66). If international assistance is usually provided on the basis of the reasons for displacement in compliance with agencies' mandates, in this case UN MS acknowledged that the needs of everyone are to be addressed. To that end, humanitarian assistance shall be delivered in a way that benefit refugees and host communities alike, as well as other persons with a different legal status. It should also take into account the fact that most refugees do not live in camps, but in urban and rural areas (para 66).

The actions envisaged to meeting needs and supporting communities cover several areas: education; jobs and livelihoods; health; women and girls; children, adolescents and youth; accommodation, energy, and material resources management; food security and nutrition; civil registries; statelessness; fostering good relations and peaceful coexistence.

Many of these commitments recall those agreed upon in the NYD, such as the effort to prevent statelessness and facilitation of access to civil registries and documentation.

Others, however, are more specific or completely new. For instance, with regard to education the GCR recommends that refugee children should wait ideally no more than three months after arrival to access to education (para 68), despite NGOs had asked for its reduction to a maximum of 30 days.[369] Furthermore, along with skills and qualifications recognition, States should develop possibilities for online learning and livelihoods opportunities. This last point encountered the protests of many developing and least developed countries who still face a technology gap and lack the resources to fill it.

[369] *NGOs Statement on the High Commissioner's Dialogues on Protection Challenges*, Agenda item 6a, Executive Committee of the High Commissioner's Programme Standing Committee, 71st Meeting, 6-8 March 2018, p. 2.

Other States and relevant stakeholders are thus encouraged to contribute to it, as well as to the promotion of integrated and sustainable management of natural resources and ecosystems; the provision of clean energy, water, sanitation and hygiene services; the support to technical capacity development; and the elaboration of DRR strategies.

In the facilitation of access to the labour market, the conclusion of preferential trade agreements in industries with high refugee participation in the labour force is also suggested as a good practice.

Another best practice that is mentioned in the GCR regards food security and nutrition, where cash-based interventions have demonstrated their impact in the enhancement of refugee self-reliance. Furthermore, food and agricultural production should be supported to resist the impact of large numbers of refugees, taking into consideration the cultural and religious practices in the field.

The last section of the PoA is dedicated to solutions. Interestingly, the adjective "durable" was omitted, though usually used to define the duty of States to find timely and long-lasting solutions to refugees, thus preventing the latter from being living in precarious legal conditions. This choice followed States' requests, as a consequence of the fact that *durable* local solutions or resettlement might be perceived as entailing long-lasting obligations on the part of host States.

It is recognized that the elimination of root causes is the most effective way to achieve solutions (para 85). Yet, since this can take time, a mix of solution shall be used, including not only the traditional repatriation, resettlement and local integration, but also other local solutions and complementary pathways for admission, taking into account the absorption capacity, the level of development and the demographic situation of different countries.

However, there are no further indications on how the level of contributions will be assessed. In addition, it was rightly observed that weighting contributions is like comparing "chalk and cheese": how can financial contributions be compared to the provision of technical expertise or to the availability of resettlement places?[370] Will State

[370] GILBERT, "Indicators for the Global Compact on Refugees," op. cit., p. 4.

contribution to the root cause of refugee flows be taken into account in the distribution of responsibility?[371]

In conclusion, despite the broadness of its commitments, which disappointed many in the academia and civil society, the GCR can be considered a great achievement. It places BRS at its centre and focuses on the operationalization and facilitation of the fulfilment of rights and obligations stemming from international law. Moreover, it can exercise a norm-filling function through the provision of interpretation of some issues, the clarification of the interoperation between different legal frameworks, and, in the same way of the Guiding Principles on Internal Displacement, it gathers existing standards, principles and practices in one document.[372]

Lastly, its capability to galvanize change is already visible in the roll-out of the CRRF. In pilot countries, in fact, concrete changes are already taking place.[373]

2. THE GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION

The GCM is "a milestone in the history of the global dialogue and international cooperation on migration",[374] "but not the end of our efforts".[375] It is, in fact, the first inter-governmentally [376] agreed comprehensive framework on the management of migration in all its dimensions. Even though discussions about international migration are not new,[377] the GCM is the first document to bring together all the legal tools governing international migration.[378] For these reasons, "[it] will remain *the* reference for future

[371] *Ibidem*.
[372] GAMMELTOFT-HANSEN, "The Normative Impact of the Global Compact on Refugees," op. cit., p. 4.
[373] TÜRK, "The Promise and Potential of the Global Compact on Refugees," op cit., p. 4. For more information on the CRRF's roll-out, visit the website: www.globalcrrf.org.
[374] GCM, para 6.
[375] GCM, para 14.
[376] The process of negotiations was led by two co-facilitators, namely the Ambassador José Juan Gomez Camacho (Mexico) and Ambassador Jürg Lauber (Switzerland).
[377] For instance, the High-level Dialogues on International Migration and Development, that took place in 2006 and 2013, and the GFMD, launched in 2007 provided space for discussions on migration.
[378] T. GAMMELTOFT-HANSEN, "The Normative Impact of the Global Compact on Safe, Orderly and

initiatives dealing with cross-border human mobility.[379]

Adopted as outcome document of the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration[380] and endorsed by the UNGA on December 19, 2018, the GCM was negotiated in NY, given the highly political sensitivity of the topic. As a result, it retains a stronger political balance as compared to the GCR.

Its adoption was much awaited; however, despite the document is clearly driven by State preferences and notwithstanding the consensus it had during the negotiation phase,[381] it could not achieve a consensus as broad as that of the GCR. Still, its adoption with 152 votes in favour at the UNGA is an enormous success,[382] to the extent that many scholars go as far as to say that its most remarkable feature is that "it exists at all."[383]

What is interesting in the voting, though, is not so much the broad consensus it gained, rather the fact that countries voting in favour of the GCM at the UNGA were less than those that adopted it just one week before. Actually, at the Marrakech Conference the GCM had been approved by 164 countries.[384]

Although the heated debate that characterized the UNGA's endorsement of the GCM can be considered a proof of the political and legal weight retained by an instrument of soft law, the strong opposition manifested to it by many States could have a weakening

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Regular Migration." In T. Gammeltoft-Hansen, E. Guild, V. Moreno-Lax, M. Panizzon, and I. Roele. *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration.* Working Paper No. 1, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, October 2017. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051027 [accessed 24 April 2019], p. 10.

[379] L. ARBOUR, *Closing remarks at GCM*, Statement by the Special Representative of the Secretary-General for International Migration, 11 December 2018, Marrakech. Available at: https://www.un.org/en/conf/migration/assets/pdf/GCM-Statements/closingremarksarbour [accessed 22 May 2019].

[380] The Conference was held in Marrakech on December 10-11, 2018.

[381] The final draft had been approved in July by the 193 UN MS, with the exception of the United States, which left the negotiation on December 2017.

[382] The GCM obtained 152 votes in favour, 5 votes against, and 12 abstentions. The absents were 24.

[383] K. NEWLAND, "The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement." *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey058, p. 1.

[384] A. BUFALINI, "The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?" *Questions of International Law*, Zoom-in:58, 2019, p. 8.

effect on its potential legal impact.[385]

2.1 DISTINGUISHING FEATURES

Both the GCR and GCM are non-legally binding in nature and uphold to state sovereignty and obligations under international law.[386] They envisage contributions to be made considering national realities, capacities, levels of development, and in respect of national policies and priorities.[387] However, they are two separate and complementary documents,[388] with different structure and objectives, even though many issues they are concerned of overlap.

The first major difference with the GCR, is in the structure of objectives and recommended practices. The GCM presents, in fact, a list of 23 objectives and commitments,[389] each of which is followed by a range of proposed actions – informed by best practices – States can choose from to better address their specific situation. This contrasts with the only four objectives that characterize the GCR and the three areas in need of support identified in its PoA.

A remarkable difference stands in how the Global Compacts framed the legal background in which they are meant to operate. If the GCR mentions its normative framework only under its guiding principles, the GCM provides a list of instruments of both hard law and soft law governing the different aspects of migration at global level in its Preamble. Specifically, it mentions the UDHR; the nine HRTs, of which the ICCPR and the ICESCR are cited in text given their relevance for migrants;[390] the UNTOC and its two

[385] *Ibidem*, p. 10.
[386] GCR, para 4;on GCM, para 7
[387] GCM, para 41.
[388] *Ibidem*, para 3.
[389] To underline the practical nature of the commitments, the GCM Zero Draft (available at: https://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf), Zero Draft Plus (available at: https://refugeesmigrants.un.org/sites/default/files/2018mar05_zerodraft.pdf) and Draft Rev 1 (available at: https://refugeesmigrants.un.org/sites/default/files/180326_draft_rev1_final.pdf) heading for this section had been "actionable commitments". The last three versions as well as the final text, instead, name it "objectives and commitments".
[390] The other 7 HRTs are fully listed in footnote.

Protocols; the Slavery Convention; the United Nations Convention on Climate Change; the Paris Agreement; the ILO conventions on decent work and labour migration; the SFDRR; and, obviously, the 2030 Agenda (para 2).

The latter, together with the Addis Ababa Action Agenda, represents the backbone of the GCM (paras 6, 15(e)). Moreover, the strong tie with the 2030 Agenda is sealed in the title of the GCM, which stems from target 10.7 of the Agenda for Sustainable Development.[391]

Significantly, the GCM explicitly refers to the complementarity of the international cooperation frameworks instituted by the two Compacts "which recognizes that migrants and refugees may face many common challenges and vulnerabilities". [392] The GCM's declaration of the complementarity of the two Compacts is even more noteworthy because it is not mirrored in the GCR. To some extent, it can be said that the GCM formalizes the link existing between refugeehood and migration, which has always been repelled and it is still object of controversy among States as reflected in the explanation of the votes on GCM's adoption.[393] Even the GCR in its para 12 refers vaguely to "persons on the move" and fails to reiterate such a connection.

The path towards this recognition was marked already in the NYD, which included commitments for both migrants and refugees together, in light of the increased incidence of mixed movements on host countries and asylum systems. Notably, the GCM reaffirms the NYD several times,[394] in stark contrast with the GCR, where it is only mentioned when recalling the CRRF (para 10).

However, both Compacts are very clear in distinguishing their sphere of competence reiterating that refugees and migrants are two separate legal categories referring to distinct legal frameworks.

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[391] Target 10.7 of the 2030 Agenda calls for States to facilitate safe, orderly, regular and responsible migration. The responsibility element was omitted in the GCM; however, the latter's strong tie with HR should ensure that States gran responsible paths

[392] GCM, Objective 7, para 23.

[393] For instance, the United States (against), Chile (abstained) and Lebanon (in favour) underlined that refugees and migrants shall not be confused and that no obligation to protect non-refugees cannot be deduced from the GCM.

[394] GCM, Preamble; paras 3, 7, 16.

In fact, despite the GCM emphasizes that "[r]efugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected and fulfilled at all times",[395] it recognizes that only refugees are granted the specific protection provided by IRL and it specifies that the GCM will only refer to migrants (para 4). For this reason and in order not to interfere with the GCR and IRL, all referrals to refugees and asylum present in its Zero Draft,[396] including the wording of Objective 12 which called for the strengthening of procedures of status determination, have been delated from or reformulated in the final text.

Another difference between the two Compacts can be seen in how they present their guiding principles. If the GCR mainly recalls its normative framework, the GCM presents a set of 10 guiding principles. Four of them of are mainly dedicated to HR protection (people-centred responses; rule of law and due process; HR; gender-responsive and child-sensitive actions); the other six are of a more general character (international cooperation; national sovereignty; sustainable development; to conclude with the whole-of-government and whole-of-society approach) (para 15).

The order in which these principles are presented is worth of notice. National sovereignty, in fact, comes only third in a context in which, on the contrary, it has always been hailed as paramount. The strong reaffirmation of the sovereign right of States to determine their national migration policy and prerogative to govern migration may prevent full international cooperation in a matter that is transnational in nature, though.

Despite the principle of HR protection is among the last to be mentioned, the GCM is strongly underpinned by HR, a feature that distinguishes it from other documents relating to international migration. As emerged in the thematic discussion held in 2017, the GCM reflects States agreement to keep migrants' rights at the core of the GCM.[397] Specifically, the guiding principle reads as follows:

> The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the

[395] *Ibidem*, para 4.
[396] GCM Zero Draft, Objective 3, para 17(c); Objective 12, para 26 (commitment), (a),(e).
[397] IOM, *Towards the Adoption of a Global Compact*, op. cit. p. 64.

> Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.[398]

What is more, the principle of non-discrimination, which is of outmost relevance in migrations issues, constitutes the content of Objective 17 of the GCM. The vague mention of other HR and fundamental freedoms that are most important to migrants,[399] such as the right to liberty, the right to protection of private and family life, and protection against expulsion,[400] is justified in that the Preamble specifically mentions the ICCPR and ICESCR which include them all.

The principle of non-regression thereby mentioned is also noteworthy. Added in the text after tight advocacy on the part of several NGOs, it serves to confirm and consolidate HR standards as granted by customary international law, which should not be understated.[401] However, some States have expressed their uneasiness with it when delivering their vote at the UNGA.[402]

Despite the strong referral to HR, it has been pointed out that there is no guarantee that the actions envisaged in the GCM will indeed improve the protection of migrants' rights.[403] Indeed, it is not certain that it will lead to the development of legally-binding norms nor that it would incentivize extensive interpretation of already existing obligations under IHRL.

A final element of distinction of the GCM is the use of a firmer language with respect to the GCR. There is a frequent recourse to firm verbs, such as "commit", "must" and "shall", together with the thoroughly use of "will", which appears 41 times, in contrast with the only one "would". This choice was reason of criticism by several States, which at

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[398] GCM, para 15 (f).
[399] E. GUILD, "The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights." *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey049, p. 2.
[400] ICCPR, Arts. 9, 7, 17, 13.
[401] BUFALINI, "What is its contribution to International Migration Law?" op. cit., p. 12.
[402] UNGA, *Agenda items 14 and 119 (continued)*, 60th Plenary Meeting, 73rd Session, 19 December 2018, A/73/PV.60. Available at: https://www.un.org/en/ga/73/resolutions.shtml [accessed 15 April 2019]
[403] GAMMELTOFT-HANSEN, "The Normative Impact of the Global Compact on Safe, Orderly and Regular Migration," op. cit., p. 9.

the UNGA argued either that the GCM does not employ a language that is proper to its non-binding nature[404] or that they shall not be bound by any customary international law that may stem from its implementation.[405] Yet, the contents of the commitments are quite vague and non-prescriptive.[406] Moreover, the firmer language of the GCM as compared to the GCR is mainly due to the diversity in the structure of the two Compacts: the GCR's most consistent part is constituted by the PoA which sets out explicitly non-prescriptive actions that are conducive to the achievement of the four objectives; whereas the GCM presents a list of 23 objectives, each with its own commitment.

2.2 A COOPERATIVE FRAMEWORK

The GCM builds on the assumption that no country can effectively manage migration alone (paras 7, 11) and that international cooperation is in every State's interest, also considering that all are countries of origin, transit and destination.[407]

If the GCR is just the "ambition of the international community",[408] the GCM constitutes instead a cooperative framework (para 7) in which States collectively commit to improve cooperation at international, regional and bilateral level (para 8). In fact, international cooperation and global partnership also constitutes the 23rd Objective of the GCM, which was called for by States during the negotiations.

The intergovernmental nature of the document is mirrored in the wording used as compared to the GCR: while the latter mostly uses an impersonal tone, the GCM is the expression of the will of the Heads of States, thus there is a thoroughly use of "we".

In line with its strong collegiality character, it presents *common* understanding, *shared* responsibility and *unity* of purpose in order to make migration work for all.

The GCM calls for the collection, sharing and analysis of quality data, as "shared

[404] See, for instance, the statements of Hungary and the United States.
[405] See, for instance, the statements of China, Poland and the United Kingdom.
[406] BUFALINI, "What is its contribution to International Migration Law?" op. cit., p. 19.
[407] Hungary was the only country that rejected this fact, arguing that Hungary "does not want to fall into any of those categories. We do not want to become a country of origin, a country of destination or a country of transit."
[408] GCR, para 4.

understandings will improve policies that unlock the potential of sustainable development for all."[409] It is recognized that data and information are not only crucial to elaborate well-managed migration policies, but also retain a fundamental role in allowing migrants to make informed choices as well as in helping citizens understand the benefits of migration and dispel negative and misleading narratives on migrants (para 10). This will be further guaranteed through the enhancement of predictability and certainty of migration procedures for all the actors involved, including migrants themselves (para 13).

States recognized their "shared responsibility to one another as Member States of the United Nations to address each other's needs over migration, and … promoting the security and prosperity of all our communities" (para. 11). In addition, the GCM bases its success on the principles of mutual trust, determination and solidarity (paras 14, 42).

It is interesting to note how, distinctly from the NYD, the GCM recalls some of the language that is instead so typical of refugee issues, i.e. that of responsibility-sharing and solidarity. Such a change of language may stem from the fact that the GCM presents objectives dealing not only with the facilitation of safe, orderly and regular migration, but also with addressing the needs and fulfilling the rights of irregular migrants who may already be on their journey or in destination countries.

To help States taking effective steps to achieve the 23 objectives, the GCM devises the creation of a capacity-building mechanism in the UN to support States during the implementation phase (para 43). This will build on existing initiatives and will allow all relevant stakeholders to voluntarily share their technical, financial and human resources in order to strengthen capacities and foster multi-partner cooperation.

It will be composed of three parts: (1) a connection hub; (2) a start-up fund; and (3) a global knowledge online platform (para 43).

The connection-hub is designed to facilitate demand-driven, tailor-made and integrated responses through the analysis of country requests for solutions and the identification of the partners that, by reason of their comparative advantage and operational capacities, could better implement the actions needed. In this regard, it will also ensure effective arrangements for multi-agency and multi-stakeholder

[409] GCM, para 10.

implementation. Finally, the connection hub will connect requests to similar initiatives and solutions already operationalized, providing an opportunity to share best practices, as well as identify opportunities for funding, including the start-up fund.

The start-up fund will serve to finance the realization of project-oriented solutions either through seed-funding or complementing other financial resources. It will also catalyse voluntary financial contributions by MS and other stakeholders such as the UN, international financial institutions, the private sector, and philanthropic foundations.

The global knowledge open data platform will instead be instituted with the scope of facilitating the sharing and storing of existing evidence, best practices and initiatives. It will build on the GFMD Platform for Partnership and other relevant sources, which, regrettably, are not specified.

In addition, the SG decided to establish a UN network on migration with IOM as the coordinator and secretariat with the purpose "to ensure effective and coherent system-wide support for implementation, including the capacity-building mechanism, as well as follow-up and review of the Global Compact, in response to the needs of Member States."[410] Drawing on it, the SG will report to the UNGA on a biennial basis on GCM's implementation, on UN's role in this regard and on the functioning of institutional arrangements (para 46).

The GCM recognizes that its authority rests not only on its consensual nature, credibility collective ownership, and joint implementation, but also in follow-up and review.[411] These will be State-led and intergovernmental in nature, but open to all relevant stakeholders, mirroring the GCM's negotiation process (para 48).

In particular, the High-level Dialogue on International Migration and Development shall be repurposed and renamed "International Migration Review Forum" (IMRF). It will constitute the main global platform where progress in GCM implementation at all levels is to be monitored and discussed, including as it relates to the 2030 Agenda. It will start in 2022 and take place every four years since then.

The precise modalities and organizational aspects of the IMRF, as well as its

[410] *Ibidem*, para 45.
[411] *Ibidem*, para 115 (b).

connection with regional review mechanisms, are currently under negotiations (para 54). Interestingly, previous versions of the text envisaged the IMRF to take place until 2030. On that occasion, together with the expiry of the 2030 Agenda, it was proposed that a review conference of the GCM could take place, if States so decided in 2026.[412] The final text maintains, instead, vagueness with regard to how review will take place.

What is sure is that at each edition of the IMRF States will agree on a Progress Declaration, which may be taken into account by the High-Level Political Forum on Sustainable Development (para 49(e)). Hence, it reinforces the link with the 2030 Agenda process. This is a step forward as compared to the GCR that, as discussed above, does not clarify whether the GRF will have an outcome document reporting on the progress made and on the way forward.

Cooperation in implementation must also come at the regional and subregional levels. In particular, the GCM encourages regional and subregional fora, but also other international fora, to review the implementation of the GCM in their areas of competence starting in 2020 and then alternating with and informing the IMRF (para 50).

Besides, annual informal exchange will be provided by the GFMD (para 51).

Regrettably, there is no mention in this case of the development of indicators, nor is there reference to the SDGs in this regard. Even if data shall allow for effective monitoring and evaluation (para 17), this missed opportunity weakens the scope of review and follow-up, especially if compared to the GCR.

2.3 MAKING MIGRATION WORK FOR ALL

The GCM is based on the premise of making migration work for all through the establishment of a holistic and comprehensive framework. It is in fact composed of objectives that focus on the prevention of irregular migration through mitigation of drivers, on the effort to address migrants' vulnerabilities along the journeys and after arrival taking into account the legitimate concerns of host communities, and on the enhancement of migrants' positive contributions to sustainable development at the local,

[412] Zero Draft, para 44(d); Zero Draft+, para 45(d).

national, regional and global levels, while upholding the HR of every person regardless of migratory status.

First and foremost, migration works for all if it occurs in a regular manner. As the title of the Compact suggests, in the GCM States commit to enhance the availability and flexibility of pathways for regular migration (Objective 5, para 21). Among the possibilities States are called to explore in this area is the release of admission or stay permit based on compassionate, humanitarian, or other grounds to persons who were forced to leave their country of origin due to sudden-onset natural disasters and "other precarious situations", as long as adaptation in or return to one's home country is not feasible. Planned relocation and visa options could be developed, instead, to respond to movements caused by slow-onset natural disasters, the adverse effects of climate change, as well as environmental degradation.

Safe, orderly and regular migration would also be enhanced if fair and ethical recruitment and decent working conditions are ensured (Objective 6, para 22). This would guarantee protection against all forms of exploitation and abuse and maximize the socioeconomic contribution of migrants in both countries of origin and destination. Together with the second and the seventh, this is the Objective that has the longest set of actions. Among these is the institution of national sanctions against human and labour rights violations; the strengthening of monitoring authorities; the possibility to allow migrants to change employer to prevent extortion and abuse; the commitment to ensure that migrants are engaged and remunerated on equal footing with nationals; and the guarantee to migrants working in the informal economy to have access to redress and complaint mechanisms in cases of exploitation and abuse without exacerbating their vulnerabilities.

However, the broadening of regular pathways for migration and the establishment of fair recruitment regulations are not the sufficient to ensure that migration will work for all. In fact, the most effective way to curb irregular migration is to minimize the structural and adverse drivers that trigger it.

Specifically, in Objective 2, States committed:

> To create conducive political, economic, social and environmental conditions for people to lead peaceful, productive and sustainable lives in their own country and to fulfil their personal aspirations, while ensuring that desperation and deteriorating environments do not compel them to seek a livelihood elsewhere through irregular migration.(para 18)

This Objective seems to align with the rhetoric that depicts migration as a failure of development. As a result, the emphasis appears to be not so much on the creation of regular pathways for migration, rather on the elimination of drivers of regular migration as well. It recalls a strategy of containment rather than one of regular and safe flows of people, despite the GCM affirms that migration is "a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance",[413] in line with the 2030 Agenda and the NYD.

Migration will work for all only if it works *in primis* for migrants themselves. Therefore, it is important to ensure that migration occurs safely and that, if it does not, that migrants' needs and vulnerabilities are addressed in either transit or destination countries.

To ensure safety in migration, States undertake to guarantee that all migrants have proof of nationality and relevant documentation, and that effective migration procedures, efficient service delivery and good public safety are in place (para 20); to save their lives (Objective 8, para 24), especially at sea; to strengthen the response to smuggling of migrants (Objective 9, para 25); and to prevent, combat and eradicate human trafficking in the context of international migration (Objective 10, para 26).

Documentation constitutes a modality of protection and fulfilment of the HR of individuals. Moreover, to ensure that migrants who lack such documentation can still have access to basic services, States are invited to consider the possibility to review and revise requirements of legal identity and nationality at service delivery centres.[414]

Regarding the operations of search and rescue at sea, States commit to "preserve the lives of all migrants" (Objective 8, para 24). Together with the pledge to "keep migrants

[413] GCM, para 8.
[414] *Ibidem*, Objective 4, para 20(f).

out of harm's way" made when affirming States' unity of purpose (para 13), this could lead to an extensive interpretation of the obligations to save lives at sea and to ensure a safe harbour to ships in distress.[415]

Moreover, it is established that States must uphold the prohibition of collective expulsion. What is missing, though, is the referral to the principle of non-refoulement, which is not exclusively related to refugees, as previously argued in this thesis.[416] Even though the Compacts have no normative scope, it is still disappointing that neither texts sufficiently underline the need to abide by the cardinal tenets of the international HR protection regime. The GCM could have referred to such a principle when mentioning the 9 core HRTs. In particular, it could have cited Art. 3 of the CAT and its peremptory prohibition to expose individuals to torture. Otherwise, it could have mention the principle of non-refoulement among its guiding principles, as the GCR does.[417] At the very least, the GCM could have referred to this fundamental tenet indirectly in the commitment section of the Objective, as in the first revision of the draft text, which, even if in unsatisfactory tone, held that States shall "refrain from pushbacks at land and sea borders", [418] wording recalled only in Objective 21 on return and readmission in the adopted text. Lastly, it is regrettable that even the prohibition of collective expulsion is mentioned among the menu of actions from which States will draw to achieve the objective, and not on the commitment itself, further undermining its peremptoriness. Yet, the aforementioned principle of non-regression should safeguard its non-restrictive application.[419]

Countering smuggling (Objective 9, para 25) and preventing, combating and eradicating human trafficking (Objective 10, para 26) are also fundamental to reduce irregular migration and guarantee the safety of the journeys. Both objectives call for the end of impunity of criminals and the non-liability of migrants.

Commitment is made to identify and protect victims of smuggling, as well as to assist,

[415] BUFALINI, "What is its contribution to International Migration Law?" op. cit., p. 15.
[416] Cfr. *supra* Chapter I, para 1.2.
[417] BUFALINI, "What is its contribution to International Migration Law?" op. cit., p. 16.
[418] GCM Rev 1, para 23(a).
[419] BUFALINI, "What is its contribution to International Migration Law?" op. cit., p. 17.

in particular, those who have been subjected to such a crime "under aggravating circumstances", which, however, are not exemplified. Moreover, States commit to discourage demand that fosters exploitation that leads to trafficking in persons through, among the others, the education of all relevant stakeholders, including citizens, to empower them identify the signs of trafficking in persons, and the promotion of awareness-raising campaigns to inform migrants and prospective migrants on the risks they may incur in.

States are called to cooperate at transnational, regional and bilateral level to share relevant information on smuggling routes, *modus operandi*, financial transactions and on all other aspects that could help dismantle these criminal networks. Furthermore, States are encouraged to ratify, accede and implement both Palermo Protocols and to revise and review national legislation with the appropriate definition of smuggling and human trafficking.

Vulnerabilities are another important issue at stake when speaking of safety in migration. [420] It holds particular relevance since the topic of vulnerability and HR protection has accompanied the process of adoption of the NYD and subsequent development of the Global Compacts.

To this pivotal matter, the GCM devotes its Objective 7 (para 23), through which States commit to:

> respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law.

It is recommended that HR, gender, age, disability and diversity considerations drive migration policies and related practices. Furthermore, migrants should have access to public and affordable independent legal assistance; referred to adequate services; and facilitated in their access to procedures that may lead to regular status.

Many of the objectives and actions envisaged in the GCM overlap with those

[420] Cfr. *infra* Chapter III, para 3.1.

proposed in the GCR. For instance, among the measures advanced to open the labour market and education to respectively migrants and refugees both Compacts mention the need for skills and qualifications recognition, the mapping and matching of individuals' skills with the labour market, and the provision of quality education to both host and hosted communities.

To make migration work for all, migrants shall be allowed to contribute to the development of their host country and country of origin alike.

In the first case, it is peremptory to achieve full inclusion and social cohesion (Objective 16, para 32). The GCM recognizes integration as a two-way process and promotes the mutual respect of cultures, traditions and customs of each of the parties involved. In addition, migrants should be facilitated in accessing decent work, and have their skills capitalized upon.

To facilitate inclusion and maximize migrants' contributions to sustainable development, it is fundamental to invest in demand-driven skills development and their mutual recognition at all skills level (Objective 18, para 34). Standards and guidelines could be developed to this end and transparency of certifications and compatibility with National Qualification Frameworks should be promoted.

To succeed in integration, it is fundamental that efforts are enhanced towards the elimination of discrimination in all its forms as well as contrast any form of intolerance against migrants, alongside evidence-based public discourses that dispel misleading narratives on migrants (Objective 17, para 33). In this regard, the GCM recalls the importance media have in shaping the public opinion and recommends States to take actions to educate the media in order to promote an objective and quality reporting on issues relating to migrants and migration and to stop allocation of public funding or material support to those fomenting intolerance, xenophobia, racism or other form of discrimination against migrants, while respecting the right to freedom of expression.

To make migration work for countries of origin, diasporas shall be allowed to fully contribute to their sustainable development (Objective 19, para 35). Specifically, diaspora entrepreneurship should be encouraged through the development of targeted support programmes and financial products. Moreover, diasporas should be enabled to politically

participate in their country of origin and be facilitated in the transferring of knowledge and know-how to their countries of origin without necessarily losing their job, residency permit or earned social benefits. The latter constitute the content of Objective 22 (para 38), where States specifically commit to establish mechanisms for the portability of social security entitlements and earned benefits in migrants' country of origin or in the country in which they decide to work.

Ultimately, they shall be supported in their financial contribution to their countries of origin through the sending of remittances. Their transfers shall be made faster, safer and cheaper (Objective 20, para 36), in line with target 10.c of the 2030 Agenda. In particular, States proposed to harmonize remittance market regulations while combating money laundering; promote access to the market to different providers; develop technological solutions to facilitate the sending of remittances; allow women to access financial literacy training and formal remittance transfer systems, as well as access to other financial services such as the opening of a bank account.

Finally, to make migration work for all, States have reaffirmed their sovereign right to return in a safe and dignified manner those who have no authorization to stay on any ground, as well to facilitate their sustainable reintegration (Objective 21, para 37). Importantly, in contrast with Objective 8, the commitment made under Objective 21 does mention the principle of non-refoulement, even if indirectly, when reaffirming:

> the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law.

The sustainability of returning migrants' reintegration is of outmost importance. In fact, it is a way to prevent further displacement caused by social tensions between returning migrants and local communities as well as by the lack of livelihood opportunities in the area of return. While this is the primary responsibility of the country of origin, which should also cooperate on the identification and issuance of proper documentation to their own nationals and assist them through diplomatic missions, the international community should facilitate return through the establishment of bilateral, regional and multilateral

cooperation frameworks and agreements, and the guarantee of a free and informed choice of return and of reintegration assistance. In particular, returning migrants should be given access to social protection, services, assistance, employment opportunities and decent work, and their skills recognized to fully build on their entrepreneurial skills, paying attention to the specific needs of the communities they return to.

The peculiar structure of the GCM reveals its weakness in that it does not reaffirm the need for individual assessment by competent authority to precede any act of return and the establishment of mechanisms of redress is mentioned in the commitment part of the objective, but only among the recommended actions to achieve it.

The GCM is a *unicum* in the international law panorama concerning migration. Indeed, for the first time, a broad set of consensual guidelines was approved,[421] reconciling the existing patchwork of documents and strengthening international cooperation.[422]

As the GCR, the GCM is only the starting point for enhanced cooperation on migration, and it has to run parallel to an institutional reform in the UN system.[423] It arguably holds the largest potential and, at the same time, is likely to face the biggest challenges due to the incoherence and fragmentation typical to the global governance on migration.[424]

Furthermore, if the heated debate that characterized the UNGA's endorsement of the GCM is a proof of the political and legal weight an instrument of soft law has, despite its non-legally binding nature, the opposition of States to the creation of customary law from the implementation of the GCM and the weakness of its own mechanisms of follow-up and review will likely reduce its normative impact.

Even though it has many shortcomings, the GCM still has the merit to have brought such an issue, deemed too divisive for general debate, on the top of the UN agenda, ensuring periodic dialogue and review, and to provide for a framework of globally agreed

[421] NEWLAND, "An Unlikely Achievement," op. cit., p. 4.
[422] M. K. SOLOMON and S. SHELDON, "The Global Compact for Migration: From the Sustainable Development Goals to a Comprehensive Agreement on Safe, Orderly and Regular Migration." *International Journal of Refugee Law*, 2019. doi: 10.1093/ijrl/eey065, p. 4.
[423] NEWLAND, "An Unlikely Achievement," op. cit., p. 3.
[424] GAMMELTOFT-HANSEN, "The Normative Impact of the Global Compact on Safe, Orderly and Regular Migration," op. cit., p. 7.

expectations and obligations. [425]

3. ADDRESSING THE GAPS: A COMPLEMENTARY APPROACH

After having presented the main aspects of the Compacts, this paragraph will focus on the main argument of this thesis, i.e. whether the Global Compacts have the potential to address the protection gaps previously identified.

Their impact on the protection gaps will be assessed through an analysis of the commitments contained therein, bearing in mind that they are soft law tools and that much will depend on their implementation, on the well-functioning of the mechanisms of follow-up and review and of genuine international cooperation and solidarity.

None of the protection gaps previously identified is treated explicitly in either the GCR or the GCM. Instead, they fall under those aspects that are complementary to both Compacts, with the only exception of IDPs and PRS which are only mentioned in the GCR.

3.1 PERSONS IN VULNERABLE SITUATIONS

Concerns over persons in vulnerable situations have accompanied both the GCR and GCM adoption processes. They constitute a peculiar category to deal with since they encompass both refugees and migrants.

However, no definition of person in vulnerable situations is provided in either Compact. The GCR does not even mention this category of persons, preferring the wording "persons with specific needs". [426]

This notwithstanding, the Compacts refer to similar situations that arise specific needs and vulnerabilities. According to para 59 of the GCR:

> Persons with specific needs include: children, including those who are unaccompanied or separated; women at risk; survivors of torture, trauma, trafficking in persons, sexual and gender-based violence, sexual exploitation

[425] NEWLAND, "An Unlikely Achievement," op. cit., p. 3.
[426] GCR, paras 59-60.

> and abuse or harmful practices; those with medical needs; persons with disabilities; those who are illiterate; adolescents and youth; and older persons.

This definition aligns with the idea that vulnerabilities stem from situations associated with a person's identity, condition or circumstance.

It was observed above that the GCM, which refers to vulnerabilities 17 times, devotes its 7th Objective to their reduction. Interestingly, though, it fails to identify in the commitment section the circumstances and situations that may exacerbate vulnerabilities. Instead, it lists them when recommending identification and assistance of persons in vulnerable situations. The latter are very similar to those identified in the GCR and include:

> women at risk, children, especially those unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, including sexual and gender-based violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, workers facing exploitation and abuse, domestic workers, victims of trafficking in persons, and migrants subject to exploitation and abuse in the context of smuggling of migrants.[427]

Moreover, the GCM recommends States to take into considerations the Principles and Guidelines, Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations[428] developed by the GMG jointly with the Office of the High Commissioner for Human Rights. The latter provide for a definition of migrants in vulnerable situations, i.e.:

> persons who are unable effectively to 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 … Vulnerability in this context should therefore be understood as both situational and Rather, vulnerability to human rights violations is the result of multiple and intersecting forms of

[427] GCM, Objective 7, para 23(b).

[428] GMG, *Principles and Guidelines Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations*, Office of the High Commissioner for Human Rights, Geneva, 2018. Available at: https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf.

> discrimination, inequality and structural and societal dynamics that lead to diminished and unequal levels of power and enjoyment of rights.[429]

The *Principles and Guidelines*' concept of vulnerability is thus clearly aligned with the one expressed in the CRPD. In fact, the principles are drawn from IHRL and standards, including International Labour Law and IRL, ICL, IHL, the Law of the Sea deriving from treaties, customary international law and general principles of law.

3.1.1 Gender, age, disability and diversity

According to the definitions provided in the Compacts, vulnerabilities and specific needs may stem from one's gender, age, disability or diversity.

The Compacts' language with regards to gender, age, disability and diversity has been bolstered throughout the negotiations and consultations processes. As a result, both Compacts thoroughly affirm the commitment of States and relevant stakeholders to mainstream these considerations in all aspects of their responses. Notably, the GCM enshrines gender- and child-sensitive responses among its guiding principles,[430] whereas the GCR states that age, gender and diversity considerations are part of the strong partnership and participatory approach that underpins the PoA.[431]

The Compacts emphasizes the need to ensure that women, girls and minors are empowered, and their HR fulfilled. The emphasis is particularly placed on providing them with equal access to services and opportunities, especially to education and labour market,[432] while considering also the specific needs of boys and men.[433]

The GCR also considers that women refugees should be registered individually, i.e. without correlating their request of protection to that of the closer male relative they are accompanied by.[434] On its part, the GCM calls for developing gender-responsive mobility agreements.[435]

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[429] *Ibidem*, pp. 2-3.
[430] GCM, para 15(g) and (h).
[431] GCR, para 13.
[432] GCR, paras 68, 74, 77; GCM, Objective 15, para 31(f) and Objective16, para 32(e).
[433] GCR, para 74.
[434] *Ibidem*, para 58.
[435] GCM, Objective 5, para 21(a).

The GCM further establishes that women should be provided with access to justice and effective remedy as well as referred to appropriate counselling services, above all in cases of SGBV, abuse and exploitation.[436]

Both the GCM and the GCR include a provision on the equal possibility for women and men to give nationality in order to prevent statelessness, even if the GCR takes a much softer and ambiguous approach calling for gender-sensitive practices on statelessness prevention.[437]

With regards to children, adolescents and youth, both Compacts restate that the best interest of the child is paramount in all responses regarding minors.[438] Specifically, for refugee minors, the GCR establishes cross-border cooperation and regional partnership to provide a continuum of protection.[439] Both Compacts underline the importance of the prompt identification and referral of migrant children and refugees, especially in the case of UASC, to appropriate care arrangements or other services they may need, including psychosocial counselling.[440] It is interesting to note that only the GCM mentions the need for the swift appointment of a legal guardian,[441] despite the fact that it is a figure that holds significance for refugees as they are taken throughout the process of status determination. Regrettably, the GCM fails to define a timeframe within which this appointment should be made, remaining vague in tone and scope.

In the case of UASC, family tracing will be supported, if considered in their best interest, and UNHCR will increase efforts to facilitate children's access to resettlement and complementary pathways for admission,[442] whereas for migrant children family reunification possibilities may be enhanced.[443]

Importantly, the GCM recommends States to account for migrant children in their

[436] *Ibidem*, Objective 7, para 23(c).
[437] GCM, para 20(e); GCR, para 83.
[438] GCR, paras 13, 60 and 76; GCM, para 15(h); Objective 7, para 23 (commitment), (e) and (f); Objective 11, para 27(e); Objective 13, para 29(h); Objective 21, para 37(g).
[439] GCR, para 76.
[440] GCR, para 60; GCM, Objective 7, para 23 (f).
[441] GCM, Objective 7, para 23 (f).
[442] GCR, para 76.
[443] GCM, Objective 5, para 21(i).

national child protection systems.[444] On the other hand, the GCR tries to better respond to some of the challenges faced by refugee children, recommending the respect of their right to education, which, as noted above, shall be ensured ideally within the first three months of arrival.[445]

One of the most debated provision of both Compacts has been the one on child detention. Regrettably, indeed, neither the GCM nor the GCR succeeded in incorporating the commitment stated in the SG Report regarding the end of such practice,[446] nor do they refer to its use as a measure of last resort as envisaged in the NYD.[447]

The needs of persons with disabilities find little space in the Compacts. Nevertheless, the GCR, as a result of the last revision of the draft text, retains a strong inclusive language, and calls States and stakeholders to ensure that assistance and protection are inclusive and accessible.[448]

However, the specific barriers to asylum and status determination faced by these categories are overlooked. Despite the call for States to increase their effort to prevent and respond to all forms of violence, including SGBV and harmful practices,[449] the GCR does not reaffirm the possibility that they amount to persecution for the purpose of RSD, as interpreted in IRL and IHRL. Nor does it call for gender, age, disability and diversity considerations when processing the requests for asylum. Moreover, no reference is made to the possibility of having accelerated procedures for child status assessment in order to avoid making them live in precarious situations for too long.

What is worst, there is no commitment to ensure that arriving persons can claim for asylum.[450] States are only encouraged to ensure the existence of:

> Mechanisms for the fair and efficient determination of individual international protection claims [that] provide an opportunity for States to

[444] *Ibidem*, Objective 7, para 23 (e).
[445] GCR, para 76.
[446] Report of the SG, *In safety and dignity*, para 101(b)(ii).
[447] NYD, para 33.
[448] GCR, paras 34, 40, 60.
[449] *Ibidem*, para 75.
[450] HATHAWAY, "The Global Cop-Out on Refugees," op. cit., pp. 13-14.

> duly determine the status of those on their territory in accordance with their applicable international and regional obligations (A/RES/72/150, para 51), in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.[451]

Even though Türk had explained that the GCR was not meant to reiterate all the international obligations pending on States,[452] the failure to mention this paramount right and the relegation of Art. 14 of the UDHR to footnote cannot be regarded if not with disappointment.

To conclude, if at normative level no substantial improvement can be expected due to the non-binding nature of the Compacts and their operational and technical scope, at the implementation level the strength and pervasiveness with which States underlined the need for gender, age, disability and diversity considerations to be mainstreamed throughout the whole process of migration is remarkable. Even though there has been no push for the extensive interpretation of persecution, the fact that no State had any reservation on the language used in this regard underlines the firmness of their engagement and increases the possibility that the Global Compacts could actually come to dispel the typical adult-male lens usually applied to displacement.

3.1.2 Victims of smuggling and human trafficking

Both Global Compacts deal with victims of smuggling and trafficking in persons, even though they have different focuses.

The GCR mainly identifies the victims of trafficking in persons as persons with specific needs, who may also be entitled to international protection. In particular, according to the GCR it is key to identify and refer "victims of trafficking in persons and other forms of exploitation to appropriate processes and procedures, including for identification of international protection needs or victim support."[453]

Moreover, the GCR has a provision on other protection and humanitarian challenges

[451] GCR, para 61.
[452] TÜRK, *Opening remarks to the fifth formal consultations*, op. cit.
[453] GCR, para 60.

that States are currently facing. Among them, it can be assumed that there are also those victims of trafficking who cannot be recognized as refugees under the 1951 Convention. According to this provision, States could explore the possibility of providing these persons with temporary protection or humanitarian stay arrangements.[454] As a result, IHRL recent developments are reaffirmed in the Compact and recognized by the international community at large.

The approach taken in the GCR is reiterated and enhanced in the GCM, where it is proposed that victims of trafficking are given a permit to stay in the country of destination, even on a permanent basis, if the case so requires.[455] The possibility of permanent stay envisaged in the GCM is significant since the length of the stay has been carefully referred to throughout both texts.

On the other hand, the focus of the GCM is mainly on combating and punishing smuggling and human trafficking activities, rather than on ensuring assistance to victims.[456]

Yet, the GCM recognizes that smuggled migrants face higher risks of becoming victims of human trafficking, and that special attention shall be paid to victims of smuggling under aggravating circumstances, which, however, are not further clarified in the text. Moreover, attention should be paid to those persons who may be at risk of becoming victims of human trafficking and other forms of exploitation by guaranteeing that they will not be detained, deported or otherwise penalized if they access to justice or decide to report.[457]

In line with this commitment, States are encouraged to ensure that victims will not be criminalized. However, it is also specified that, while migrants may not be held criminal for the mere fact of having been smuggled or trafficked, victims of trafficking or smuggling may still be convicted for other violations of national laws, among which is migration law. Actually, during the session of the UNGA in which the GCM was endorsed, the United Kingdom has interpreted this provision as according them the discretion to criminalize

[454] *Ibidem*, para 63.
[455] GCM, Objective 10, para 26(h).
[456] *Ibidem*, Objectives 9 and 10.
[457] *Ibidem*, Objective 10, para 26(e).

migrants by reason of their violation of entry regulations.[458]

Yet, the Compacts recommend the non-penalization of irregular entry, which shall be understood as an administrative rather than a criminal violation since no harm or threat is posed to the safety or security of the State. In fact, both Compacts use the term *irregular* rather than *illegal* migration. However, States insisted on affirming that the GCM and GCR are both non-binding instruments and, consequently, should not require change in national policies and regulations with regard to this sensitive topic, unless they so independently decide.

In conclusion, the GCR and GCM confirm the extensive interpretation of IRL and IHRL as regards the provision of international protection to victims of human trafficking. However, smuggled and trafficked migrants who do not qualify for international protection may still be held liable for their breach of migration policies.

3.1.3 'Environmental refugees'

The GCM and GCR were expected to deal with one of the most important recent development in international migration, i.e. migration arising from natural disasters, environmental degradation and the adverse effects of climate change. It was observed above, in fact, that currently there is no inter-governmentally agreed document dealing with this issue. Furthermore, IHRL hardly fills the gap with only the CRPD mentioning a duty of State to protect in the event of disasters in Art. 11, but on whose interpretation the CRPD Committee has not yet pronounced.

It was thoroughly noticed that the Compacts do not intend to create new obligations on States; yet, the hope was that they could provide an extensive interpretation of existing norms that could recognize these natural factors as possible causes of migration or refugee flows – on the basis of the inability of the country of origin to protect its own citizens in these events – and, consequently, extend protection to those compelled to leave their country of origin for such reason.

However, if protection is considered, the answer given by the Compacts is rather disappointing in that they do not recognize explicitly this category of migrants. They are

[458] UNGA, *Agenda items 14 and 119 (continued)*, op. cit.

not even mentioned among the persons having specific needs or facing vulnerabilities. Yet, both the GCR and the GCM present innovative, if still cautious, elements.

With regards to the GCR, it was already noted that it recognizes natural disasters, environmental degradation and the adverse effects of climate change as factors interacting with the root causes of refugee flows, while not root causes in themselves. However, what is more significant is the acknowledgement that there might be persons forcibly displaced by natural disasters, constituting a protection and humanitarian challenge.[459] This assertion is followed by the proposal of considering temporary and humanitarian stay permits for those who cannot be repatriated because of the conditions in the country of origin as a result of such disasters.

Previous drafts of the text used a stronger language as compared to the conditionality of the one used in the final text on this issue;[460] however, States strongly reacted to it during the consultation process because they suggested that UNHCR was attempting to broadening the scope of its mandate.

For the GCR does not affirm the existence of such a category as "climate/environmental refugees", the issue has been better dealt with in the GCM. The latter indeed devotes a section of Objective 2 to the minimization of drivers of irregular migration relating to natural disasters, environmental degradation and the adverse effects of climate change. It is significant to note that previous versions of the text reproduced the same actions without formally separating them from the other actions set out under Objective 2. The choice to neatly distinguish these drivers from all the other underlines the relevance the international community assigns to the issue.

Specifically, States recognized that these factors may have implications on migration and committed to prioritize adaptation strategies in countries of origin.[461] In addition, the GCM calls States to ensure that persons affected by sudden-onset and slow-onset natural disasters "have access to humanitarian assistance that meets their essential needs with

[459] GCR, para 63.
[460] The Zero Draft (para 47) and Draft 1 (para 55) did not present the wording "where appropriate" or other conditional language as introduced from Draft 2, para 67.
[461] GCM, Objective 2, para 18(i).

full respect for their rights wherever they are".[462]

Furthermore, the GCM also refers to the possibility of evacuation planning to be developed in cooperation with neighbouring countries and encourages States to take into consideration the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change and the Platform on Disaster Displacement.[463]

In addition, the GCM explicitly relates to the possibility to:

> Develop or build on existing national and regional practices for admission and stay of appropriate duration based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin, due to sudden-onset natural disasters and other precarious situations, such as by providing humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible.[464]

Therefore, in the case of slow-onset natural disasters it is assumed that return and adaptation are always possible, even if not immediate. This contrast with the encouragement to States to devise planned relocation and visa options to those forced to migrate due to slow-onset natural disasters, the adverse effects of climate change and environmental degradation "in cases *where* adaptation in or return to their country of origin is not possible".[465] The use of the adverb "where", in fact, signals a much more durable timeframe and, therefore, can be interpreted as leading to permanent stay.

The language has been softened since the Zero Draft in this respect. Indeed, the latter explicitly envisaged the possibility to devise also permanent protection and reception schemes in cases where return was not possible.[466]

The GCM is, therefore, the result of States' concerns relating to the creation of new obligations. However, in this it is short-sighted because it does not take into account situations such as that of the Small Developing Island States, which are expected to

[462] *Ibidem*, Objective 2, para 18(k).
[463] *Ibidem*, Objective 2, para 18(l).
[464] *Ibidem*, Objective 5, para 21(g).
[465] *Ibidem*, Objective 5, para 21(h), emphasis added.
[466] GCM Zero Draft, para 19(f).

disappear by 2050 and whose population presumably will need to be permanently relocated in other countries. What is more, these persons may arguably fall under the category of migrants who cannot be returned to their country of origin because of the high risk of incurring in irreparable harm, prohibition stated in the commitment made under Objective 21.[467]

This notwithstanding, the representative of Fiji, speaking in the name of the Small Developing Islands States, declared their overall happiness with the consideration given to their problem in the GCM. In particular, he hailed that "[t]he compact marks a much-needed shift in perspectives, as the international community begins to acknowledge the interlinkages between the effects of climate change and human rights, including the right to safety, health, livelihoods and food security."[468]

In summary, both Compacts define situations arising from natural disasters, environmental degradation and climate change as *humanitarian* challenges, recognizing that persons affected may need assistance. Moreover, both promote the provision of international protection, albeit temporarily and with recommendatory tones, to these categories of persons on the move.

The disappointment for the light approach adopted in the GCR is balanced by the bolder, if still weak, stance used in the GCM.

Given the reluctance the international community has always manifested in addressing the reality of disasters-induced displacement, the Compacts can be said to have achieved a historic result in that through them the great majority of UN MS have formally recognized a cause-effect relation between international migration and natural disasters, environmental degradation and climate change and proposed solutions to address the related challenges.

However, the statements delivered at the UNGA at the moment of GCM's endorsement revealed States' unreadiness to modify national visa systems or international protection possibilities to include these new categories of migrants in

[467] W. KÄLIN, "The Global Compact on Migration: A Ray of Hope for Disasters-Displaced Persons." *International Journal of Refugee Law*, 2018. doi: 10.1093/ijrl/eey047, p. 3.
[468] Statement by the Representative of Fiji, UNGA, *Agenda items 14 and 119 (continued)*, op. cit.

countries and regions that do not have this option yet.

3.2 INTERNALLY DISPLACED PERSONS

Another focal point of the expectations regarding the Compacts, and particularly on the GCR, was the issue of IDPs. However, the text barely mentions internal displacement in order to accommodate the concerns of States on interference with national sovereignty and the creation of additional burdens and obligations.

In light of what has been observed, the omission of IDPs considerations in the GCR and GCM is unsurprising. States argued that the Compacts have distinct and specific mandates that shall be respected, to the extent that even the complementarity of the two texts raised concerns and was indicated among the reasons to vote against the GCM.

In fact, during the consultations leading to the GCR, some States held that since the latter is specifically meant to address refugee issues, IDPs and migrants should deserve no mention. Whereas, the GCM has its focus on cross-border migration and, as a result, does not include any reference to IDPs.

On the other hand, Türk has often remarked that the GCR has a practical and operational focus, that has to respond to the reality on the ground and to complement the responses to other migration movements and contexts.[469] The GCR recognizes, in fact, that there may be other situations, including of internal displacement, that pose challenges to countries affected, who may seek the support of the international community.[470]

Host countries, though, advocated for the recognition of the existing correlation between refugee movements and internal displacement, affirming that IDPs could easily become part of refugee or mixed migration flows and that their needs shall be addressed. As a result, the GCR encourages States to pay due consideration to IDPs in early warning and emergency response mechanisms, as well as in DRR plans.[471]

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[469] TÜRK, *Opening remarks to the fourth formal consultation*, op. cit.; TÜRK, *Closing remarks to the sixth formal consultation*, op. cit.
[470] GCR, para 12.
[471] *Ibidem*, para 53.

The reverse is also true: returned refugees may become IDPs. Therefore, the GCR acknowledges that States may seek technical guidance to activate sustainable reintegration programmes and prevent further displacement upon return.[472]

However, it is most deceitful that the GCR lacks referral to the 1998 Guidelines on the Protection of IDPs. Notably, though, no State mentioned the IDPs – weak – referral when called to justify their vote during the UNGA session.

It is important to note, however, that for how much the GCR and GCM fail to address in depth the needs of those internally displaced, they are guided by HR and people-centred approaches, as well as by the paramount principle of protection. Their complementarity in identifying and addressing the drivers of displacement, as well as in fostering cooperation among humanitarian, development, peace and diplomatic actors and the specific reference to the 2030 Agenda and its leave no one behind principle are meant to ensure that forced movement in all its forms will be curbed and the needs of otherwise affected people addressed.

Furthermore, while they have both clear and specific scopes as set out in their titles, the Global Compacts are based in the NYD, which called for the application of the provisions contained therein to different legal contexts which may require similar actions, since they are practical and not normative in scope. Moreover, it stated that "[t]he needs of refugees, internally displaced persons and migrants are explicitly recognized"[473] and noted "the need for reflection on effective strategies to ensure adequate protection and assistance for internally displaced persons and to prevent and reduce such displacement."[474]

Therefore, if the Global Compacts are considered jointly with the NYD, they do succeed in bringing to the fore in cross-border displacement dialogues a matter that has mostly been understood as one of strictly internal affair.

[472] *Ibidem*, para 89.
[473] NYD, para 16.
[474] *Ibidem*, para 20.

3.3 MIXED MOVEMENTS

Notwithstanding the fact that the NYD was adopted as a response to large movements of refugees and migrants, neither the GCR nor GCM provide with measures or guidance on how to deal with mixed migration movements.[475] This choice may be attributed to States reiterated concern that the distinction between the two categories of migrants and refugees could be blurred. Actually, the alleged lack of a clear distinction between these two legal categories of persons on the move has constituted the excuse many States used to justify their non-adoption of either one or both Compacts.

In fact, an obligation to provide assistance and protection to all those in need, regardless of their migration status, could be deduced by the premise underpinning both Compacts that refugees and migrants may face common challenges and vulnerabilities. Such an interpretation is in line with IHRL but in stark contrast with the principle of sovereignty.

This notwithstanding, it was observed above that both the GCR and the GCM strongly insisted that they are they are governed by different legal frameworks and that only refugees are beneficiaries of the specific rights enshrined in IRL.[476]

To achieve consensus, the GCR final text only indirectly refers to mixed migration in its para 12, which talks about "large movements involving both refugees and other on the move" and calls for the avoidance of any protection gap.[477]

If, instead, the GCM does explicitly mentions mixed migration, it fails to provide a definition of what they are, nor does it go further than the GCR. Indeed, mixed migrations are only referred to when calling for reducing migrants' vulnerabilities (Objective 7, para 23), as well as when encouraging States to ensure that the provision of information on rights and obligations under national laws and procedures, including on regular migration possibilities, legal stay, international protection, and return and reintegration, are promptly and effectively provided.[478]

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[475] NEWLAND, "An Unlikely Achievement," op. cit., p. 3.
[476] GCM, para 4. The GCR in para 11 says that the PoA is meant to facilitate the application of the CRRF in support of refugees and host countries. It does not make any reference to migrants.
[477] GCR, paras 61 and 63.
[478] GCM, Objective 12, para 29(e).

Undoubtedly, the strong emphasis put on the commitment to fulfil the HR and fundamental freedoms of all human beings regardless of migratory status and the reference to the 2030 Agenda which is premised on the principle of leaving no one behind should result in a holistic and complementary implementation of the Compacts also in the context of mixed migrations.

As noted above, the GCM does not exclusively refer to the facilitation of safe, orderly and regular migration but also seeks to respond to the vulnerabilities and the challenges faced by irregular migrants. For instance, both Compacts ensure that access to basic services and assistance shall be granted to all persons in need, regardless of their migration status. Besides, the GCM refers to the GMG's Principles and Guidelines, which are meant to provide advice to States also in large or mixed movements.[479]

Therefore, despite the missed opportunity to explicitly address one of the most pressing issues of the migratory phenomenon to date, the Compacts could still afford some positive results through their complementary implementation.

The failure to tackle the issue comprehensively risks to negatively impact their operationalization on the ground, though. It was thoroughly noted that States have reiterated several times during the negotiations and adoption phases their sovereign right to determine who can entry their country. Considered jointly with the lack of explicit reference to the prohibition of rejection at the frontiers, that would have been in line with the principle of non-refoulement as interpreted in IRL and IHRL, this could result in the continuance of restrictive and non-HR compliant border policies, despite the abundant reiteration of the commitment to guarantee HR protection and fulfilment. Thus, it would prevent persons who could legitimately claim asylum from exercising their fundamental right and be pushed back at the frontiers of a country where they may face inhuman or degrading treatment or punishment, torture, threats to life or other serious harm.

3.4 PROTRACTED REFUGEE SITUATIONS

The GCR was expected to deal with another issue of major concern to date, i.e. PRS. It was

[479] GMG, *Principles and Guidelines*, op. cit., p. 9.

observed above that these presently constitute most of refugee situations and that solutions to the crisis that generated them are not looming. However, this fact is not sufficiently underlined in the GCR, which merely recognizes their existence and does not devote any specific section to the challenges and needs of protracted refugee populations. Therefore, in order to understand if and how the GCR will impact on PRS, it is necessary to consider the text in its entirety.

First, the GCR restates the need for the operationalization of the humanitarian-development nexus, which envisages refugee mainstreaming in national development policies and plans.[480] For refugees in protracted situations this point is particularly important because it aims at providing them with the tools and opportunities to become self-reliant and positively contribute to their host societies. This could boost integration and advance the dismantling of xenophobic and negative narratives on refugees and migrants.

Second, the GCR encourages States to increase the availability and possibilities of solutions. Regrettably, it does not address them as *durable* solutions. For refugees in PRS, this could make a relevant difference in their lives, though.

The solutions proposed in the GCR vary from voluntary repatriation, to resettlement and local solutions.

Voluntary repatriation, although defined the preferred option for refugees, is not a viable option in the case of PRS. In order to make it available, the GCR envisions the joint effort of the international community to support countries of origin in creating the conditions necessary for sustainable and durable return.[481]

Where there is no possibility of voluntary repatriation, resettlement may be regarded as the best solution for refugees in protracted situations and host communities alike. However, the GCR declines it in a light approach and does not push for a significant increase in the use of this tool. It is remarkable, however, that it calls for its strategic endorsement, for instance through the allocation of places for resettlement to situations

[480] GCR, para 32.
[481] *Ibidem*, para 88.

identified as priority by UNHCR, including PRS.[482]

Resettlement is envisaged to be promoted through a UNHCR's three-years strategy, which will also encompass complementary pathways for admission.[483] These could include also grant or scholarships and student visas and labour mobility opportunities for refugees.[484]

For most refugees in protracted situations the most relevant solution is constituted by local integration, which, however, remains a sovereign decision and an option to be exercised by States on the basis of their obligations under international law.[485] This option shall not add burdens on host countries; rather, it shall be supported by the international community through the sharing of resources and expertise. Specifically, strategic integration plans should be elaborated taking into account labour market assessments and skills profiles and backed by investments in areas where refugees will settle.[486] Moreover, States committed to explore regional frameworks that could complement those existing at national level.[487]

Naturalization is indicated as a good practice in this field, even if it is stated that it should be considered without prejudice to the situation of middle-income and developing countries hosting large numbers of refugees.[488] Remarkably, the GCR does not refer to permanent legal stay among the options envisaged to foster local integration; however, it could have been an important solution for those refugees living in protracted situations and staying in countries where naturalization is not possible. Rather, the GCR prefers to use the term *"durable* legal stay",[489] which retain a temporary connotation, despite it being longer than the possibility of interim legal stay proposed among other local solutions.[490]

Even if local solutions and integration are referred to carefully, it is significant that

[482] *Ibidem*, para 92.
[483] *Ibidem*, para 95.
[484] *Ibidem*.
[485] *Ibidem*, para 97.
[486] *Ibidem*, para 99.
[487] *Ibidem*.
[488] *Ibidem*, para 97.
[489] *Ibidem*, para 99.
[490] *Ibidem*, para 100.

they are recognized as good practices that can benefit both refugees and host communities. Such solutions become crucial when the refugee situation becomes particularly protracted and refugees may have little if no prospect of return to their home countries. On the other hand, States are reluctant to resort to these local durable solutions since they are concerned that refugee status would be perceived as a mode of immigration and would thus become a push factor for irregular migration.

Third and fundamental for the success of the measures proposed throughout the GCR is the elimination of xenophobia, intolerance and racism and an effort towards inclusion, which is a goal common to both Compacts. In fact, this issue is of particular significance for migrants too, to the extent that it constitutes the content of GCM's Objective 17.

In summary, local solutions are those mostly referred to throughout the text. The inclusion of refugees in national development plans to devise a long-term strategy and the two paragraphs specifically dealing with local solutions as compared to the only one truly cooperative measure, i.e. resettlement, risk to make countries already hosting large numbers of refugees continue to offer the lion's share of refugees' assistance and protection.[491]

[491] HATHAWAY, "The Global Cop-Out on Refugees," p. 8.

CONCLUSION

The aim of this thesis was to assess the capability of the Global Compacts to address effectively the current major humanitarian and protection challenges and the gaps existing in the international protection regime despite their non-binding nature.

I demonstrated how the Compacts from a normative point of view do not provide with a satisfactory answer to the questions initially made. Particularly, the GCR is disappointing as it was expected that it would encompass all the most controversial issues, specifically with regards to the so-called "environmental refugees". The GCR indeed fails to institutionalize this category. Moreover, it does not confirm the extended meaning of the term "persecution" as interpreted by the Treaty Bodies and the same UNHCR, nor does it tackle the internal displacement, despite it recognizes the link existing between IDPs and refugees. Finally, the GCR does not specifically address the challenges originating from PRS and mixed migrations.

In contrast, the GCM has been praised by scholars for its mere existence given its unicity in international migration law. However, it gained less support by the international community and could thus hamper the efficacy of the Global Compacts in their complementary action in order to avoid protection gaps.

Despite the unsatisfactory normative answer, the Global Compacts pave the way for a new operational approach in the international governance of migration and refugee flows based on past successful practices and on the institutionalization of mechanisms for follow-up and review, which would ensure compliance with the commitments made.

Specifically, I noted the emphasis that both the GCR and GCM put on the need for gender, age, disability and diversity mainstreaming throughout the whole migration and asylum processes. With regards to victims of smuggling and human trafficking, the Global Compacts succeed in advancing their need for special protection and assistance and envisage the provision of international protection on either temporary or permanent

basis on humanitarian ground when return may endanger their lives.

I also underlined how forced displacement caused by natural disasters, environmental degradation and the adverse effects of climate change is anyway treated as a major humanitarian and protection challenge to address and for which measures need to be developed. The GCR suggests temporary protection or humanitarian stay arrangements as a viable solution, whereas the GCM complements it with a call for relocation planning and new visa options to be provided where conditions in the country of origin are not conducive to return.

Furthermore, the thesis stressed the significance of a complementary implementation of the Global Compacts in order to ensure that the challenges posed by mixed movements of refugees and migrants are adequately addressed.

Lastly, I noted how the GCR, through the enhancement of the humanitarian-development nexus and the affirmation of the need to broaden the availability and possibilities for solutions, either in the host country or in third countries, can bring relief to persons to whom return is precluded by the perpetuation, in the country of origin, of the conditions that triggered their displacement.

Therefore, in principle, the Global Compacts do have the potential to improve the efficacy and the quality of the responses, placing persons at their core, while respecting HR and restating existing standards and obligation.

Yet, from an operational point of view, their impact is more difficult to assess today, and doubts still remain on their concrete contribution in the international protection regime. Despite the pragmatic and technical nature of the commitments made and the establishment of several mechanisms for follow-up and review, the Global Compacts still retain a non-binding nature, which can compromise their success. Moreover, the failure of the GCM to gain the same consensus the GCR had can jeopardize their complementary application, which, however, is necessary to effectively respond to the challenges States currently face.

An element that could positively impact on States' implementation of the pledges made is the multi-stakeholder approach which, besides characterizing the process of drafting and adoption of the Global Compacts, will also define those of follow-up and

review. This could indeed prove beneficial to put pressure on States. Furthermore, with regards to the GCR, the development of indicators could be an effective manner to assess compliance with the commitments made and advocate for their achievement in the case of low performance by States. Moreover, the roll-out of the CRRF and the sharing of its results may encourage States to engage further in the operationalization of the Global Compacts.

The first IRF, which will take place this December, will be a first occasion in which to test the willingness and readiness of the international community as a whole to translate into concrete actions the pledges they have made in the GCR. And, hopefully, its success will increase the likelihood of GCM implementation too.

The GCM potential, however, should be explored more. So far, scholars have mainly focused on some of the commitments made therein but have barely tried to assess what could be the impact of an overall operationalization of the GCM on international migration management. Such analysis would be useful to galvanize States' support and foster genuine solidarity and international cooperation in a controversial issue as migration is.

Future research, based on the data gathered by the first years of implementation of the GCR and GCM, will surely better shed light on their efficacy, on the shortcomings they might still have, as well as on their connection with and their impact on the normative framework. In particular, it would be interesting to explore whether some of the provisions contained therein might acquire the status of international customary law and/or pave the way to new international treaties despite some States opposed to these possibilities at the moment of voting for the adoption of the two documents.

Nevertheless, since for customary international law to originate a sufficient number of States is needed, the fact that most of them accepted the Global Compacts without opposing to the development of new norms of binding character out of them, I would not entirely exclude that some provisions may actually acquire the status of customary international law. Moreover, despite the thesis explained that the likelihood that these documents lead to the adoption of new international conventions is low, at the regional and national level they could still be the blueprint for new binding instruments.

To conclude, we will still have to wait to understand the real impact of these documents. Despite my experience in Geneva has surely influenced the opinion I have on the Global Compacts, the research I conducted confirms that, notwithstanding their modest tone and scope, they have the merit of having engaged into constructive discussions on topic of high political sensitivity all the 193 UN MS, alongside with civil society, non-governmental and international organizations, as well as financial institutions, UN Agencies and other relevant stakeholders. Moreover, they succeeded in obtaining the support of more than 150 States, which is a result to be praised, especially in this particular political juncture where nationalist discourses and xenophobic attitudes are spreading fast.

Therefore, I believe that the Global Compacts shall be recognized as milestones in their respective fields, reaffirming the existing obligations and standards, and enshrining the political willingness of States to jointly tackle protection challenges in a spirit of cooperation and in the full respect of human rights, towards making migration work for all.

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