

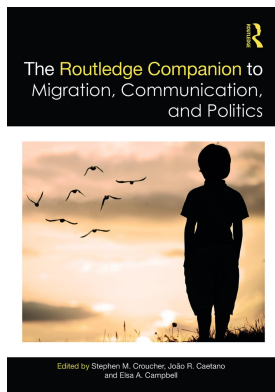
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2

CURRENT CHALLENGES FACING THE INTERNATIONAL PROTECTION FOR REFUGEES AND OTHER MIGRANTS

The role of and developments resulting
from the United Nations 2016 Summit

*Liliana Lyra Jubilut, André de Lima Madureira &
Daniel Bertolucci Torres*

Humankind is “facing the biggest refugee and displacement crisis of our time” (UNHCR, 2016a, p. 5). From 1996 to 2012, the number of forced displaced persons around the world was maintained at a range of between 40 and 50 million; however, mostly driven by the Syrian conflict, since 2013 onwards the figures have consistently increased (ibid, p. 6). By the end of 2017 there were 25.4 million refugees, 3.1 million asylum seekers, and 40 million internally-displaced persons (IDPs) (UNHCR, 2018). The number of “voluntary” migrants has also been increasing; 258 million persons were living abroad in 2017 (United Nations, 2017).

Even if a “human-rights-oriented approach has progressively informed the state-sovereignty focused perspective over the years following the atrocities of the Second World War” (Barbour, 2008, p. 3) and a human rights-oriented approach has been tied up with the global political agenda, international commitments towards the protection of migrants have either been lacking and/or biased by individual states’ own agendas, given that “international law has been dominated by a ‘state-sovereignty-oriented approach’, where states are the primary subjects of the international legal order and are bound only through consent” (ibid). One of the main gaps in the governance of migration and the protection of migrants is still the lack of international norms on the topic.

To try to make progress in closing this gap, the United Nations Summit for Refugees and Migrants (UN Summit) took place on September 19, 2016 and aimed to engage the

international community in “changing gear”¹ in relation to the protection of forced displaced persons (UNHCR, 2016b) and other migrants. Focusing on addressing large movements of people, it resulted in the New York Declaration and the commitment to adopt two global compacts – one led by the United Nations High Commissioner for Refugees (UNHCR) on refugees and another on migrants led by states – by 2018.² The UN Summit was the first initiative of this type and in a world of increased migration and closure of borders it is relevant to assess its outcomes to establish what has already been secured and what needs to be addressed before the 2018 deadline in terms of the normative aspects of the governance of migration. Thus, this chapter aims to analyze, mainly through dialog with current events and document analysis, the normative developments resulting from the UN Summit and the NY Declaration and to present the current and prospective international landscape of migrants’ and refugees’ rights and protection.

Current challenges facing the protection for refugees and migrants

To be able to assess the developments resulting from the NY Declaration, it is necessary to begin by describing the current scenario of challenges in global migration to consider if the document has tackled and is able to deal with the real landscape of obstacles faced by refugees and other migrants. Nowadays, the governance of migration faces several challenges from a normative standpoint, among which the following five need to be highlighted.

The first challenge relates to the existing (or non-existing) regimes of protection of migrants. To date, of all migrants only refugees can count on an international regime of protection.^{3,4} IDPs have international norms on their behalf but those are either principles,⁵ not hard international commitments, or regional frameworks with limited scope.⁶ Migrant workers rely on an international treaty,⁷ but one that is poorly ratified.⁸ In this sense, being a refugee may be the only way to ascertain protection, if you are a migrant. This is complicated, given that the definition of refugee enshrined in the 1951 Convention Relating to the Status of Refugees (the 1951 Refugee Convention) is both limiting and deemed outdated. In regard to the former, only a person with a well-founded fear of being persecuted as a result of his or her nationality, race, religion, political opinion, or membership of a social group that is outside his or her country of origin and both needs and deserves international protection (i.e., is subjected to neither cessation nor exclusion clauses)⁹ can be recognized as a refugee. In relation to the latter, the 1951 Refugee Convention was influenced by the post-Second World War historical context (Koser, 2015). As a result, the definition seems to be incapable of dealing with other current causes of forced migration, such as environmental displacement,¹⁰ other humanitarian causes, or voluntary migration.

Legally speaking, the universal definition of refugee features two main shortcomings that hinder the protection of those forced migrants. First, it lacks a better integration with the three dimensions of human rights (Jubilut & Madureira, 2014), considering only violations of civil and political rights for the purpose of refugee status determination, which makes the protection of, for instance, economic migrants and environmental displaced persons difficult. Second, the above-mentioned five grounds of persecution listed by the 1951 Refugee Convention restrict its scope (ibid). As only individuals who have a well-founded fear of persecution on account of race, nationality, religion, political opinion, and membership of a particular social group can be recognized as refugees, persons who, for instance, flee settings of gross and generalized violations of human rights or civil unrest often need to be protected either by complementary forms of protection¹¹ or regional responses, such as those encountered in Africa¹² and Latin America.¹³

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A second normative challenge in the governance of migration, related to the first one, exists in the labeling of migrants. As only refugees are legally entitled to protection, labeling migrants to separate them from refugees has become a common practice. If, on the one hand, this practice can assist in determining specific causes of displacement and need of protection, on the other hand, it can also undermine even refugees' access to international protection. The purpose of labeling migrants has changed in recent decades (Zetter, 2007). If, in the late 1980s, non-governmental organizations (NGOs) were labeling refugees for humanitarian purposes, states in the global north are currently responsible for dividing the label "refugee" to manage new globalized flows (ibid). By creating labels such as "illegal migrants," "economic refugees," "temporary protection" and so on, states obscure the label "refugee" rather than clarify it (ibid, pp. 188–189). In doing so, they create a scenario in which claiming asylum becomes a challenge even for those who fall under the 1951 Refugee Convention definition (ibid). Moreover, in a scenario involving mixed migration flows and in which being considered a refugee may be, as aforementioned, the only avenue for protection, these might overburden the refugees' regime and "underplay the status of 'refugees' in international law" (Gilbert, 2016) or "minimize the refugee character" (Durieux, 2017) (thus, jeopardizing refugees' protection) and, at the same time, reinforce the continuous lack of protection for other migrants (Ceriani, 2016), in a lose–lose situation.¹⁴ Mixing refugees and other migrants in the governance of migration can suit states' agendas (ibid) and reinforce the need for global governance of all aspects of migration, but the challenges in doing so need to be dealt with and particularities respected so as to avoid negative consequences in the protection of human beings in situations of displacement.

A third relevant normative challenge is the existence of obstacles to migrants in accessing international protection. States are closing their borders, restricting access to refuge protection, and criminalizing both the act of claiming asylum and the act of migrating. They are also in some cases violating their obligations under international law – both in terms of international refugee law (with the norm of *non-refoulement*¹⁵) and international human rights law.¹⁶ An outcome of this scenario is the current lack of secure channels for refugees and other migrants to access safe territories and, once inside them, to access protection in safe places. This, in turn, fuels the market for smuggling migrants¹⁷ and makes refugees and other migrants risk their lives on dangerous routes and pushes persons into hazardous situations.¹⁸

A fourth challenge in the governance of migration from a legal standpoint also refers to international human rights law and relates to securing specific protection in relation to specific vulnerabilities that may exist among migrants. International migrants may be seen as vulnerable in light of their lack of international protection and the constant violations of their (human) rights. Also, migration in itself can exacerbate this situation: "Migration in the context of globalization brings opportunities but also important challenges of vulnerability and discrimination" (Office of the High Commissioner for Human Rights (OHCHR), 2011, p. 8). Moreover, in some cases vulnerabilities can be present in more than one way. The elderly, women, persons with disabilities, LGBTI persons, persons with health (physical or mental) issues, and children are, for example, more vulnerable in the context of migration and this needs to be taken into consideration in the creation of norms to protect them.¹⁹

A fifth normative challenge in the governance of migration relates to finding durable solutions for migrants and refugees (Madureira & Jubilut, 2016). This challenge encompasses at least three topics: (1) international cooperation, (2) the securitization of migration, and (3) finding durable solutions. In terms of international cooperation, one sees that there is a crisis in this regard both in relation to migration and within the refugee regime.²⁰ According to Türk and Garlick (2016):

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There is a pressing need in today's context to reinforce international cooperation in order for protection, assistance, and solutions, in ways that reflect States' commitments to the principles of solidarity and responsibility-sharing. Predictability and equity are also intrinsic features of any functioning international cooperative framework...

(pp. 657–658)

Also, there is an urgent need to focus on the “centrality of [the] 1951 Geneva Convention and its 1957 Protocol,” on the 2030 sustainable agenda paradigm and, most importantly, migration governance must be built on the idea of a global partnership and shared responsibility (EEAS, 2016a). However, this does not seem to be the case, given that, as mentioned, the only international treaty on migrants is poorly ratified; also, responsibility for refugee protection is very poorly balanced due to the fact that 85 percent of refugees are being hosted in developing countries (UNHCR, 2018) and “[o]ver four out of every five refugees [are] located in a neighbouring country to the one from which they fled” (ibid). This highlights the fact that currently neither burden-sharing nor responsibility-sharing mechanisms are being adequately implemented. In terms of the securitization of migration, countries have been adopting restrictive measures and criminalizing actions against migrants, as mentioned earlier. Moreover, following 9/11 there has been a notable increase in the relating of themes such as terrorism, international security, and refugees (Gibney, 2002, p. 40). Additionally, countries often ignore “the reality of push and pull factors” and end up using repressive policies, notably in terms of the tightening of border controls and of fighting undocumented frontier crossing by using detention and extraterritorial border control (Crépeau, 2017b).

Lastly, in terms of access to (human) rights and effective protection after migration, translated in durable solutions, there are complex challenges. Integration of migrants remains a key topic and a multifaceted task. In particular for refugees there is a paradox: although they are the single group of migrants with a specific protection regime, data points out that this advantage is not translated into durable solutions even for them. By the end of 2016, approximately two-thirds of all refugees (i.e., 11.6 million people) were in protracted situations (UNHCR, 2017, p. 22); 4.1 million refugees had been in these situations for more than 20 years (ibid), thus suffering human rights abuses (Bakewell, 2014, p. 136), with no prospect of an end to their refugee status. Moreover, many refugees still cannot benefit from any of the three existing durable solutions used by UNHCR (integration, resettlement, or voluntary repatriation). All these normative challenges in the governance of migration are intertwined and need to be addressed in order for refugees and other migrants to actually have international protection. Thus, it is relevant to describe what the NY Declaration of the UN Summit put forward in this regard.

Background, legal perspective, and legal structure of the 2016 UN Summit and the NY Declaration

Efforts have been made in recent years in respect of improving international governance of migration (OHCHR, 2011). In 2005, Kofi Annan, then UN Secretary-General, was unable to bring states together in an international conference to discuss the issue of migration (Guild & Grant, 2017). Thus, his solution was to invite a Global Commission on International Migration outside the UN (ibid). In 2006, the UN's General Assembly held its first High-Level Panel Meeting on Migration and, as a result, in 2007 an inter-governmental Global Forum on Migration and Development²¹ was established outside the UN, and the Global

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Migration Group was developed to gather together migration-related UN entities to exchange information and knowledge on the matter (ibid). Following these efforts, Annan's successor, Ban Ki-moon, continued to place the challenges of the protection of refugees and other migrants on the international agenda. In 2013, the UN convened the High-Level Dialogue on Migration and Development, which resulted in a declaration on the part of the General Assembly²² (Martin, 2015).

In April 2016, Ban Ki-moon presented his report – “In safety and dignity: Addressing large movements of refugees and migrants”²³ – in which, and among several relevant points, he highlighted the necessity of creating international plans of action based both on burden-sharing and on the dignity of refugees and other migrants (United Nations General Assembly, 2016a). For him, “if one lesson can be drawn from the past few years, it is that individual countries cannot solve these issues on their own. International cooperation and action to address large movements of refugees and other migrants must be strengthened” (p. 2). He stated that, even though the international refugee and other migrant crisis is serious, solutions can be found once Member States “act together and share responsibility more equitably” (p. 2) and that the consequences of inaction can be a cause of “greater loss of life and heightened tensions among Member States and within communities” (p. 3).

The report stressed that, although humanitarian actions are needed, they are “not a viable long-term response to large movements of people” (p. 10), and that efforts are “imperative in order to include both refugees and migrants who stay in national and local development plans to ensure their livelihood opportunities while strengthening the resilience of and development opportunities for host communities” (p. 10). Following this report, in September of the same year state delegates gathered in New York to attend the UN summit to address the refugee and migrant issue, on which occasion the NY Declaration²⁴ was adopted.

Like the Secretary-General's report, the NY Declaration is an instrument of soft law, but one that has been adopted by the affirmative votes of states displaying the agreements that they accepted on the topic of protecting refugees and other migrants. The NY Declaration was adopted by the 193 states that are members of the UN (UNHCR, 2016c, p. 1), an impressive feat as the “global governance of international migration has been much more controversial than has been the case regarding most other transnational issues” (Martin, 2015, p. 64). This document will be guiding the global initiative on the topic of migration governance. In general, the document focuses on giving a global meaning to the phenomenon of large movements of refugees and other migrants, and tries to create a uniform and global response to the situation of both (even though the causes, labels, and normative architecture for refugees and other migrants are distinct). In paragraph 6, the NY Declaration explains that the definition of *large movements* takes into account “a number of considerations, including: the number of people arriving, the economic, social and geographical context, the capacity of a receiving State to respond, and the impact of a movement that is sudden or prolonged” (United Nations General Assembly, 2016b, p. 2, para. 6). The NY Declaration is divided into four sections and has two annexes. In its introduction, the text highlights that, to protect persons amidst large movements, which “may involve mixed flows of people, whether refugees or migrants, who move for different reasons but who may use similar routes” (p. 2, para. 6), it is necessary to fully face it as a “global phenomena that call for global approaches and global solutions” (p. 2, para. 7).

In addition, it recalls existing general documents that should guide the debate on the topic, such as the 2030 Agenda for Sustainable Development (pp. 1–4, paras. 4, 16, 17), the Charter of the United Nations, the Universal Declaration of Human Rights, and the core of international human rights treaties (p. 2, para. 7). It also evokes specific frameworks such as

the Sendai Framework for Disaster Risk Reduction 2015–2030, the Paris Agreement on Climate Change, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (p. 4, para. 19), and the Brazil Declaration and Plan of Action (p. 2, para. 7). The NY Declaration stresses the commitment to international law and highlights that agreed-upon commitments are taking “into account different national realities, capacities and levels of development and respecting national policies and priorities” (p. 5). The NY Declaration brings three types of commitment: (1) commitments to be applied to both refugees and migrants, (2) commitments towards migrants, and (3) commitments towards refugees.

The commitments of the NY Declaration

Commitments towards the protection of both refugees and migrants

The first main commitment brought by the NY Declaration concerning both refugees and migrants is the need to regulate migration from a “people-centered” perspective (United Nations General Assembly, 2016b, p. 5). Second, it highlights the obligation to offer adequate responses to vulnerable persons. Whether they are refugees or migrants, persons with special needs and vulnerabilities need to be subject to special approaches amidst large movements of persons and the development of global commitments to protect them. These include:

women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.

(p. 5, para. 23)

This approach can be said to be based on human rights as the protection of persons and of their specific needs is at its core. Implementing such an approach would call for a framework of migration governance based on international human rights law as a way of diminishing political and ideological national differences and approaches to human rights that are in place in the world today as well as strengthening commitment to protection based on agreed-upon and universal standards that have been set into law. International human rights law contains a set of core rights that cannot be violated and that are (from an international law perspective) consensually universal. These rights should constitute the minimum standards for the protection of migrants and refugees, both those that apply to all human beings and those for specific groups.

The NY Declaration continues to stress the need to protect vulnerable groups of persons from “discrimination and exploitation ... [and] sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery” (p. 6, para. 29). The health care needs of persons with HIV are also highlighted (p. 6). The need to apply a gender-specific approach to protecting women and girls is also present (p. 6). Concerning children, the NY Declaration stresses the need to “comply with our obligations under the Convention on the Rights of the Child” (pp. 6–7, para. 32) and emphasizes the need to give primary consideration to the “best interest of the child” (p. 7, para. 33), notably when addressing unaccompanied and separated children.

Another commitment concerning both refugees and migrants is the need to bring a sense of humanity to border control and to avoid the criminalization of the act of crossing borders. Although recognizing that “States are entitled to take measures to prevent irregular border

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crossings” (p. 5, para. 24), the NY Declaration takes note of the need to create alternatives based on dignity when it concerns “the human rights of all persons crossing, or seeking to cross, international borders” (p. 6, para. 24). However, and in apparent contrast to this approach, the NY Declaration also demonstrates some degree of tolerance to detention based on migratory reasons, once it affirms that states will be pursuing alternatives to detention but “will use it [detention] only as a measure of last resort” (p. 7, para. 33).

The NY Declaration’s concern regarding human trafficking is clear. Recalling that refugees and migrants in the context of large movements of persons are “at greater risk of being trafficked and of being subjected to forced labour” (p. 7, para. 35), the NY Declaration recommends the ratification and implementation of the United Nations Convention against Transnational Organized Crime and its two relevant protocols (p. 7, para. 34) and affirms states’ commitment to review national legislation on this matter as well as to implement the United Nations Global Plan of Action to Combat Trafficking in Persons (p. 7, para. 36). As a constant, the NY Declaration places emphasis on the need to avoid, and to criminalize, smuggling and human trafficking. However, it has been defended that the only way to actually reduce smuggling and unethical recruiting is to undercut the smugglers and exploitative recruiters by offering regular, safe, accessible, and affordable mobility solutions, in the form of visas or visa-free travel opportunities, with all the identity and security checks that efficient visa regimes can provide. In effect, one must take over the mobility market. Migrants do not want to be undocumented. They would rather pay a visa officer than a smuggler, rather arrive by plane than on a leaky boat, and rather work above the table than below it (Crépeau, 2017a). There is, thus, a need for expanding the possibilities of visas but in the NY Declaration the issue of new visas only appears in the section on commitments towards refugees (United Nations General Assembly, 2016b, p. 14). Commitments to work on the root causes of large movements of people, inclusive of forced displacement and protracted refugee situations, and adequate humanitarian financing to host countries and communities are also pointed out (p. 8). Actions on avoiding xenophobia and discrimination, access to social rights, justice, and language training are presented as measures to reduce marginalization and radicalization (p. 8). Finally, the need to collect data is established as a commitment to be taken seriously, “particularly by national authorities” (p. 8, para. 40).

Commitments towards the protection of migrants

On the commitments towards migrants, the NY Declaration repeatedly brings forward the need to consider the 2030 Agenda for Sustainable Development²⁵ as the basis for creating a world where migration is a choice and not a necessity (United Nations General Assembly, 2016b, p. 9, para. 43), placing emphasis on the need to strengthen the capacities of countries of origin (p. 9). It highlights that the act of migrating is a human right, as “everyone has the right to leave any country, including his or her own, and to return to his or her country” (p. 9, para. 42). In terms of normative architecture, on the one hand, states that adopted the NY Declaration declared that they “will consider reviewing [their] migration policies with a view to examining their possible unintended negative consequences” (p. 9, para. 45). On the other hand, the NY Declaration encourages the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (p. 10) and making the International Organization for Migration (IOM) the “global lead agency on migration” (p. 10, para. 49). It also encourages other bilateral, regional, and global initiatives that could help the implementation of the 2030 Agenda (p. 10) and briefly considers the return of migrants to their countries of origin or nationality (p. 11, para. 58).

Concerning migrants who were forced to move due to natural disaster, the NY Declaration refers to the need to improve states' participation in the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change resulting from the Nansen Initiative (p. 10). It also highlights the need to build cooperation among countries of origin, in transit and as destinations, to ensure that unauthorized migrants are able to return to their countries of origin, and to consider the principle of *non-refoulement* (p. 11). Furthermore, repeating a topic presented on the commitments to both refugees and migrants, the NY Declaration demonstrates concern for the protection of vulnerable groups such as children, especially unaccompanied and separated minors, as well as the need to create special forms of protection for women and girls (p. 11). This section finishes with the commitment to set up intergovernmental negotiation with the purpose of creating "a global compact for safe, orderly and regular migration at an intergovernmental conference to be held in 2018" (p. 12, para. 63), the groundwork for which is established in Annex II of the NY Declaration.²⁶ In this annex the NY Declaration provides directions on the content of a future compact on migration, requiring that it should "promote holistic approaches that take into account the causes and consequences of the phenomenon" and acknowledge "that poverty, underdevelopment, lack of opportunities, poor governance and environmental factors are among the drivers of migration" (p. 22). It also establishes that "an intergovernmental conference on international migration" is to take place in 2018 at which a global compact on migration "will be presented for adoption" (p. 23, para. 9).

Commitments towards the protection of refugees

Regarding the commitments towards refugees, the NY Declaration's first consideration is the need to work on the root causes of forced displacement (United Nations General Assembly, 2016b, p. 12). In terms of the existing legal structure, the NY Declaration encourages states that have not signed the international treaties on refugees to do so, and also requests that those states that have made reservations to them to withdraw such limitations (p. 12). The NY Declaration also points out that the international law framework relating to refugees should be strengthened (p. 12), while reaffirming the right of asylum and the principle of *non-refoulement* (p. 13), and highlighting the need for, and importance of, international cooperation and burden and responsibility sharing (p. 13) and the role of UNHCR in coordinating a comprehensive framework for refugees. All of these are relevant issues in a world where "[r]efugee movements have unfortunately become a politically toxic issue" (Crisp, 2017), and highlight the importance of a declaration that "[upholds] the basic principles of refugee protection and committed states to address refugee issues in a more cooperative and coordinated manner" (ibid).

The NY Declaration mentions the need to ensure fast procedures and easing of administrative barriers to process refugee status determination (United Nations General Assembly, 2016b, p. 13). A controversial provision in this regard, however, is that the "ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, protection elsewhere" (p. 13, para. 70). This is controversial insofar as the NY Declaration seems to be admitting the possibility that refugees cannot choose where they can deposit their asylum claim, which can be understood as an obstacle in the need to ensure burden-sharing and international cooperation. The section dedicated to commitments towards refugees also places emphasis on the need to create instruments for the effective protection of vulnerable persons in the context of large movements of persons. Besides pointing out the promotion of appropriate mechanisms to process the request for refugee status of children (p. 13), the NY Declaration

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recognizes statelessness as one of the causes of forced displacement and encourages states that have not yet committed to the two main treaties on statelessness (i.e., the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness) to consider doing so (p. 13).

In terms of durable solutions, the NY Declaration also stresses that refugee camps should be an exception (p. 13–14); that the international community should work on supporting countries that host large refugee populations (p. 14); and that states should work toward durable solutions, especially in response to protracted refugee situations (p. 14). Notably, concerning resettlement, the NY Declaration encourages countries to make use of resettlement and to considering doing so as early as possible (p. 14, paras. 77–78). The NY Declaration also briefly addresses the issue of complementary pathways for admission of migrants (p. 19, para. 9).²⁷

Regarding humanitarian aid, the NY Declaration reaffirms the already existing framework in terms of providing assistance in urgent situations and also supporting countries and communities affected by large movements of persons (p. 14). Educational rights, especially in the context of childhood, basic health rights, notably for women and girls, and labor rights, encouraging the opening of labor markets to refugees, are also emphasized (p. 15, paras. 81–84).

The last three paragraphs of this section focus on the need for coordinated action to protect refugees on the part of host countries and communities and other stakeholders, such as international, private, and local institutions, with the support of the United Nations and the help of civil society. Furthermore, there is recognition of the “gap between the needs of refugees and the available resources,” in light of which the NY Declaration encourages donors’ support by making “humanitarian financing more flexible and predictable” (p. 15, para. 86). It also welcomes efforts by the World Bank and other multilateral actors to make financing more effective. As is the case for migrants, the NY Declaration establishes the groundwork for a Global Compact on Refugees in 2018, which aims to create hard international commitments towards refugees. In its Annex I, the NY Declaration establishes that said compact should entail the following elements: (i) reception and admission of refugees; (ii) support for immediate and ongoing needs; (iii) support for host countries and communities; (iv) durable solutions; and (v) ways forward, with respect to the near future regarding the creation of a more comprehensive refugee response framework.

The NY Declaration in the face of the normative challenges

The NY Declaration is undoubtedly a positive step in the international protection of refugees and other migrants given that it is the first comprehensive document on the topic and that it sets forward a pathway for the adoption of legally binding documents in 2018. Furthermore, the NY Declaration clearly highlights important issues in the governance of migration and the protection of refugees and other migrants, such as emphasizing the already existing human rights regime and strengthening the need for states to ratify all related treaties.

In terms of the normative challenges presented above, the NY Declaration can be subject to mixed reviews or give “reasons for both disappointment and hope” (Papademetriou & Fratzke, 2016). On the one hand, the NY Declaration (i) explicitly mentions the need to consider the specific protection of vulnerable groups; (ii) establishes that refugees and other migrants “have the same universal rights and fundamental freedoms” (United Nations General Assembly, 2016b, p. 2), thus aiding in mitigating the protection concerns associated with “labeling migrants”; (iii) alludes to the need for protection of migrants who lack an international regime of protection (such as environmentally displaced persons) and the need to strengthen the existing structures of protection; and (iv) recalls the need to re-examine the

implementation of durable solutions. On the other hand, the proposed commitments of the document are not fully attached to any practical proposals for solutions to “people-centered” policies and regimes in situations of displacement, leaving the NY Declaration with a lack of implementation tools²⁸ in several areas and a feeling that the document’s rhetoric is far from the migrants’ reality (Howden, 2016).

Furthermore, and creating another set of implementation challenges, is the fact that even though the NY Declaration opts for combining the governance of refugees and other migrants in one document, albeit separating them once deemed needed, it does not define any of the categories that might impose difficulties in enhancing protection for both groups in a scenario of mixed migration flows. This search for “a common reaction to the ‘massification’ of a cross-border flow” might lead to “the contamination of the qualitative by the quantitative. And, in any event, a state enjoys a fair amount of discretion in deciding that, while the people concerned may be refugees, they are not ‘its’ refugees” (Durieux, 2017).

In addition to these issues relating to normative challenges, it is relevant to point out that, as the NY Declaration sets the tone for the Global Compacts, at least four trends might be of concern. All of these seem to stem from the deeply-rooted migration myth of opposing interests of the state and the needs of human beings, when, in fact, migration is a phenomenon that has individuals as its subjects and constituents (Jubilut & Lopes, 2017) and also benefits states (ibid, p. 53). It is true that there has been recognition of such a view, for instance the High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, Federica Mogherini, affirmed that solutions for migration should be centered on human beings and highlighted migration’s relevance to host societies and that Europeans “should understand that we need migration for our economies and for our welfare systems, with the current demographic trend we have to be sustainable.”²⁹ However, it appears that such points of view are not predominant within the NY Declaration even though they could guide a new (European and global) approach to migration and be present in the Global Compacts and that an adversarial position of states versus human beings is still behind migration governance leading to the four trends of concern in the NY Declaration.

The first trend relates to the rhetoric used by the NY Declaration, as it seems to paint a scenario that is not true to reality and at times is too idealistic. Recently, the world has seen severe violations of the human rights of refugees and other migrants, especially after 2015 following the “massive” arrivals in Europe, which were highlighted by the death of thousands of migrants in the Mediterranean Sea and the inhumane border control used by some countries in the form of pushbacks, detentions and relocations. These situations are not, however, expressly addressed by the NY Declaration, albeit that the emphasis of the document is on the need to “save lives” or to address the “moral and humanitarian” challenges in the governance of migration.³⁰

Moreover, even though the NY Declaration seems to bring elements of “people-centered” guidelines to responses to migration, most proposals seem to be focused on states’ concerns rather than on seeing the human side of migration. Examples in this regard are noted in paragraphs 24 and 33 of the NY Declaration (as described above), which respectively allow for a considerable degree of discretion on the issues of border control and detention, thus favoring a state-centric perspective rather than a human rights approach. In the sense of how much the actual global regime for the protection of migrants and refugees is contaminated by an evasive and reluctant state-view approach, “it is ironic that 50 years ago nations were able to see the broader picture, while some today seem unable or unwilling to think and act internationally in the face of challenge that requires international and cooperative

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responses” (Goodwin-Gill, 2017). Another trend of concern is that, as in many international documents, the NY Declaration seems to bring more promises and ideas than actual means to implement its principles and guidelines, which seem extremely relevant in the complex scenario of migration. The lack of implementation mechanisms as well as of binding international norms and obligations regarding the governance of migration is not only a current problem but also a concern for any future endeavors in this area.

Lastly, it seems that the NY Declaration prefers to emphasize the convincing of states that it is good for them to receive migrants, rather than to make a stronger case for the respect of human rights in migration and in migration governance. The NY Declaration highlights, for example, that receiving migrants would be a good way to implement the 2030 Agenda (United Nations General Assembly, 2016b, p. 9, para. 46) and tries to demonstrate how migration can be positive for the countries of reception (ibid). It seems, then, that the NY Declaration could have done more to dilute the opposition between states’ interests and human beings’ needs when addressing migration. This shortcoming should be avoided in the Global Compacts of 2018.

Conclusion

The governance of migration is currently a significant global challenge and the lack of strong normative structures makes it even more difficult. In trying to advance in creating ways to address this issue, the UN held the 2016 Summit and adopted the New York Declaration on Refugees and Migrants. The document is historical in its efforts to address large movements of persons and to pave the way for two Global Compacts – one on refugees and another on migrants. It has shortcomings, mainly in relation to its success in dealing with the perceived opposition between the interests of states and the need of human beings to migrate, which ought to be corrected following the adoption of the Global Compacts so that refugees and other migrants will have actual regimes of protection that are respected and implemented by states. However, the NY Declaration does make advances in terms of stating long fought after ideas in adding a human rights or “people-centered” perspective to migration. This is to be commended, as human beings are not only the subjects and regulators of migration but also the ones who actually create the phenomenon.

Notes

- 1 An expression used by Filippo Grandi at the opening of the UN 2016 Summit on Refugees and Migrants.
- 2 United Nations, main page of the New York Declaration (<http://refugeesmigrants.un.org/declaration>).
- 3 Encompassing the 1951 Convention relating to the Status of Refugees (www.refworld.org/docid/3be01b964.html), the 1967 Protocol relating to the Status of Refugees (www.refworld.org/docid/3ae6b3ae4.html) and UNHCR (www.unhcr.org).
- 4 Migrants can, however, count on the International Organization for Migration (www.iom.int).
- 5 See, for instance, the Guiding Principles on Internal Displacement. www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html.
- 6 See the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (also known as the Kampala Convention). www.unhcr.org/about-us/background/4ae9bede9/african-union-convention-protection-assistance-internally-displaced-persons.html.
- 7 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is available at: www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx.

- 8 As of May 29, 2017 the Convention has been subject to 51 ratifications and 15 states are party to it, with the vast majority being states from the Global South. <http://indicators.ohchr.org/>
- 9 Article 1 of the 1951 Refugee Convention.
- 10 In 2013, an estimated 22 million were environmentally displaced, according to UNHCR. www.unhcr.org/pages/49c3646c10a.html
- The most cited estimative figure for 2050 is 200 million environmental migrants (Laczko & Aghazarm, 2009, p. 5).
- 11 In legal terms, “complementary protection” describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework (McAdam, 2005, p. 4).
- 12 According to Article I (2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, a refugee is also any person compelled to leave his or her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his or her country of origin or nationality.
- 13 In accordance with the third conclusion of the 1984 Cartagena Declaration on Refugees, the term “refugee” should also apply to those persons who flee their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances that have seriously disturb public order.
- 14 “[.T]he categorical classification and separation between migrants and refugees or between economic migration and forced migration, together with other concepts, has led, on one hand, to a situation where the rights of migrants are increasingly being left unprotected. On the other hand, paradoxically, it brings the human right to asylum and one of the principle (sic) ways in which it is realised – refugee status – into question” (Ceriani, 2016, p. 99).
- 15 Initially established by Article 33 of the 1951 Refugee Convention, *non-refoulement* prevents the sending/return of a person to a place where his or her life, security and liberty might be at risk.
- 16 An example can be seen within the context of forcibly displaced children from Central America seeking international protection in the US. Recent reports have shown that, since January 2014, many US deportees from Central America have been killed shortly after being returned to their countries of origin, including children. See, for instance, www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america. Other examples of violations of migrants’ rights to access safe territories are the occurrence of “push-backs,” transfers and returns at borders. See, as examples of these instances: <http://reliefweb.int/report/world/dangerous-game-pushback-migrants-including-refugees-europe-s-borders>, www.unhcr.org/news/press/2017/4/58eb7e454/unhcr-urges-suspension-transfers-asylum-seekers-hungary-under-dublin.html, and www.newsdeeply.com/refugees/community/2017/04/13/a-troubling-trend-of-u-s-turning-away-asylum-seekers-at-mexico-border.
- 17 For more on this, see www.unodc.org/toc/en/crimes/migrant-smuggling.html.
- 18 The deaths of migrants in the Mediterranean Sea while trying to reach Europe in the past three years can be seen as examples of these facts. In 2014, 3,283 migrants died while crossing the Mediterranean due to the lack of secure channels, with figures jumping to 3,784 in 2015 and 5,089 in 2016. <https://missingmigrants.iom.int/latest-global-figures>. Another example is the fact that migrants are being sold as slaves in Libya (www.theguardian.com/world/2017/apr/10/libya-public-slave-auctions-un-migration).
- 19 For instance, it is well acknowledged that asylum-seeking unaccompanied children face several threats during their displacement: as “many abandon home to avoid forced recruitment, only to find that being in flight still places them at risk of recruitment, especially if they have no documentation” (United Nation General Assembly, 1996, para 68).
- 20 See, for instance, Alexander Betts’ interview on Al Jazeera’s *Inside Story*, June 19, 2015, in which he states that, “It is not just a crisis of numbers, it is a crisis of politics and a crisis of the failure of international cooperation.” (www.rsc.ox.ac.uk/news/its-not-just-a-crisis-of-numbers-its-a-crisis-of-politics-and-a-crisis-of-failure-of-international-cooperation-alexander-betts).
- 21 “It is an annual States-led, voluntary, informal and non-binding . . . platform for States to conduct informal dialogue and cooperation on migration and development issues” (United Nations Office of the High Commissioner for Human Rights, 2011, p. 24).
- 22 Declaration of the High-level Dialogue on International Migration and Development. A/68/L.5.
- 23 Retrieved from www.refworld.org/docid/5732e34e4.html.
- 24 Retrieved from www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1.
- 25 The link between migration and development is a common assertion nowadays, and it has been posited that even though the act of migrating may stem from a great variety of circumstances, there

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is still a strong and actual link between the act of living outside one's home country and development, both at an individual level and to the country of origin or destination: "International migration is one of the main transformation factors of the world we live in. It is also a consequence as it maintains complex relations with the changing of societies and economies of a world in movement with more and more vast distances and that nurture among them multiple interdependencies. It has always been a part of economic and political evolution, being an engine of change in the societies of departure and destination" (our translation from the original in French (De Wenden, 2009, p. 40).

- 26 The process of adopting the Global Compact on safe, orderly, and regular migration is underway, and has been regulated by the Modalities Resolution A/71/L.58 of January 2017.
- 27 For more on complementary pathways for admission, especially in Latin America, see Jubilit. (2017).
- 28 An example of this is the criticism that "the Declaration misses the opportunity to give proper weight to the need for more pragmatic and attainable commitments to expand legal pathways of migration (encompassing resettlement, humanitarian visas, student and work permits, etc.), which could result in a considerable blow to the smuggling business" (Almeida & Bamberg, 2016).
- 29 https://eeas.europa.eu/headquarters/headquarters-homepage/20176/remarks-federica-mogherini-valletta-joint-action-plan-2017-senior-officials-meeting_ru.
- 30 In relation to the EU's response to migration, it has been defended, for instance by Federica Mogherini, on the grounds that its work with partners should "flow into the new Global Compact" (European External Action Service (EEAS), 2016b), which could be an improvement on international cooperation on migration governance, especially if the foundation of said collaboration is the protection of migrants and refugees.

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