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RETHINKING MASS MIGRATION BEYOND THE 1951 GENEVA CONVENTION

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Abstract

The current migration crisis, which is now affecting mostly Europe, shows how patterns of migration are changing. Recently, States' attitude towards migrants seems to be regressing. Consolidated catalogues of rights, such as the right to life, the prohibition of torture or cruel, inhuman or degrading treatment are generally perceived as binding; however, States' responses to the current mass migration crisis, predominantly focused on security dimensions, are threatening the most important principle of humanitarian ideology, namely equality of human beings. The protection offered by international refugee law, primarily based on the 1951 Geneva Convention relating to the Status of Refugees, does not apply to all people crossing international borders in irregular ways. The Convention is primarily aimed at ensuring fundamental rights and freedom; however, its provisions are not consistent with humanitarian standards recognized at the international level. States' inadequate approach to migration in an international context addressing mainly refugees result in protection gaps. In fact, mixed migrants frequently fall outside the category of people seeking asylum or refugees; nonetheless, they are entitled to receive protection due to the fact that they are, first of all, human beings. Reasons to migrate are complex and diverse: they can result from a combination of conflict, instabilities, environmental change, and resource scarcity. Additionally, these individuals face several risks in leaving their homes for greater security that can result in different types of vulnerability. Criteria based on the Geneva Convention are obsolete and incompatible with necessities raising from today's reality. Non-traditional forms of legal protection have been elaborated, especially at the EU level; however, a major reform is extremely necessary in order to address the huge humanitarian challenge now occurring in the Mediterranean. This thesis starts, firstly, by analyzing the current emerging trends of mass migration in order to identify the needs of mixed migration flows, particularly with regard to the Mediterranean area and the routes of access to Europe. Secondly, it investigates the existing international normative framework recognizing mainly refugees as the only class of forced migrants entitled to receive international protection. Thirdly, it considers the positivity of the operational programs conducted by humanitarian organizations shaped on a protection-oriented approach. At the end, it assesses the necessity of rethinking the whole international framework in a way that encourages the development of a protection policy no longer focused on the refugee status, but rather on specific needs and vulnerabilities, within a broader international framework that involves elements of operational migration management in the short-term and a longer-term plan that combines both sustainable development programs inside countries of origin and transit and new legal channels facilitating the access of migrants to the EU.

Introduction

In the 19th century, the modern form of mass migration "was made possible by new forms of transport, colonial settlement and the expansion of the United States (US)"[1]. In fact, between 1846 and 1914, over 30 million people left Europe for the US, with the consequence of an increasingly selective control over admittances.

After the First World War and the 1917 Russian Revolution, a first Europe's refugee crisis was registered in the period between 1914 and 1922, with five million refugees on the move and 1.7 million people moving between Greece and Turkey alone. This period was marked by the development of the first norms and institutions for the protection of refugees, namely the High Commissioner for Refugees and the Nansen passports[2].

Even more serious was the mass migration that took place in 1945, after the Second World War, when over 40 million refugees were created in Europe. In 1951, a new legal and institutional framework, represented by the creation of the UN High Commissioner for Refugees (UNHCR), was introduced to respond to mass migration. This was possible due to the "collective political will in the face of emergency, and a sense of humanitarian responsibilities in the wake of the horrors of war and the Holocaust" (conversely, "political will and humanitarian impulses are in short supply today"[3]).

In the 1990s, Europe experienced its third refugee crisis mainly due to the collapse of the Soviet Union, the wars in Yugoslavia, and the wars in Iraq and Afghanistan in which Western countries were involved. This third crisis was also characterized by 9/11 and the rise of terrorism, which led to a wave of restrictive initiatives towards entries[4].

The contemporary refugee crisis in Europe is dated from 2011. The Civil War in Syria, failed States of Libya, Afghanistan, Iraq, Somalia, Sudan, Republic of Congo, the instability of States in the Global South, and the establishment of new routes in the Balkans and Eastern Europe towards Northern European countries, such as Germany, Sweden, Denmark and the UK, besides the more established Mediterranean routes, are the main components of this fourth mass migration crisis.

New processes of migration are already outlined by the fact that countries such as Italy, Spain, and Greece formerly sources of migration, represent now countries of immigration[5]. With the majority of people originating from Africa, the Middle East, and Central-Asia going towards richer countries and regions, such as the EU, the increasingly growing economic divide between the Northern and the Southern parts of the globe becomes evident.

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[1] Colin Bundy, "Migrants, refugees, history and precedents," *Forced Migration Review, Destination: Europe* (January 2016): 5-6.
[2] See para 3.2.1. "The Geneva Convention and the Principle of Non-Refoulement."
[3] Ibid., 6.
[4] Ibid.
[5] Roger Zetter, "Protecting Forced Migrants," *Migration Reports* (2014): 20.

The current mass flux of people arriving to Europe is a mixed migration crisis, as migrants have mixed motives to move. Mixed migration is a humanitarian crisis itself, as people's life, physical safety, health, or subsistence may be endangered as a result of the mode of moving.

IOM's broad definition of migrant has been inspirational for the development of the present reasoning over current and forward approaches to protection, as it suggests the diversity of contemporary patterns of migration. Status, willingness, and causes for moving become progressively irrelevant for the definition of migrant, as it should be for the identification of the individuals who are eligible for protection.

Thus, this thesis starts by exploring the contemporary phenomenon of mass migration according to its main characteristic of multicausality, for which conflicts, political and food insecurity, poverty, and environmental factors are only some of the factors triggering a humanitarian crisis and consequent potential mass displacement. These reasons are descriptive of a condition of vulnerability that may persist or intensify also outside the country of origin. In this regard, the reactions of EU's Member States in response to mass migration, influenced by a high degree of politicization resulting in perceived threat to sovereign control of national borders and security, are often the main causes of the sharpening of migrants' vulnerability. In absence of legal channels, due to the imposition of physical, formal, or informal restrictive measures aimed at containing the mass arrival to the EU, migrants may make use of means managed by criminal organizations.

The international normative framework is then analyzed, starting from the premise of an existing humanitarian core of international norms, for which human dignity, but also an adequate standard of livelihood and health, must be assured to all human beings, including, thus, migrants. The 1951 Geneva Convention and the principle of non-refoulement are then investigated as the fundamental basis of the right of asylum; yet, they provide benefits to refugees according to specific and restrictive requirements that are met by increasingly less migrants. At the regional level, several Conventions derive directly from the application of the Refugee Convention and non-refoulement, even though, in some cases, they may be also more inclusive, as shown by the Cartagena Declaration[6]. Attempts to fill the normative gap for the protection of all migrants not matching refugee requisites, have been made especially at the EU level. However, complementary forms of protection result to be inadequate. The EU architecture for migrants' management, outlined by the Common European Asylum System (CEAS), built on the implementation of the Geneva Convention, is far from being coherent and efficient in ensuring the respect of human rights for all migrants. Huge gaps are evidenced by investments mainly oriented towards initiatives of border surveillance, formal and informal push-back operations, and Partnerships with transit countries where human rights are doubtfully respected and the protection from abuses is not a core priority. Among international practices, only some specific areas are covered by an emerging structure for protection, namely displacement as a consequence of natural disasters, climate change, and internal displacement. However, also in these cases,

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[6] See para 3.2.1. "The Geneva Convention and the principle of non-refoulement."

the targets are represented more by people remaining in their country of origin than people crossing international borders.

The real commitment to the protection of human rights in the management of the contemporary mass migration crisis comes from the active involvement of international humanitarian organizations. International organizations engaged in migration management have the merit of having established a rights/needs based approach in contrast to the status-based approach descending from the Refugee Convention. Humanitarian organizations are involved in activities that place the individual at the center of concern and recognize everybody's eligibility to protection, in view, first of all, of the complexity of displaced populations. Another merit is represented by the identification of the essential links between migration and development, on the basis of which, the international organizations' activities consider the engagement not only in emergency response, but also into longer-term perspectives of capacity-building and support in the country of origin.

All the causes contributing to the vulnerability of the migrants, whether represented by natural or human made disasters, or States' measures that deny access and protection, result in an increasingly divide between rich and poor countries of the Globe and, consequently, increasingly numbers of displaced people that are likely to cross international borders for improving conditions of livelihood. At the end, rethinking mass migration will equate rethinking the concept of protection on the basis of the existing connection between migration and development, in view of which the framework represented by the 1951 Geneva Convention, based on a system of classification, seems to lose relevance. Conversely, interesting hints are provided by the latest contribution made by Italy in the draft proposal of the Migration Compact[7], that focuses on the creation of mechanisms facilitating the access to the European market for African countries and the establishment of new legal channels to the EU. The only viable option capable to ensure protection to everyone is based on the integration of short-term emergency and humanitarian measures and existing operational frameworks with initiatives aimed at implementing sustainable development projects and legal channels for migration.

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[7] See para 5.1.2. "The Migration Compact."

Chapter 1
The Multifaceted Aspects of Migration

2.1. Definition of Migrant

Migration is the movement of a person or a group of persons across an international border or within a State[8]. The new emerging patterns of international migration with regard to the movement across international borders will be the main focus of this thesis. However, patterns of moving in the face of crisis situations include also cases in which individuals remain in the country of origin due to inability of moving to greater safety. In view also of the importance that sustainable solutions in areas of humanitarian crisis have in the present analysis, internal displaced people (IDPs) and the legal framework related to it are investigated. IDPs are described as

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict situations of generalized violence, violations of human rights or human-made disasters, and who have not crossed an internationally recognized state border[9].

Given the diversity of contemporary humanitarian crisis causing people displacement, the description of humanitarian crisis broadly includes "any situation in which there is a widespread threat to life, physical safety, health or subsistence that is beyond the coping capacity of individuals and the communities in which they reside"[10].

Traditionally, migration is dominated by a general dichotomy between voluntary and involuntary migrants. In this way, there is a differentiation between people who are forced to leave their country due to particular risks, conventionally associated to the definition of refugee, and people who migrate in order to seek a better life elsewhere on the basis of a conscious choice. The dichotomy forced-voluntary "has influenced conceptions of causality and shaped classification systems that place those who migrate into specific categories"[11]. According to the 1951 Geneva Convention, people with a well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular social group or political opinion, are legally labeled refugees. Over the last decades, the 1951 definition was extended informally to include all types of involuntary migrants, namely people displaced by conflicts and violence[12].

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[8] International Organization for Migration (IOM), "Key Migration Terms," 2015, https://www.iom.int/key-migration-terms.

[9] United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, 11 February 1998, UN Doc. E/CN.4/1998/53/Add.2, Introduction, para 2.

[10] Susan F. Martin, Sanjula Weerasinghe and Abbie Taylor, *Humanitarian Crises and Migration*, eds., (New York: Routledge, 2014), 5.

[11] Ibid., 10.

[12] Zetter, "Protecting Forced Migrants," 21.

Recently, the International Organization for Migration (IOM) gave a new definition of migrant, which sums up all potential different features emerging from contemporary migration. According to IOM, a migrant is

> any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is[13].

Such an inclusive definition avoids tracing distinctions that may assume specific causes and legal status as more legitimate or more eligible to receive protection than others and makes status more objective.

IOM definition represents the starting point to analyze the complexity of factors pushing people to migrate, as well as the risks they may face during the journey and at the arrival in transit or destination countries. In this way, legal status, causes for movement, and, thus, differentiation among migrants' conditions are explicitly refused as decisive criteria to define a migrant. The idea that will be carried on throughout this thesis with regard to discriminatory systems of protection towards the migrants reflects IOM's perspective according to the definition: there is no legal status, cause, or measurable degree of compulsoriness driving migration that can lead to a greater qualification for the protection of a migrant.

However, if the general nature of IOM definition offers an inspirational hint for reflecting on the diversity of factors driving current migration flows, at the same time, it may be also excessively broad. For the sake of argument, an alternative definition proposed by the Special Rapporteur of the Commission on Human Rights should be taken into account. According to the Special Rapporteur, the following persons can be considered as migrants:

a) Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State;

b) Persons who do not enjoy the general recognition of rights which is inherent in the granting by the host State of the status of refugee, naturalised person or of similar status;

c) Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas, or other agreements[14].

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[13] IOM, "Key Migration Terms," 2015, https://www.iom.int/key-migration-terms.

[14] Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human Rights, *Human Rights of migrants*, Note by the Secretary-General, A/57/292, 9 August 2002, 12, https://www.iom.int/jahia/webdav/shared/shared/mainsite/policy_and_research/un/57/A_57_292_en.pdf.

In this way, migrants who leave their countries because of political persecution, conflicts, economic issues, environmental degradation or a combination of these factors or those "who do so in search of conditions of survival or well-being that does not exist in their place of origin" are included.

Zetter, on his part, supports the use of the label "forced migration", as it is able to include all the different dynamics driving population displacement. Protection needs arising from migration crises are then best described by the concept of "displacement vulnerability", since it offers "a fuller understanding of protection needs in terms of safety, security, maintaining livelihoods, and the reduction of vulnerability from, during and after forced migration"[15].

People are eligible for protection for the sole reason of being human beings. Human rights violations in the context of contemporary migration may have different sources, no longer confined to the precise condition of persecution, but extended to a series of other factors occurring in the country of origin, during the move, and in the country of arrival. In this perspective, labels are inadequate to describe the current reality. As Zetter states, terminological extremes of refugee and voluntary migrant define "two ends of a spectrum in which voluntary migration gradually merges into forms of migration that are increasingly recognizable as forced"[16]. The complexity of mixed migration, the diversity of factors influencing the moving, and migrants' different protection needs cannot be captured by a categorical method.

2.2. Main Patterns of Mass Migration in the Mediterranean

The Mediterranean is chosen as the specific framework for the current analysis, as the number of people taking dangerous journeys to reach Europe is unprecedented. Different nationalities, routes, causes, risks, expressly shown by the high numbers of deaths of migrants crossing the Mediterranean, are all evidences of the extreme diversity of the current migration trends. The phenomenon now occurring in this area is well described by the notion of "migration crisis", namely "a term that describes the complex and often large-scale migration flows and mobility patterns caused by a crisis which typically involve significant vulnerabilities for individuals and affected communities and generate acute and longer-term migration management challenges"[17].

Since January 2016, at the date 07/04/2016, 172,772 migrants and refugees have arrived to Europe by sea. 2,442 have arrived by land, for a total of 166,465 arrivals. 714 of these are drowned or missing[18]. In 2015, over 1 million of people arrived to Europe in irregular ways[19] with 3,771 deaths that made 2015 the deadliest year on record for migrants and refugees crossing the Mediterranean; in 2014, 3,279 died in the

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[15] Zetter, "Protecting Forced Migrants," 80.

[16] Ibid., 22.

[17] IOM, "Migration Crisis Operational Framework," 15 November 2012, MC/2355, 4.

[18] IOM, "Mediterranean Migrant Arrivals in 2016," posted on 29 March 2016, http://www.iom.int/news/mediterranean-migrant-arrivals-2016-164752-deaths-531.

[19] Patrick Kingsley, "Over a million migrants and refugees have reached Europe this year, says IOM," *The Guardian*, 22 December 2015. http://www.theguardian.com/world/2015/dec/22/one-million-migrants-and-refugees-have-reached-europe-this-year-iom.

Mediterranean[20] and many deaths have been registered also in the desert. The vast majority of migrants, 816,752, arrived by sea in Greece, whereas a further 150,317 arrived by sea in Italy, with less arrivals to Spain, Malta and Cyprus. 34,215 people crossed by land routes, such as over the Turkish-Bulgarian border[21].

This phenomenon of mass migration can be traced back to the 2003 invasion of Iraq that triggered new waves of refugees. After refugee flows had already settled in countries such as Lebanon and Jordan, Iraqis started to move to neighboring countries. The paradigm shift with the Arab Spring in 2011 and the Syrian war, which escalated to such a level of protracted violent conflict that triggered mass displacement outside the country. Countries in the region lacked capacity in addressing the huge challenges of the new political environment. In short time, many countries ended up in conditions of chaos, lawlessness, and forms of oppression, resulting in huge number of refugees and asylum seekers, escaping both the dramatic situation characterizing their country of origin and the Islamic State that filled the voids left by old collapsed regimes[22].

All the other countries of origin of mass mixed migration are places characterized by struggling economies, repression, lack of freedom, dysfunctional institutions, and dictatorships[23]. Migrants coming from West and Sub-Saharan African moved for causes mainly related to security challenge, regional stability challenges, poverty and unemployment due to the deterioration of the economic and social environment¸ and climate change.

The flows include mostly men, the 80%, but also an increasing number of women and children, including unaccompanied and separated children[24]. Migrants come from over 20 countries; those travelling to Greece and along the Eastern Mediterranean are nationals of the Syrian Arab Republic, Afghanistan, Pakistan, Albania, and Iraq, whereas migrants arriving to Italy through the Central Mediterranean route mainly come from Eritrea, Nigeria, Somalia, Sudan, the Syrian Arab Republic, Gambia, and Bangladesh. In 2015, Syrians arriving to Italy decrease, as the routes shifted towards the East, following the situation in Libya and due to the restrictive visa policies adopted by Algeria and Egypt[25]. Migration routes consist of the Mediterranean, the South-Eastern, and the African route. In the Mediterranean, the Central Mediterranean route goes from Northern Africa towards Italy and Malta, through the Mediterranean Sea. Libya, in this case, is often the nexus point linking the Horn of Africa with the Western African routes before embarking to Europe. The Eastern route describes the travelling of persons arriving from Greece or Turkey to the EU. Migrants along the Eastern route and the South-Eastern route then proceed to the Western Balkans into the former Yugoslav Republic of Macedonia and Serbia, entering again the EU through Croatia, Slovenia, Romania, Bulgaria, or Hungary. The Western Mediterranean route starts in North Africa to Spain and the

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[20] IOM, "IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015," posted on 1 May 2016, https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015.

[21] Kingsley, "Over a million migrants and refugees have reached Europe this year, says IOM," 22 December 2015.

[22] Jelena von Helldorff, "The EU Migration Dilemma", September 3 2015, https://eu.boell.org/en/2015/09/03/eu-migration-dilemma.

[23] Ibid.

[24] IOM, "IOM Response Plan for the Mediterranean and Beyond", October 2015, 12.

[25] Ibid.

land route through Ceuta and Melilla. Lastly, the African routes are the East African, from East Africa towards Libya and Egypt, followed by the Central Mediterranean route, and the West African, from West Africa to Morocco, Tunisia, and Libya, followed by Western Mediterranean or Central Mediterranean route[26]. The main countries of destination are Germany and Sweden, but also Cyprus, Malta, Spain, Slovenia, Finland, and France[27].

Thus, in sum, if the Eastern route mainly deals with refugees fleeing from the Syrian Civil War; the Central and Western Mediterranean routes mainly deal with migrants escaping situations of poverty and economic issues, besides climatic changes, thus, mirroring the typical nature of mixed migration fluxes.

According to IOM data, the main countries of origin of migrants arriving to Italy in 2015 were Eritrea with (39,162 migrants), Nigeria (22,237) Somalia (12,433), Sudan (8,932), compared to Syrians (7,448). Other main countries of origin in relation to the Central/Western Mediterranean routes are mainly African countries, such as Senegal, Mali, Morocco, Tunisia, Benin, Ethiopia, Egypt, Mauritania, Guinea Bissau, Niger, Guinea, Cameroon, and Sierra Leone. The attribution of the country of provenience may be, though, biased and influenced by existing outbreaks or national security problems that the migrant may be afraid to declare.

2.3. Causes to Migrate

Thus, along the routes described, multicausal drivers of migration emerge. Beyond conflict and traditional persecution, as outlined by the 1951 Refugee Convention, reasons for moving are a combination of factors, resulting from new conditions of uncertainty. Direct attack combined with violence is not the only migration driver; new manifestations of conflict are emerging. Wars imply a variety of factors, such as food insecurity, socio-economic negative impacts, damage of livelihoods, and lack of access to key institutions and markets[28]. Conflicts, political instability, insecurity, human rights violations, poverty, family reunification, environmental degradation, and climate change are all reasons forcing people to move to reduce vulnerability. Also economic drivers are often shaped by underlying political instability. Reasons are complex and mixed and they may also overlap, resulting in migrants' belonging to more than one category and different emerging protection needs. This is why mixed migration flows, in fact, call into question the status-based approach introduced by the Refugee Convention.

2.3.1. Conditions in Countries of Origin

Zetter identifies three sets of interacting factors at the basis of people displacement today: (1) intrastate conflict, (2) poor governance, political instability, and repression, (3) and environmental factors. Instances of contemporary intrastate conflicts causing violent and large-scale displacement of people are Afghanistan, Yemen, Iraq, Northern Nigeria, and Syria. The Civil War in Syria is at its fifth year, resources

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[26] Ibid., 5.
[27] Ibid., 12.
[28] Zetter, "Protecting Forced Migrants," 44.

in neighboring countries (Lebanon, Jordan, and Turkey), which are hosting 4 million Syrian refugees, are scarce. Internally, over 7 million of Syrians are dispersed. The situation in Arab countries where the uprisings took place is explanatory of what concerns political instability and dynamics of violent repression. Libya, in particular, since 2011, has been affected by a huge crisis that began with the Arab Spring protests and resulted in the Civil War, characterized by deep political instability and violence. Lastly, environmental factors may be represented by "water scarcity, food insecurity, drought, environmental degradation, famine, natural disasters, and climate change"[29]; however, they are often combined with other factors, such as poverty, poor governance, and other forms of vulnerability. The convergence of all these factors leads to an extremely uncertain life and governments fail in protecting human rights from violations. In the case of Zimbabwe, only few migrants out of the 2 million people in search of asylum in the period 2005-2009 met the requirements of the Geneva Refugee Convention. Though, labelling them as economic migrants does not reflect the conditions of serious economic and social situation, lack of access to shelter, water, and sanitation, and public health crisis in relation to HIV/AIDS describing the condition of the country[30]. Somalia, for instance, shows the consequences of the combination of these factors. Since 1991, the governance failure and the clashes between clans and armed factions intensified the problem of food security, which is no longer sustainable.

In this regard, Human Rights Watch issued a report in 2015 on the basis of a research on human rights conditions in countries of departure, with regard to a series of countries particularly affected by internal conflicts and humanitarian crisis. Beyond Syria, Eritrea, and Afghanistan, also the situation in Somalia has been analyzed. In May 2015, Human Rights Watch interviewed young migrants after their rescue and disembarkation in Lampedusa. They emphasized the security risks in Somalia represented by the activity of Al-Shabaab. The armed Islamist group is controlling large areas of Somalia and severe restrictions of basic human rights are taking place. Public executions and beatings, deadly attacks against political and civilian targets, indiscriminate attacks, sexual violence, and arbitrary arrests and detention are all descriptive of the dramatic situation that the armed conflict is causing since 1991. The ongoing crisis and the lack of security is then combined with problems of health and water scarcity. The Somali government is failing in providing protection of basic human rights, also in the areas under its control. In the camps established in Mogadishu, displaced people are subject to abuses, rape, physical attacks, restriction of access to humanitarian assistance, and clan-based discrimination[31].

The overlap of different causes of migration is thus clear in the context of massive migration coming from Africa. The majority of people live in abject poverty without access to good health care, clean water, education, and employment.

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[29] Roger Zetter, *Protection in crisis. Forced Migration and Protection in a Global Era*, (Washington, DC: Migration Policy Institute, 2015), 6.
[30] Alexander Betts, *Soft Law and the Protection of Vulnerable Migrants*, (Oxford: University of Oxford, 2010), 8.
[31] Human Rights Watch, "World Report 2013: Somalia," 2013, https://www.hrw.org/world-report/2013/country-chapters/somalia.

2.4. Protection Crises Arising outside Countries of Origin

Gaps in protection needs arise also as a result of movement. Regardless the initial reasons driving the decision to migrate, migrants' conditions change during transit. In this case, "refugee status is rarely accorded to people whose vulnerabilities emerge as a result of movement"[32]. By classifying different groups of migrants, IOM identifies regular and irregular migrant workers, unaccompanied and separated children, environmental migrants, stranded migrants, pregnant women, refugees, asylum-seekers, individuals seeking to re-unite with their families, but also victims of exploitation and abuse, smuggled migrants and trafficked persons[33]. When travelling, migrants are exposed to several risks and potential human rights violations, especially when they are not covered by protection norms or legal frameworks. Most of them do not have the possibility of accessing legal channels to migrate in the country of origin and the only viable alternative is represented by moving in irregular ways. Migrants are often undocumented and are not able to access protection either in the transit country or in the country of arrival, resulting in further increasingly vulnerability. In addition to the lack of knowledge or access to national protection, vulnerability rises also from exposure to violence, exploitation, human rights violation, absence of resources to move from the crisis areas, absence of travel documents and passports, and lack of clear status[34]. They rely on traffickers, organized-crime groups, and smuggling networks in order to be assisted in transportation and get documents. Reliable information on safe migration choices are absent and migrants receive false information about the journey, as well as false information about opportunities offered in Europe.[35] When they cross the Mediterranean, they are exposed to fatal risks and, throughout the journey, they may face also rough environmental conditions, limited access to basic survival needs that are often compounded by xenophobia, experiences of violence, exploitation, extortion, rape, abduction, robbery, abuse and torture by smugglers or human traffickers.

Thus, for what concerns the protection crises arising outside the country of origin, by analyzing the main routes taken by the migrants crossing the Mediterranean, Zetter identifies four important features. Firstly, irregularity, as migrants are forced to use illegal means due to lack of access to legal channels. Using irregular means to enter in the transit or destination territory prevents many migrants to receive adequate protection, even when they may be eligible to receive protection on the basis of international legislations, such as in cases of refugee and temporary protection status. Moreover, transit territories such as Libya, Morocco, Yemen, and Tunisia have limited or absent capacity to provide protection, and "many of these same countries are themselves prone to violence, conflict and instability, which further underscore the vulnerability to which the migrants in transit are susceptible"[36]. Secondly, the protection crisis arises "as a result of the means by which the migrants travel"[37], represented by cases in which the travelling is organized

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[32] Betts, *Soft Law and the Protection of Vulnerable Migrants*, 9.
[33] IOM, "IOM Response Plan for the Mediterranean and Beyond," 6.
[34] Ibid., 39
[35] IOM, "IOM Response Plan for the Mediterranean and Beyond," 8.
[36] Zetter, "Protecting Forced Migrants," 40.
[37] Ibid.

with the involvement of smugglers, criminal organizations, and human traffickers, who are sometimes also responsible for violations of migrants' human rights. Increasingly often, journeys are facilitated in this way and migrants become victims of extortion, rape, robbery and sexual assault. Thirdly, the protection crisis is occurring at the European borders. As the data show, throughout the past years, arrivals have increased, with Italy, Greece, and Spain suffering the greatest pressure among all the other EU Member States. The emergency represented by the growing number of migrants arriving to the EU is worsened by the non-entrée regimes adopted by Member States. The construction of physical fences and the focus on restrictive measures centered on securing the borders revived the term "Fortress Europe" to indicate how Europe is now representing a space of protection denial rather than a space for protection. The migration policy framework determined by the closing down of legal channels to access the EU exacerbates migrants' vulnerability and prevent them to reach Europe and exercise their rights. Fourthly, meeting refugee status' requirements is becoming increasingly difficult and States' current responses to mass migration are not only reluctant towards different forms of forced migration other than persecution, but sometimes result also in denied access to those that would be normatively legitimated to receive protection according to the Geneva Convention.

2.4.1. Absence of Regular Channels and Human Rights Violations in Transit Countries

The first protection crisis identified by Zetter is described by the phenomenon of migrants crossing international borders by irregular means, due to the lack of legal migration channels. Access to both transit and destination countries at the borders "raises many profound concerns about the inadequacy of border governance measures to protect human rights at borders, and the failure to meet human rights obligations at the point of entry"[38].

People migrating by irregular means are considered clandestine or illegal migrants, with a pejorative terminology that "panders to an anti-immigrant and anti-asylum seeker political rhetoric in many European countries" and makes access to basic protection more difficult (also in cases the migrant is eligible for one of the statuses provided by international legislation), increasing even more migrants' vulnerability. The term "illegal migrant" does not even exist in international law, and "undocumented migrant" would be better descriptive of the condition characterizing migrants crossing international borders irregularly.

Restrictive measures of containment adopted by EU Member States are all part of a migration policy that does not provide enough regular migration channels, forcing migrants to rely on other alternatives.

The extension of restrictive measures also to neighboring countries describe a condition where either "migrants end up trapped in countries such as Libya, Morocco, Ukraine, and Turkey, where their rights are at risk"[39] or these countries set agreements that allow sent back operations more easily and agree to ratify

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[38] Ibid.

[39] Amnesty International, *Libya: Scapegoats of Fear*, (London: Amnesty International Ltd, 2013), 6.

cooperation arrangements to block migrants, promote reception and detention centers[40] in conditions that raise serious concerns in matter of human rights protection and where migrants may face violence and torture[41].

2.4.1.1. The Cases of Libya and Morocco

Risks to which migrants are exposed in transit countries are particularly shown by the report of Amnesty International[42] in Libya. The death of Gaddafi and the Civil War led to a void of power and escalated until resulting in political instability, lawlessness, and a huge State crisis. Situations of exploitation, arrests, pending deportation, and abuses against foreign nationals, including refugees and migrants, are all consequences of the State failure. The void of power represented also a new birth for smugglers' and traffickers' business opportunities.

Foreign nationals without documentation that enter, stay, or leave Libya irregularly are criminalized by Libyan legislation and all the policies adopted so far have been differentiating groups of refugees and migrants, such as Syrian nationals, that now have a series of benefits with regard to residence permit and health care, from other migrants of sub-Saharan origin, who cannot access similar basic services. In general, sub-Saharan Africans, North Africans, and Middle Eastern nationals arrive to Libya mainly in the hope of continuing their journey to the EU.

Amnesty International's visits in holding centers in Libya shows how the conditions of refugees and migrants result in serious human rights violations. Very high numbers of refugees and migrants are subject to unexpected arrests, and, when they are handed over the holding centers (many held by militias), they are victims of torture, exploitation, humiliating treatment, where sanitary facilities, hygiene, and basic necessities are often absent, due to overcrowding and inadequate conditions of the accommodation areas. Many groups of migrants from Egypt, Somalia, Eritrea, Nigeria, Niger, and Ethiopia reported to the Organization stories of abuse, harassment, torture, and other degrading treatment in this context.

Although international and regional measures adopted to address the emerging characteristics of the current migration patterns will be discussed later, the lack of compliance between the operational architecture deployed by the EU and the respect of human rights' obligations towards the migrants should be addressed. The European Union Border Assistance Mission (EUBAM), established in 2013 by the EU, with the purpose of building the capacity of Libyan authorities to strengthen security at Libyan borders, does not contain any reference to migration. The extent of EUBAM's involvement in developing migration management capacities is still unclear. The report shows also the absence of compliance between the standards related to human rights obligations for the return of irregular third-country nationals set by the EU

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[40] Amnesty International, *The Human Cost of Fortress Europe Amnesty International,* (London: Amnesty International Ltd, 2014), 6.

[41] Ibid.

[42] Amnesty International, *Libya: Scapegoats of Fear*, 4.

in 2008[43], the 2012 Resolution of the European Parliament on the situation of migrants in Libya[44] and the approach pursued by Libya in immigration control. A more specific reference to the EU Partnerships with third countries will be later analyzed[45].

A similar situation emerges from the 2014 Human Rights Watch report[46] related to the documentation of the ill-treatment of sub-Saharan African migrants in Morocco. Morocco is considered a way station on the journey to Europe by many sub-Saharan Africans who leave their countries for reasons of conflicts and poverty. Many migrants stay in campsites in proximity of Morocco's borders with Algeria and Spain, in the area of Melilla. The report denounces the conditions of the migrants during this transit, showing how migrants live in tents, exposed to cold and rain, lack basic necessities, and struggle in accessing food, water, and toilets.

The report signals also the exposition of migrants to the violence exercised by the police. In fact, there are some cases showing that the police "deprived them of their few possessions, burned their shelters, and expelled them from the country without due process"[47]. Migrants are thus subject to tightened pressure, raids, robbery, arrests, collective expulsions, threats, abuses, and other violations of basic rights and inhuman or degrading treatments at the hand of Moroccan and Algerian authorities. Episodes of violence have been also referred by migrants when they tried to scale the fence into Melilla. They said that the Moroccan Auxiliary Forces beat them when they were caught trying to cross the fence, "not only to prevent them from crossing, but also, seemingly, to punish them"[48], and sometimes they were also subject to violence once they were returned from Melilla.

2.4.2. Human Trafficking

The second protection crisis described by Zetter is represented by the serious phenomenon of human trafficking and smuggling. Insufficient legal migration channels are, in fact, the main determinant of human smuggling. Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons (TiP) as

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or

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[43] Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. L 348/98. According to the Directive, detention is only allowed when "there is a risk of absconding" or the individual "avoids or hampers the preparation of return". Moreover, it stipulates that detention should be applied for "as short a period as possible" and "shall be executed with due diligence".

[44] European Parliament Resolution of 22 November 2012 on the situation of migrants in Libya, 2012. The Resolution called for "commit to enter into further agreements on migration control with Libya only after Libya demonstrates that it respects and protects the human rights of refugees, asylum-seekers and migrants and puts in place satisfactory systems for assessing and recognising claims for international protection".

[45] See para 3.2.4.1. "The EU Global Approach to Migration and Mobility".

[46] Human Rights Watch, "Abused and Expelled," 10 February 2014, https://www.hrw.org/report/2014/02/10/abused-and-expelled/ill-treatment-sub-saharan-african-migrants-morocco.

[47] Ibid.

[48] Ibid.

of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[49].

Key feature of this crime include "movement or confinement of an individual, accompanied by coercion or exploitation, usually for the financial profit of the trafficker"[50].

Related to TiP is also the crime of smuggling, defined as the "procurement for financial or other material benefit of illegal entry of a person into a State of which that person is not a national or resident"[51]; and it is different from TiP because it usually involves migrants' consent and ends with the migrant's arrival to destination. TiP, instead, is characterized by the absence of consent of the victims and, if they have initially consented, they are then subject to coercive, deceptive, or abusive actions of traffickers[52]. In fact, many people who are trafficked do not "very often perceive other option than to remain under the control of traffickers"[53] thanks to common tactics used by traffickers, such as physical, sexual, and psychological violence and manipulation, debt bondage, threats against the family, and withholding of the documents[54]. Trafficking is often perceived as a cycle, as it involves a pre-departure or recruitment stage, followed by the journey and the stage of destination and exploitation; however, what is important is that each stage of the journey poses additional risks to the migrant, represented by physical abuse and deprivation, threats, sexual abuse, emotional abuse, economic exploitation, legal insecurity, and marginalization[55]. In any case, the activities of trafficking and smuggling often overlap, as criminal networks that have dealt with traffickers have relationships with smugglers.

Trafficking and smuggling are never homogenous criminal activities, as the cost of the trip, the conditions of travelling and the status upon arrival can vary significantly[56]. Routes used by smugglers are sometimes simple and direct, whereas other times they are circuitous. The time between departure and arrival can vary as well; it can last some days, months, or even years. On average, the payment demanded is between 10,000 US dollars and 40,000 US dollars[57]; then, additional payment may be requested along the route, when money is asked to families in the country of origin.

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[49] UN, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, UN Doc. A/55/383, Article 3, para a.

[50] Cathy Zimmerman and Rosilyne Borland, eds., *Caring for Trafficked Persons*, (Geneva: International Organization for Migration, 2009), 8.

[51] United Nations Office on Drugs and Crime, "Trafficking in Persons and Migrant Smuggling," 1999. https://www.unodc.org/lpo-brazil/en/trafico-de-pessoas/index.html.

[52] Ibid.

[53] Cathy Zimmerman and Rosilyne Borland, *Caring for Trafficked Persons*, 9.

[54] Ibid.

[55] Ibid., 17.

[56] Interpol, "People Smuggling," http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/People-smuggling.

[57] Zetter, "Protecting Forced Migrants," 41.

Lately, cases in which people rely on human smugglers and traffickers to migrate are increasing resulting in huge protection gaps for the migrants. The IOM Coordination Office for the Mediterranean Director, Federico Soda, said about the arrival in the Mediterranean in 2016 that "what is worrying is that many migrants are arriving in very bad health conditions, because of the violence perpetrated by smugglers". He also added that "it is shocking that we regularly receive reports from migrants that women are being raped by smugglers on the beach, right before departure"[58]. Alarming data gathered by the Italian Ministry of Interior shows that trafficked girls and women travelling from Nigeria to Italy by sea in 2015 were 5,633, whereas, in 2016, so far the arrivals have already been 395, 346 more than last year in the same period[59]. Soda explained that IOM estimated that 80 percent of these Nigerian girls are victims of trafficking and "many of them come from the Edo region, where they are lured into enslavement and exposed to voodoo rituals to psychologically ensnare them to accept their faith, in the belief that any attempt of escaping or rebelling against their traffickers will cause harm to them and their family"[60].

In general, as a result of armed conflicts or natural emergencies, the erosion of the rule of law and the collapse of the institutions trigger these additional risks. Situations of crisis in certain localities, such as Libya, create conditions of impunity where traffickers can act. In Libya, traffickers often represent a means for armed groups, as they recruit fighters and workforce. Beyond being also targets for sexual services, migrants may satisfy, especially in cases of minorities, armed groups' objectives "in terms of ideology"[61], due to their systematic trafficking and enslavement.

Traffickers take advantage of people receiving humanitarian assistance through fraudulent opportunities of migration. Refugee and migrant camps represent often a source of new victims for traffickers. The absence of other alternatives in Eastern Africa and along the route through North Africa, the lack of legal opportunities to migrate to third countries, the low quality of education, and the poor livelihood conditions are all factors contributing to make the migrants vulnerable to human trafficking.

2.4.3. Fortress Europe

The third protection crisis is represented by the thousands of migrants that are waiting in North Africa and the Middle East to be embarked to Europe and the contemporary context dominated by non-entrée regimes and a high politicization of the migration discourse that contributes to worsen migrants' condition of vulnerability. Governments perceive that the irregular flow of undocumented migrants threatens the sovereign national borders and the security of the territory,

Migrants crossing the Mediterranean trying to arrive to Europe are constantly increasing. IOM estimated that, in 2014, 283,532 migrants irregularly entered the EU. In 2015, it was calculated that about 1

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[58] IOM, "Mediterranean Migrant Arrivals in 2016," posted on 22 March 2016, https://www.iom.int/news/mediterranean-migrant-arrivals-2016-160547-deaths-488.

[59] Ibid.

[60] Ibid.

[61] IOM, *Addressing Human Trafficking and Exploitation in Times of Crisis*, (Geneva: International Organization for Migration, 2015), 4.

million individuals entered the EU irregularly, three or four times more than in 2014. The first three months of 2016 have been marked by over 170,000 arrivals of migrants and refugees entering Europe by sea, more than eight times the number recorded in the same period of 2015 (20,700)[62].

EU Governments are reacting to the pressure of mass migration with a combination of physical, legal, and policy instruments creating a non-entrée regime, characterized also by a great politicization of the issue of migration. The construction of physical walls and the adoption of restrictive instruments are reviving the metaphor "Fortress Europe"[63] from the years of the Second World War to indicate all the measures employed by the EU to stop irregular migration towards Europe. Measures may range also to the informal, when they refer to the use of violence and push-back operations. By using this approach and by protecting so rigorously destination countries from the arrival of migration flows, the EU is actually making itself responsible for the creation of huge protection gaps and increasing vulnerability of the migrants.

Attempts to block the migrants is thus, first of all, evidenced by the continuous elaboration of wall-building projects by EU Member States. In 2012, Greece[64] launched Operation Aspida to block the land border with Turkey, which has always represented one of the main routes taken by refugees and migrants to access the EU. The Operation implied the deployment of additional 1,800 police officers and a 10.5 km fence along the Northern border. This measure had the immediate effect to increase the number of migrants taking the more dangerous sea route. Migrants taking the sea route in the Aegean Sea rose from 169 in 2012 to 3,265 in 2013. In 2013, there were 1,109 irregular migrants entering Greece from Turkey on land compared to 11,447 by sea. In 2014, the entrances trying to pass from Turkey to Greece by sea increased to 43,518 reaching the Greek islands. These numbers rose also in 2015, when 416,245 individuals reached the Greek islands. The strengthening of measures for preventing migrants to enter the Greek borders was also accompanied by push-back operations of refugees and migrants to Turkey and to the border between Bulgaria and Turkey without any due process and episodes of serious human rights violations. Bulgaria built a 30 km fence along the border with Turkey and increased cooperation with Turkey under EUROSUR. As a consequence, the number of refugees and migrants entering irregularly Bulgaria dropped from almost 8,000 to just 320 migrants. The report made by Amnesty International underlines how "many of the measures taken by Greece and Bulgaria to seal off the EU's southeastern border with Turkey were made possible by the funding Bulgaria and Greece received from the EU"[65]. After the decision taken by Bulgaria, Macedonia recently reacted by building a fence along its border with Greece with the purpose of blocking the migrants travelling from Turkey to Northern Europe. The access will be denied for all migrants, except for those coming from Syria, Afghanistan, and Iraq that will be allowed to continue crossing the border.

As for the rest of the Balkan area, also Hungary built a 109-mile-long border fence along the Serbian frontier in order to stop migration flows travelling on the West Balkans route towards the EU. Slovenia and

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[62] IOM, "Mediterranean Migrant Arrivals in 2016," posted on 4 January 2016, https://www.iom.int/news/mediterranean-migrant-arrivals-2016-169846-deaths-620.
[63] Zetter, "Protecting Forced Migrants," 42.
[64] Amnesty International, *The Human Cost of Fortress Europe,* 11-12.
[65] Ibid., 11.

Austria are beginning to build fences along respectively the borders with Croatia and Slovenia, which would result in fences built inside the EU's border-control-free Schengen Area. Recently, also the UK improved the fence around the Channel Tunnel, which links France and Britain, representing an important passage for migrants travelling further North[66].

Since the 1990s, Ceuta and Melilla have been fenced by physical barriers separating the Spanish territory from Morocco. The fences have the purpose of impeding the access of migrants to the autonomous provinces, with episodes of repeated human rights violation. The constant attempts to reinforce the borders, however, has not stopped migrants from crossing them.

Recently, also the practice at Italy-Austria border and the latest declarations of Austria aimed at establishing border controls at the Brenner pass are rendering irrelevant the Schengen Regulation. Migrants try to use also the Brenner in order to reach Northern Europe. International trains have been boarded and police checks have increased[67].

Furthermore, Zetter's opinion is that "nowhere is the issue of migration in all its forms – intra-European mobility, international migrations, mixed migration, forced migration, refugees – so highly politicized in public discourse than in Europe"[68], so that national elections, elections and the public discussion at the EU level are now extremely influenced by the migration issue.

Particularly significant was the 2014 Swiss referendum on immigration quotas for the EU, promoted by the National Conservative Swiss People's Party through the federal popular initiative against mass immigration, three months before the elections to the European Parliament[69]. The initiative was aimed at limiting immigration through quotas, as it was before the Switzerland-EU bilateral agreements that guaranteed free movement of people. Politicization of migration continued when the France's National Front, first elected in the French European Elections, congratulated with the Swiss voters on the result. Similar reactions came also from the anti-immigrant parties of the Netherlands, Austria, and Scandinavia[70].

Anti-immigrant parties in Europe are newly powerful, right-wing populists denouncing immigration and television footage of the situation at borders serve as campaign propaganda. In Italy, the migration crisis has represented a political opportunity for the Northern League and its leader Matteo Salvini; the party has transformed from having dominantly a secessionist ideal to being an anti-immigrant group. Moreover, in Hungary, Fidesz, the party of the Prime Minister Viktor Orban, in power since 2010, has been carrying out the most radical anti-immigrant policy in Europe. Orban built the border's fence mentioned earlier. His

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[66] Adam Taylor, "Fortressing Europe", The Washington Post, 28 October 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/08/28/map-the-walls-europe-is-building-to-keep-people-out/.
[67] Marco Funk, "Trickery in Dublin's shadow," *Forced Migration Review, Destination: Europe* (January 2016): 19-20.
[68] Zetter, "Protecting Forced Migrants," 67.
[69] Ian Traynor, "Switzerland backs immigration quotas by slim margin", *The Guardian*, 10 February 2014, http://www.theguardian.com/world/2014/feb/09/swiss-referendum-immigration-quotas.
[70] Ibid.

popularity has grown from 28% in April to 43% in October[71]. The same is happening in Austria, where the political debate over irregular migration and the decision to reinforce controls and deploy more police at Brenner's border led to the increasing affirmation of Hofer's far-right xenophobic party Fpö in the political scene, with its recent triumph in the first round of presidential elections that took place in April 2016[72].

Important is also the response given by media to the migration crisis. On this issue, the Ethical Journalism Network commissioned a report, named Moving Stories[73], aimed at reviewing the way media is addressing migration in selected countries. Political bias, opportunism, hate-speech, and a process of stereotypization and social exclusion of migrants and refugees is putting journalism under serious pressure. The report also identifies two main themes characterizing media approach to the migration crises: numbers and emotions. Media, in fact, are often dominated by loose language and talks of invasion and swarms; other times, they are characterized by leaps of humanity, empathy, and sufferance. It has been noted that "malevolent and anti-migrant or anti-Muslim statements by politicians like Donald Trump in the United State and some European leaders fuelled increasing public concern and hijacked media coverage"[74]. Additionally, journalism resulted to be driven by hyperbole, intolerance, and distortion; it fails to provide detailed and reliable information about the migration crisis because of both lack of editorial resources and absence of well-informed journalists[75]. The report states that "there is a tendency, both among many politicians and in sections of the mainstream media, to lump migrants together and present them as a seemingly endless tide of people who will steal jobs, become a burden on the state and ultimately threaten the native way of life"[76].

Push-backs constitute another pattern used by many EU Member States against migrants attempting to cross European borders. Push-back operations consist of "irregular returns of refugees and migrants to neighbouring states from within a state's territory without any form of individual screening, or rejection at the border of people seeking international protection"[77]. Episodes of intercepted and disabled boats that are then sent back to Turkish waters have been reported by refugees and migrants crossing the Greek border. The same happens in Bulgaria, where people crossing the border irregularly are then pushed back to Turkey by Bulgarian authorities. Scenes of firing stun grenades and tear gas into groups of migrants attempting to cross borders are typical also of Macedonia and Hungary[78].

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[71] The Economist, "The march of Europe's little Trumps," 12 December 2015, http://www.economist.com/news/europe/21679855-xenophobic-parties-have-long-been-ostracised-mainstream-politicians-may-no-longer-be.
[72] BBC, "Austria election: Far-right tops first round of presidential vote," 24 April 2016, http://www.bbc.com/news/world-europe-36124256.
[73] Aidan White, ed., *Moving Stories, International Review of How Media Cover Migration*, (London: Ethical Journalism Network, 2015).
[74] Roy Greenslade, "Where media fails on the reporting of migrants and refugees," *The Guardian*, 17 December 2015, http://www.theguardian.com/media/greenslade/2015/dec/17/where-media-fails-on-the-reporting-of-migrants-and-refugees.
[75] Ibid.
[76] Ibid.
[77] Duncan Breen, "Abuses at Europe's borders," *Forced Migration Review, Destination: Europe* (January 2016): 21-22.
[78] Ibid.

Push-backs have been also formalized by the EU on April 2016 with the EU-Turkey cooperation that led to the establishment of an agreement promoting large-scale returns of all irregular migrants crossing into Greece from Turkey. Turkey received 3 billion Euros funding for the management of refugees and migrants and agreed that it will take all necessary measures to prevent new routes for irregular migration to the EU. According to the agreement, all new irregular migrants not applying for asylum or whose asylum application has been declared invalid should be returned to Turkey and for every Syrian returned another one will be resettled to the EU from Turkey. Greece started to implement the agreement by returning irregular migrants "not in need of international protection" to Turkey and it transformed the hotspots into reception facilities to avoid that migrants subjected to return decisions could hide. In addition, many Frontex[79] and officers of the European Asylum Support Office (EASO) have been deployed in Greece in order to ensure the implementation of the agreement.

The legal basis allowing the return of irregular migrants from the Greek islands to Turkey is represented by the bilateral admission agreement between Greece and Turkey; whereas the legal framework for the admission of asylum seekers happens on a case-by-case basis, "in line with EU and international law requirements and the principle of non-refoulement"[80], namely, according to the Geneva Convention. The plan raises many concerns, as fast-track large scale returns are actually collective expulsions and the human rights situation in Turkey is increasingly deteriorating.

The prohibition of collective expulsion of aliens is included in Protocol No. 4 of Article 4 of the European Convention on Human Rights, which states that "collective expulsion of alien is prohibited"[81]. Collective expulsion is defined as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group"[82]. In 2012, the European Court of Human Rights (ECtHR) found a violation to the Convention in the case Hirsi Jamaa and Others v. Italy[83]. The applicants were Somalian and Eritrean migrants, travelling from Libya, intercepted at sea by Italy and sent back to Libya. They complained that they had been subjected to collective expulsion in breach of Protocol No. 4 of Article 4 of the Convention. The ECtHR observed that the applicants fell within the Italian jurisdiction according to Article 1 of the Convention (obligation to respect human rights)[84] and according to the principle of international law

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[79] See para 3.2.4.2. "The Dublin III Regulation".

[80] European Commission, "Factsheet on the EU-Turkey Agreement," 19 March 2016, http://europa.eu/rapid/press-release_MEMO-16-963_en.htm.

[81] Council of Europe, *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, 16 September 1963, Article 4.

[82] European Court of Human Rights, "Collective expulsions of aliens", Press Unit, 2016, http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf.

[83] Council of Europe: European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, Application no. 27765/09.

[84] Council of Europe: European Court of Human Rights, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Article 1.

enshrined in the Italian Navigation Code[85], which expects that a vessel sailing on the high seas is subject to the jurisdiction of the State of the flag it is flying. Italy exercised its jurisdiction in the form of collective expulsion, even though outside the national territory, considering also that the State did not carry out any examination of each individual situation.

2.4.4. Denied Access

The fourth protection crisis is identified with the same nature of mixed migration flows characterizing forced migration. The decreasingly possibility of aligning to the specific provisions of the refugee status, the reluctance to make different provisions according to the diversity of contemporary mass migratory fluxes, and the denial of access to territory is accentuating protection gaps and migrants' vulnerability. By adopting restrictive measures to contain the flows, also migrants that would probably obtain the international protection of the refugee status, have their access denied. In 2015, EU countries offered asylum to 292,540 people, but in the same year more than 1 million migrants applied[86]. Refugee status determination is increasingly complex and expensive, as it requires the asylum seeker to go through an individual procedure of registration and interview, with many safeguards and re-examination. At the end, "quality requirements mean that caseworkers can reasonably be expected to issue no more than a few dozen decisions a month"[87]. For instance, Greece can now process 1,500 applications per month, namely "less than half of the average daily inflow of refugees on the Greek islands"[88].

In conclusion, "whether it is as a result of the conditions in which they fled or due to the harsh conditions or exploitation and abuse suffered along the routes"[89], migrants always suffer from a degree of compulsion and vulnerability. Human rights violations, resulting from conditions of conflicts, poor governance, political instability, violence, water scarcity, environmental change, food insecurity, and poverty, may be experienced by people crossing international borders at all the stages of migration. Due to the conditions of their country and the difficulty in accessing proper authorization and documentation either from their country or from the country in which they seek to enter[90], migrants often rely on smugglers to assist their journey. As a result, migrants are vulnerable, not only because they escape life-threatening situations, but also because of the uncertainty they face during the travelling and, then, in the country of arrival. Along the routes and in the destination country, migrants are exposed to potential abuses, exploitation, detention or deprivation of freedom as targets for trafficking and smuggling[91] and, only when they manage to survive the journey and arrive at EU borders, the EU framework of border control and the

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[85] UN, *United Nations Convention on the Law of the Sea*, 10 December 1982, Article 98. See also para 4.3. "The Collaborative Approach: Praesidium Project."

[86] BBC, "Migrant crisis: Migration to Europe explained in seven charts," 4 March 2016, http://www.bbc.com/news/world-europe-34131911.

[87] Maria Stavropoulou, "Refugee protection in Europe: time for a major overhaul?," *Forced Migration Review, Destination: Europe* (January 2016): 6-7.

[88] Ibid.

[89] IOM, "IOM Response Plan for the Mediterranean and Beyond", October 2015, 6.

[90] Zetter, "Protecting Forced Migrants," 25.

[91] Ibid.

domestic political demands focused on security issues and protection of Member States against mixed migration flows results in increasing vulnerability and protection gaps of the migrants.

Chapter 2
The International Normative Framework

3.1. Human rights and protection of the migrants

Rights descending from international law have evolved remarkably from the past, when the traditional authority of the State resulted in the exercise of full discretional power, particularly over issues related to access to protection in the national territory. When the right of political asylum emerged as a fundamental principle of international law, the State was the only entity entitled to decide whether a foreigner or a stateless person could be admitted in the national territory. This power traditionally derives from the principle of territorial sovereignty, according to which the State had exclusive control over individuals within its own territory[92]. The absolutist character of States' jurisdiction[93] changed completely with the contemporary evolution of international law in favor of the individual.

Thus, evolving hand in hand with of humanitarian crises, the concept of protection started to be linked to refugees, as envisioned under the 1951 Refugee Convention. This system of protection is the prevailing one for individuals that satisfy the legal definition of refugee and it continues "to accept implicitly the importance of the state apparatus in respecting and protecting the rights of its nationals and habitual residents", embodying "a surrogate state accepting responsibilities toward persons who have the status of refugees"[94].

The notion of protection is at the center of this thesis, as it implies "a notion that is broader than asylum or refugee"[95]. The most widely accepted definition of protection is the one sponsored by the International Committee of the Red Cross, according to which

> the concept of protection encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law[96].

According to this definition, protection aims at ensuring both that duty bearers respect their obligations and that individuals' rights are safeguarded[97]. In this view, States are responsible to promote citizens' fundamental human rights and protect them for violations of these rights. The value of such a maximalist definition covering all activities aimed at respecting all rights is valuable in the context of humanitarian

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[92] Federico Lenzerini, *Asilo e diritti umani: l'evoluzione del diritto d'asilo nel diritto internazionale*, (Milano: Giuffrè Editore, 2009), 86.
[93] Ibid., 87.
[94] Martin, Weerasinghe and Taylor, *Humanitarian Crises and Migration*, 15.
[95] Zetter, "Protecting Forced Migrants," 7.
[96] International Committee of the Red Cross, *Professional Standards for Protection Work* (Geneva: ICRC, 2013), 12.
[97] Ibid., 9.

crises, as it has the "ability to accommodate the plethora and diversity of needs exhibited by those who move, and those who are trapped and require relocation"[98].

Thus, the protection of human rights does not apply only to citizens. On 10 December 1948, the United Nations (UN) approval of the Universal Declaration of Human Rights led to the establishment of a common standard of achievements for all peoples and nations on fundamental human rights to be universally protected, with the subsequent transposition of many of the principles of the Declaration into international customary law. Article 1 states that "all human beings are born free and equal in dignity and rights"[99], but also the right to life (Article 3), the prohibition of torture or cruel, inhuman or degrading treatment (Article 5), the right of everyone to leave any country, including their own, and to return to their country (Article 13(2))[100] are relevant principles expressing the relationship between human rights and the protection of all, including migrants. Particularly, with regard to the right of asylum, Article 14 sets that

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations[101].

On these terms, the international human rights framework results to be grounded on the idea that all human beings have human rights. Thus, when determining migration policies, States' sovereign right is constrained by the obligations descending from international human rights law and customary law[102].

Additionally, poverty and deprivation triggering migration in the forms described in Chapter 1, mainly regarding the conditions of African countries of origin, actually represent a violation of human rights, as expressed in Article 25 of the Universal Declaration:

Everyone has a right to a standard of living adequate for the health, and well-being of himself and of his family[103].

The Court of Appeal in Turin has recently published a paperwork on the issue of humanitarian protection. The paperwork, first of all, says what humanitarian protection is not. It assesses that humanitarian protection is not a status, differently from the implications of the refugee status and the subsidiary protection. The reason of this must be ascribed to the different perspectives of humanitarian protection. In fact, the two main forms of protection consider the individual in relation to particular elements (for instance, as the following sections will describe, elements of political, racial, religious discrimination), whereas,

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[98] Martin, Weerasinghe and Taylor, *Humanitarian Crises and Migration*, 17.
[99] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 274 A (III).
[100] Ibid.
[101] Ibid.
[102] United Nations Human Rights Office of the High Commissioner (OHCHR), *Improving Human Rights-Based Governance of International Migration*, (Geneva: Office of the High Commissioner for Human Rights), 2013, 14.
[103] UN General Assembly, *Universal Declaration of Human Rights*, Article 25.

humanitarian protection focuses exclusively on the individual. Since, in this latter case, the relationship with the context is not decisive, humanitarian protection is an ad personam protection[104]. Moreover, according to the paperwork elaborated by the judge of the Court of Appeal, humanitarian protection is a subjective right, integrative of a fundamental human right, on the same level of those represented by international protection following the recognition of the status of refugee and subsidiary protection[105].

The institution of humanitarian protection in Italy is thus untied from the international protection that may be provided according to the Geneva Convention. It still follows the non-refoulement principle and regards "people with serious health problems or arriving from countries affected by natural catastrophes, and unable to repatriate"[106]. At the international law level, the notion of humanitarian protection lies at the heart of humanitarian crises and the preservation of humanitarian values for the dignity of people. The Universal Declaration of Human Rights contains the social and economic rights described above and so does the international humanitarian law. In the latter case, humanitarian protection is related closely to violence and, in particular, to conflicts or man-made emergencies where the fundamental well-being of individuals must be protected. The institution of humanitarian protection is particularly addressed by the International Committee of the Red Cross (ICRC) and UNHCR. The central purpose consists of safeguarding the worth and welfare of people in distress, ensuring the minimal standards of people's dignity. The agencies work to affect "policies determining individual freedom from abuse, hunger, the elements, poor physical and mental health, lack of basic education, etc."[107]

3.2. Norms and Practice in International Law

Today, conflicts and violence threatening human rights and forcing people to leave their countries and seek a better life elsewhere makes protection an integral part of humanitarian action[108]. As already mentioned above, the current crisis and the increasingly complexity of motivations underlying migration makes less clear-cut traditional distinctions of migrants and poses many challenges to the existing normative framework and international practice, "an increasingly compelling argument to address the rights of all migrants in a holistic way, regardless of their motives for migrating and their legal status"[109]. In 1951, the implementation of the Geneva Convention led to the establishment of protection from refoulement as the cornerstone of international obligations towards migrants fitting Article 1(2) of the Convention, recognized as refugees. However, the characteristics required for a person to access this legal status "decreasingly fits

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[104] Angelo Converso, *La protezione umanitaria fra pietà e diritto: il quadro normativo e giurisprudenziale e le esigenze umanitarie; il principio di rilocalizzazione*, (Scandicci: Scuola Superiore della Magistratura, 2015), 6-7.
[105] Ibid., 12.
[106] Presidenza del Consiglio dei Ministri, Dipartimento della Protezione Civile, "Humanitarian Protection," http://www.protezionecivile.gov.it/jcms/en/che_cose.wp?contentId=APP26737.
[107] David P. Forsythe, "Humanitarian protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees," *IRRC* (September 2001): 675-697.
[108] Zetter, *Protection in crisis,* 26.
[109] OHCHR, *Improving Human Rights-Based Governance of International Migration*, 16.

the complex, multi-causal drivers of displacement that characterise contemporary mixed migration flows"[110]. Reasons pushing people to migrate are multicausal and do not allow a clear and easy discern of precise causes and correspondent possible categorization; "as a result, proportionately fewer migrants who are forced to leave their countries for whatever reason are able to claim or benefit from «refugee» status: the majority fall outside this recognised legal and normative framework that governs their reception and protection"[111]. Only very small classes of migrants are recognized as people whom countries have an obligation to protect. Beyond the Geneva Convention, policies of protection have been established to address changing situations. Nevertheless, as Zetter states, "the adaptation of protection norms and instruments has been insufficient to keep pace with the changing dynamics of forced displacement"[112].

Betts highlights the limitations of the existing international institutional framework for the protection of vulnerable irregular migrants by comparing it with the existing institutional structures related to the protection of refugees. Thus, "international refugee law provides a clear normative and legal framework for the identification and protection of refugees, and the UNHCR has the main normative and operational responsibility for ensuring that refugees receive access to the rights to which they are entitled"[113]. Different is the framework covering irregular migration, which, in contrast, "is conventionally treated as a residue category with few rights, from which refugees need to be isolated and protected, but toward which states have few other obligations"[114].

Recently, an increasing number of States and especially the EU Member States have tried to codify complementary protection schemes, namely Subsidiary and Temporary protection, in order to address the protection of migrants other than refugees. Though, these attempts often allow States to provide migrants with inferior forms of protection. More generally, a regulatory framework still tied to specific normative categories of legal status is unable to address the complexity of contemporary migration and the highly vulnerable conditions of people who migrate.

Nevertheless, the international community has tried to give priority to international migration in both the UN High-Level Dialogue on migration and development in 2006 and 2013 and by including migration in the post-2015 Millennium Development Goals. The Dialogues remark Member States' duties in ratifying and implementing all international instruments related to international migration, particularly in reference to the core international human rights instruments. Human rights of migrants should be respected at all stages of migration and should include also migrants having an irregular legal status. With this purpose, "access to legal migration channels should be enhanced"[115]. The elimination of migrant exploitation, the improvement of public perceptions of migrants, and the enhancement of migration partnerships and cooperation are some of the other important points that the 2013 Dialogue includes in the migration agenda for action.

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[110] Zetter, *Protection in crisis*, 24.
[111] Ibid.
[112] Ibid., 27
[113] Betts, *Soft Law and the Protection of Vulnerable Migrants*, 537.
[114] Ibid., 347.
[115] UN, *Making migration work: an eight-point agenda for action*, from the Report of the Secretary-General A/68/190, 3-4 October 2013.

At the EU level, the overarching framework for external migration policy, whose main pillars are the Global Approach to Migration and Mobility (GAMM), the Common European Asylum System (CEAS), and the Dublin Regulation III scheme, is still unable to address the challenge represented by contemporary mass migration. As already mentioned, the initiatives adopted within this architecture have been very much focused on security priorities rather than human rights protection. Partnerships with transit countries or countries of origin in the region, operational measures and agencies established for borders' control and management of the migrants, are all actions not sufficiently supported by the right attention to human rights.

The Nansen Initiative is instead very valuable for what concerns migrants' protection gaps resulting from environmental disasters or dramatic environmental conditions as a consequence of climate change, as it addresses the challenge of cross-border displacement by encouraging an intrastate consolidated dialogue, international cooperation, standards of treatment, and operational response within a wide protection agenda that assists climate forced migrants.

Important are also the 1998 Guiding Principles on Internal Displacement, that provides a soft-law framework of protection for IDPs, and the Kampala Convention, which is one of the most sustainable approaches adopted so far within the international framework in matter of forced migrants' protection.

However, the effectiveness of all instruments of protection depends on three factors: States' willingness to pass laws related to these issues, States' commitment to respect obligations and responsibilities arising from legislation, norms, and guidelines, and, especially, it can be successful only if these commitments are linked to a wider social transformation that is necessary to have full respect of human rights and protection from violations of these rights[116].

In a ministerial-level address to mark the 60th anniversary of the 1951 Geneva Convention, the UN High Commissioner for Refugees states that "while the nature of forced displacement is rapidly evolving, the responses available to the international community have not kept pace"[117]. Protection gaps addressing needs and mitigating risks associated to mixed migrations, in fact, pose the urgency to rethink the current approach, characterized by an obsolete architecture for protection.

3.2.1. The Geneva Convention and the principle of non-refoulement

The problem of refugees started to have a juridical relevance at the international level after the end of the First World War. In 1921 a High Commissioner for Russian Refugees was established by the League of Nations in order to respond to the events of the Russian Revolution and was transferred, in 1929, under the International Labor Organization (ILO) with the name "Refugees, League of Nations Offices"[118]. Over the following years, within the context of the League of Nations, several instruments have been adopted to

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[116] Zetter, "Protecting Forced Migrants," 50.

[117] Mr. António Guterres, "Statement by Mr. António Guterres, United Nations High Commissioner for Refugees (UNHCR), Intergovernmental Meeting at Ministerial Level to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness," December 7, 2011, http://www.unhcr.org/4ecd0cde9.html.

[118] Lenzerini, *Asilo e diritti umani*, 146.

address specific groups of refugees; for instance, the Nansen Passport, a refugee travel document, originally provided to Russian refugees from the civil war and then broaden to include Armenian, Assyrian, Turkish refugees. Then, in 1933, also the High Commissioner for Refugees Coming from Germany was established in a new framework, dominated by binding Conventions setting the formulation of the principle of non-refoulement for the first time. By 1939, the High Commissioner's mandate was extended to all refugees coming from all countries. The United Nations (UN) General Assembly adopted the Statute of the UN High Commissioner for Refugees (UNHCR) in 1950 and an autonomous jurisdiction was entirely transferred to the UNHCR two years later[119]. UNHCR is responsible for supervising the 1951 Geneva Convention and for providing international protection to refugees falling within its competence, by the promotion of international conventions, the assistance to Governments and inter-governmental and private organizations[120].

The Convention Relating to the Status of Refugees was signed in Geneva in 1951 and entered into force in 1954. Its scope of application was circumscribed to the protection of refugees produced by "events occurring before 1 January 1951"[121] and by "events occurring in Europe" before 1951[122]. The 1967 Protocol Relating to the Status of Refugees later removed the temporal and geographical limitations, "making the Convention of universal and temporally-unlimited application"[123]. Article 1(A) is the essential core of the Convention, as it sets States' obligation to guarantee protection to foreigners and stateless people who have been persecuted by another State for the causes mentioned in the article, not being able to receive protection by their country of origin. Asylum-seekers must satisfy specific requisites in order to correspond to the definition of refugee. According to Article 1A of the Convention, refugee is the person who

> 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 a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.[124]

[119] Ibid., 151-152.
[120] UNHCR, *Statute of the Office for the United Nations High Commissioner for Refugee*, General Assembly Resolution 428 (v), 14 December 1950.
[121] Ibid., Article 1B(I).
[122] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, Art. 1(B)a.
[123] Lenzerini articolo in pubbl. p. 1
[124] UN General Assembly, *Convention Relating to the Status of Refugees*, Article 1(A)2.

A five year permit, renewable automatically, is provided for refugees; then, the State will be released from the obligations of the Convention as soon as the risks linked to the qualification of the person as a refugee fall, or in cases in which the person will be able to receive protection from the State of origin or from the State in which he or she has asked the citizenship[125]. The other Articles of the Convention are related to a series of other issues, such as the duties resting on the refugees in the foreign country, the right to exercise freedom of religion, the recognition of the rights that the refugee had previously acquired and all the other rights that the refugee has in the new country, in the areas of job, education, social security, freedom of movement, etc. Particularly relevant is then Article 34, related to the principle of non-refoulement. The Article states that

> 1. No Contracting State shall 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.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country[126].

The principle of non-refoulement was subsequently transposed into a principle of customary international law[127], thus becoming binding also for non-signatories States. It represented the cornerstone for the development of the normative framework that came next, as also the 2001 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees states. In fact, in the Preamble of the Declaration, State Parties acknowledge the relevance of the principle of non-refoulement at the core of the international regime of rights and principles, in matter of refugee protection, "whose applicability is embedded in customary international law"[128]. The 1984 Cartagena Declaration confirms the imperative character of the principle of non-refoulement at the international level, as it reiterates

> the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens[129].

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[125] Lenzerini, *Asilo e diritti umani*, 154.

[126] UN General Assembly, *Convention Relating to the Status of Refugees*, Article 33.

[127] Federico Lenzerini, "Sixty-five Years and It Shows Them All. Proposals for Amending the 1951 Convention on the Status of Refugees in Light of Contemporary International Human Rights Standards," The Italian Yearbook of International Law: (2015), 1.

[128] UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees,* 16 January 2002, HCR7MMSP/2001/09.

[129] Colloquium on the International Protection of Refugees, *Cartagena Declaration on Refugees*, 19-22 November 1984, para III.5.

As a principle of customary law, non-refoulement further developed with a broader content compared to the definition given by Article 33 of the Refugee Convention. Lautherpacht and Bethlehem interpreted it in the following terms:

> (a) No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face <u>a real risk of being subject to torture or cruel, inhuman or degrading treatment or punishment.</u> This principle allows of no limitation or exception.
>
> (b) In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory <u>where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty.</u> Save as provided in paragraph 3, this principle allows of no limitation or exception.
>
> (c) Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 2 in circumstances in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country[130].

However, anyhow interpreted, whether narrowly or more broadly, huge classes of people are excluded from protection, as many migrants fall outside the provisions set by the Convention. The inadequacy of the Convention in responding to multicausal protection needs emerges, first of all, from the analysis of the conditions required for a person to be qualified as a refugee. The asylum-seeker must have a well-founded fear of being persecuted and the occurrence of persecution must be caused by the persons' race, religion, nationality, membership of a particular group or political opinion. He or she must also be outside of the country of nationality and must be unable or unwilling to avail himself or herself of the protection of that country. The persecution require an active behavior by the agent, whether it is a State or a non-State actor.

If the claimant has to demonstrate the persistence of the factors specified by the Convention, it is clear that all human beings suffering violations of their human rights, whose condition does not correspond to the provisions of the Convention, have very limited or are not entitled to international protection. The complex patterns of migration today exceed the number of refugees. Drivers of migration now extend

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[130] Elihu Lauterpacht and Daniel Bethlehem "The scope and content of the principle of *non-refoulement*: Opinion," 2003, 163, http://www.unhcr.org/419c75ce4.pdf.

beyond the traditional condition of persecution; "beyond the category of refugees and persecution, many other uprooted and vulnerable populations have protection needs"[131]. The categories listed in Article 1(A) leave "no leeway for expansive interpretation"[132].

3.2.2. Regional instruments

In addition to the transposition into customary norms of key principles such as the principles of non-refoulement, the Geneva Convention has also represented a source of inspiration for instruments implemented by regional organs[133].

An attempt to provide a more advanced level of protection to asylum-seekers is given by the 1969 Convention of the Organization of OAU on the Specific Aspects of the Refugee Problems in Africa[134]. With the result of widening the scope of protection, the African Convention extends the definition of refugee in the 1951 Refugee Convention to include those who are fleeing events that "seriously disturb public order". The African Convention regulates the principle of non-refoulement in a way that not only prevents States from rejecting people that have already accessed the territory, but also providing protection for all those that invoke it against persecution or were obliged to leave their country due to an event that caused a breach to the public order of the country[135].

Worth mentioning is also the 1969 American Convention on Human Rights, that has the merit of extending the right of asylum and the principle of non-refoulement, as stated by Article 22:

> every person has the right to seek and to be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes[136].

In this way, the right of asylum is provided not only to refugees, but also to "every person" who finds himself/herself in the condition of need, including stateless people or irregular migrants. Additionally, analyzing paragraph 8, Article 22, which states that

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions[137].

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[131] Zetter, "Protecting Forced Migrants," 26.
[132] Mehreen Afzal, "Rethinking Asylum: the Feasibility of Human Security as New Rationae Personae Protection" in *Journal of International Law & Policy,* Vol. III, 7.
[133] Lenzerini, "Sixty-five Years and It Shows Them All", 1.
[134] Lenzerini, *Asilo e diritti umani*, 114.
[135] Ibid., 115.
[136] Organization of American States (OAS), *American Convention on Human Rights,* 22 November 1969, Article 22 para 7.
[137] Ibid., para 8.

No exception to the application of the principle of non-refoulement is mentioned, as, instead, the correspondent Article 33 of the Geneva Convention does.

Another example is provided by the 1984 Cartagena Declaration on Refugees, which widens the scope of target beneficiaries of refugee protection (in Central and Latin America) in a way that is relevant to mixed migration. In two ways the definition of refugees contained in the Declaration is broader than the definition given by the 1951 Geneva Convention. Firstly, it includes in the circumstances of people fleeing harm and can seek refuge the threat of generalized violence, internal aggression, and massive violation of human rights. In particular,

> the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among 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[138].

However, as the Geneva Convention, also the Declaration of Cartagena maintains the qualification of refugee only in cases of risks implied by individual circumstances of persecution, rather than generalized. Secondly, the Declaration does not require that individuals are at threat of persecution on the basis of reasons of race, nationality, religion, political opinion, or membership of a particular social group. Moreover, as for the non-refoulement principle, the Declaration states

> the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens[139];

thus, definitively reinforcing its meaning and centrality as the fundamental rule of international law concerning refugees.

3.2.3. Complementary Protection

Complementary protection, in legal terms, describes "protection granted by States on the basis of an international protection need outside the 1951 Convention framework"[140]. So far, it has been adopted by many countries such as EU States, Canada, USA, New Zealand, and Australia. Subsidiary protection and

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[138] Colloquium on the International Protection of Refugees, *Cartagena Declaration on Refugees*, para III.5., para III.3.
[139] Ibid., para III.5.
[140] Jane McAdam, *Complementary protection and beyond: How states deal with human rights protection*, (Geneva: United Nations High Commissioner for Refugees, 2005), 1.

temporary protection are examples of codified forms of complementary protection. On the one hand, these forms of protection imply that governments recognize the necessity of according protection to people in need, also when the refugee status has been denied. On the other hand, however, Zetter notes that complementary forms of protection "allow countries to reduce the volume of people receiving refugee status and the obligations this imposes, as none of these provisions afford the same level of protection as the 1951 Convention"[141].

Forms of subsidiary protection may solve specific protection gaps for categories of migrants not covered by other norms. An example of subsidiary protection is provided by the EU system of protection, which has drawn by the 2004 Qualification Directive[142] with the aim at establishing the standards for the qualification of beneficiaries of international protection. The Directive was then followed by a recast Directive that sets a common policy on asylum, including a Common European Asylum System, as a constituent part of the EU objective of "progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union"[143], on the basis of "the full and inclusive of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of 31 January 1967 ('the Protocol')" and of the principle of non-refoulement[144]. Beyond providing the rules for the recognition of refugees and the content of refugee status, the Qualification Directives have also the objective to complement the provisions of the Geneva Convention with measures on subsidiary forms of protection, "offering an appropriate status to any person in need of such protection"[145]. The complementary protection regime established by the Directive of 2004[146] had the attempt to: "(a) harmonize European Union member state legislation in the field of asylum; and (b) (perhaps more implicitly) remedy the narrowness of the Geneva Convention regime"[147]. As Afzal observed, the Explanatory Memorandum of the Qualification Directive[148] specifies how the complementary protection "assumes the primacy of the Geneva Convention because it considers the latter suitable and flexible enough to provide protection in line with the displacement flows of today"[149]. The Memorandum also holds that "the purpose of the Directive is to account for the needs of all persons requiring international protection, therefore implying, on some level, the inadequacy of the Geneva

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[141] Zetter, *Protection in crisis*, 18.

[142] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004 O.J. L 304/12.

[143] Directive 2011/95/EU of the European Parliament and of the Council 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 (recast), 13 December 2011, O.J. L 337/9, (2), [hereinafter Qualification Directive].

[144] Ibid., (3).

[145] Ibid., (6).

[146] Qualification Directive.

[147] Afzal, "Rethinking Asylum", 9.

[148] European Commission, Report to the European Parliament and the Council on the application of the Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, COM (2007) 745 Final (November 2007).

[149] Afzal, "Rethinking Asylum", 9.

Convention"[150]. The subsidiary protection regime anyway codifies existing international provisions[151] related to asylum, not providing a new framework of protection. The scope of protection is drawn by Article 2(f) of the 2011 Directive,

> 'person eligible for subsidiary protection' means a third-country national or a stateless person <u>who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned</u>, 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 … and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country[152].

Article 15 identifies three forms of serious harm, consisting of (a) death penalty or execution, (b) torture or inhumane or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict[153]. In 2001, when the Directive was first proposed, the definition of serious harm included a further paragraph, which defined serious harm also as the "violation of human right, sufficiently severe to engage the Member State's international obligations"; though, with the removal of this provision the scope of the Directive was reduced[154]. The deleted provision "allowed for the greatest development of the human rights–refugee law nexus, providing flexibility for addressing new situations arising in international law and relevant developments in the jurisprudence of the European Court of Human Rights"; however, "as Article 15 stands now, there is little room for interpretation"[155]. Now, the complementary protection regime "is in fact constructed as default measure for an individual not falling within the refugee category"[156]; in fact, in order to access subsidiary protection, the claimant needs to exhaust Geneva Convention rights. Contrarily to the Convention, subsidiary protection may be provided for one year, renewable for persons maintaining subsidiary protection status. Then, Afzal outlines how, in general, the quality of rights provided are lower than those given to refugees[157]. Moreover, by according protection to people suffering serious harm on the basis of the categories mentioned, the scope of the complementary protection regime is furtherly reduced. These categories may also lead to an overlap of groups of protection seekers that probably would fall under the Convention refugee status, but to which

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[150] Ibid.

[151] Council of Europe: European Court of Human Rights, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Article 3. UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, 26 June 1987, Article 3.

[152] Qualification Directive, Article 2(f).

[153] Ibid., Article 15.

[154] McAdam, *Complementary protection and beyond*, 3.

[155] Ibid.

[156] Afzal, "Rethinking Asylum", 11.

[157] Ibid., 13

complementary protection is accorded. National jurisdictions have residual competence that can result in broader protection measures with those compared to the scope of the Qualification Directive's standard[158].

Temporary Protection has recently expanded in the form of Temporary Protection Status (TPS) invoked by the USA in 1998, on occasion of Hurricane Mitch, for Hondurans and Nicaraguans that, though, were already outside those countries. It was not aimed at protecting displaced people within their countries[159]. Similarly, Switzerland provided the same type of protection for Kosovo Albanians in 2000. In those years, also Finland and Sweden strengthened the normative legislation related to TPS, extending it to individuals unable to return to their country of origin as a consequence of an environmental disaster[160]. In the EU, the Directive on Temporary Protection was introduced in 2001, after the events occurred over the 1990s, specifically related to the conflicts in the former Yugoslavia and in Kosovo. The Directive provides minimum standards for giving protection in the event of a mass influx. It also promotes the balance between Member States in receiving displaced persons and bearing the consequences. Article 2(c) of the Directive establishes that beneficiaries of temporary protection are

> 'displaced persons' means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:
>
> (i) persons who have fled areas of armed conflict or endemic violence;
>
> (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;

In order to access this form of protection, people have to fall within the category of mass influx, which can be established only by a Council Decision[161] based on

> (a) an examination of the situation and the scale of the movements of displaced persons;
>
> (b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such
>
> measures;

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[158] Afzal, "Rethinking Asylum", 16-17.
[159] Zetter, "Protecting Forced Migrants," 27-28.
[160] Ibid.
[161] Directive 2001/55/EC of the Council of the European Union on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2001 O.J. L 212/12, Article 5, [hereinafter Directive on Temporary Protection].

(c) information received from the Member States, the Commission, UNHCR and other relevant international organisations[162].

The Commission proposal includes then the description of the specific groups to whom this protection scheme will apply, the date, and an estimation of the scale of the movements[163]. Temporary protection is provided for one year and can be renewed in cases the situation in the country of origin is still not safe[164]. The following Articles describe the conditions of reception, which are mostly the same of those provided by the subsidiary protection system. However, Afzal observes that "the beneficiaries of temporary protection in situations of mass influx would have to prove an individualized harm to fall within the category of subsidiary protection—in other words, fulfil the requirements of Article 15(c) of the Qualification Directive, which is very difficult to prove"[165]. Her argument is that the priorities of the protection schemes provided by the CEAS (protection under the Geneva Convention, subsidiary protection, and temporary protection) demands a reconsideration in favor of the absolute commitment to protect persons in need[166]. The different duration of protection schemes, the responsibility of Member States, and the activation of these forms of protection just in situations of mass influxes should be revised. Moreover, lastly, "creating a system of asylum that only acknowledges the insufficiency of the Geneva Convention with temporary gap-filling measures not only undermines the overall protection needs of all displaced persons, but also provides an unfair advantage to those lucky enough to fall within the narrow Convention criteria"[167].

3.2.4. The EU level

By mentioning the general attitude of EU Member States and Fortress Europe, characterized by responses focused on security protection rather than human rights protection of the migrants, Chapter 1 briefly exposed the challenges that the migration crisis is posing to Europe. The integrity of the Schengen area, that represents one of the main pillars of EU integration, in this way, is constantly threaten by protection denial against the migrants.

At the EU level, norms on asylum were originally born on the basis of the old principle of free circulation of people; then, the necessity of realizing a common system for the management of the fluxes became clearer with the establishment of the EU single market[168]. The idea of developing a joint approach to guarantee standards of protection for refugees was then realized by the implementation of the Dublin Convention in 1990. As already mentioned above, in 1999, the EU started to take the first steps for the

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[162] Directive on Temporary Protection, Article 5(4).
[163] Ibid., Article 5(2).
[164] Ibid., Article 4 and 6.
[165] Afzal, "Rethinking Asylum", 20.
[166] Ibid., 21.
[167] Ibid.
[168] Lenzerini, *Asilo e diritti umani*, 121.

establishment of the Common European Asylum System (CEAS)[169], with the purpose of creating a coherent legislative framework addressing refugee. Based on the full application of the Geneva Convention, the System is aimed at granting protection to people escaping situations of persecution or serious harm in their country seeking international protection. Several legislative measures have been adopted, among which the creation of a European Refugee fund, aimed at strengthening financial solidarity at the EU level. In 2001, the above mentioned Temporary Protection Directive had the objective of providing a normative instrument for the protection of displaced persons in cases of mass influx. Moreover, in 2008, the European Commission introduced a Policy Plan on Asylum, based on important principles underpinning the development of the CEAS, namely more harmonization to standards of protection by the alignment of Member States' legislation, more cooperation among EU States, and increased solidarity and responsibility[170]. In the following years, many other Directives have been agreed, setting out the standards of reception, processing, and interpretation of asylum with the aim at ensuring consistent management across EU's Member States[171]. Specifically, the CEAS comprises the following Directives and Regulations: the Asylum Procedures Directive (2013/32/EU), the Reception Conditions Directive (2013/33/EU), the Qualification Directive (2011/95/EU), the revised Dublin III Regulation (604/2013), and the Eurodac Regulation (603/2013). These are all new rules establishing a framework for asylum aimed at providing systems of decisions and reception, as well as providing a process for establishing Member States' responsibility over the examination of asylum applications and a system of database collection of the fingerprints of asylum seekers in order to "prevent, detect or investigate the most serious crimes, such as murder and terrorism"[172]. The problem is that the CEAS does not have a degree of complexity able to address the diversity of mixed flows; resulting in a situation where "either a migrant fits, with some difficulty, the asylum track or she/he does not"[173].

3.2.4.1. The EU Global Approach to Migration and Mobility

A further step towards balancing the internal with the EU external security dimension was set by the Global Approach to Migration and Mobility (GAMM), an instrument designed to establish a comprehensive framework to deal with external migration challenges by organizing legal channels of migration for safe access to the EU. GAMM identifies four themes corresponding to the Approach's four main pillars, namely (1) organization and facilitation of legal migration and mobility, (2) prevention of irregular migration, and trafficking in human beings, (3) promotion of international protection and asylum policy, and (4) maximization of the development impact of migration mobility, with the cross-cutting strengthening respect

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[169] European Commission, "Common European Asylum System", last update 23 June 2016, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm.

[170] Ibid.

[171] Zetter, "Protecting Forced Migrants," 71.

[172] European Commission, *A Common European Asylum System*, (Luxembourg: Publications Office of the European Union, 2014), 5.

[173] Zetter, "Protecting Forced Migrants," 71.

for migrants' human rights at all stages of migration[174]. Under the third pillar, GAMM promotes the development of EU asylum policy frameworks with non-EU countries.

Among these, in 2005, the Regional Protection Programmes[175] (RPPs) have been elaborated in order to tackle the growing pressure on the asylum system within Europe, by improving capacity of countries in both regions of origin and transit for refugees. RPPs represent a valuable instrument for enhancing the protection capacity of the regions involved and to improve refugee protection through durable solutions (return, local integration or third country resettlement). The Programmes include projects designed to improve protection conditions in the host country and establish procedures for determining refugee status, as well as projects that will benefit refugees and local communities hosting refugees and projects promoting training for persons working with refugees and migrants. This protection initiative was extended with the Regional Development and Protection Programme (RDPP), elaborated as a response to the Syrian refugee crisis, and active in Lebanon, Jordan, and Iraq. The RDPP was led by Denmark, with the participation of other EU countries, and it was aimed at improving life conditions, livelihood capacities, and economic opportunities for displaced refugees and host communities[176]. The relevant outcome of the RDPP conducted in Syria is the arise of the link between protection and socio-economic development, which "is taking place in the way humanitarian and development actors are now responding to humanitarian emergencies"[177], a configuration that goes beyond normative protection, addressing security and protection risks of refugees and displaced persons[178]. RPPs and the RDPP, thus, widen the concept and practice of protection.

Another instrument included in the GAMM framework is represented by Mobility Partnerships, established in 2005, consisting of bilateral agreements between the European Commission (EC) or individual Member States with countries that are sources of migrant labor coming to the EU or with transit countries for forced migrants and mixed migrants. They may also take the form of regional policy dialogues, agreements on visa facilitation and readmission, and funding or operational support coming from Frontex or other EU Agencies[179]. They provide assistance for the fulfillment of third countries' obligations towards refugees and asylum seekers, but also towards migrants coming from mixed flows that transit in these countries[180]. Mobility Partnerships have been concluded with countries such as Turkey, Moldova, Georgia, Armenia, Morocco, Tunisia, and Mali, including bilateral agreements between Italy-Libya, France-Tunisia, and Spain-Morocco. Recently, they have been developed also with the West Balkans, Nigeria, and Yemen.

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[174] Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled "The Global Approach to Migration and Mobility", SEC(2011) 1353 Final [hereinafter Commission Communication "The Global Approach to Migration and Mobility"].

[175] Commission Communication to the Council and the European Parliament on regional protection programmes, COM(2005) 388 Final.

[176] Zetter, "Protecting Forced Migrants," 60.

[177] Ibid.

[178] Ibid.

[179] Amnesty International, *The Human Cost of Fortress Europe*, 13.

[180] Zetter, "Protecting Forced Migrants," 65.

Instances of dialogues promoted by the EU at the regional level are the Rabat and Khartoum processes. The Euro-African Dialogue on Migration and Development (Rabat Process[181]) provides a framework for coordination, exchange, and development over challenges arising from migration issues among European and African countries, the European Commission (EC) and the Economic Community of West African States (ECOWAS)[182]. Areas of discussion are a strengthen synergy between migration and development, organization of legal migration, protection of migrants' rights, contrast to irregular migration, asylum and international protection, border management, readmission and return policies, policy consistency and coordination on acquired and shared information.

The Khartoum Process[183] has been established in 2014 and consists of a dialogue for enhanced cooperation on migration and mobility along with concrete projects aimed at addressing the trafficking and smuggling of migrants. The Process gives "new impetus to the regional collaboration between countries of origin, transit and destination regarding the route between the Horn of Africa and the European Union (EU)"[184], harmonizing the EU's GAMM with the African Union (AU) Migration Policy Framework for Africa, the Ouagadougou Action Plan, and the AU Commission Initiative against Trafficking on human trafficking and smuggling. EU's Global Approach, on its side, is based on the Directive on trafficking in human beings, adopted in 2011, and the Strategy towards the Eradication of Trafficking in Human Beings, adopted in 2012. Both set practical measures to prevent, protect, and support the victims, prosecute traffickers, and harmonize the investigation processes at the EU level. The Khartoum Process is anchored in the EU-Africa Action Plan on Migration and Mobility 2014-2017, aimed at creating a framework for policy and dialogue, strengthen cooperation with international organizations, such as IOM, UNHCR, and UNODC, and promote funding and investments to support projects.

Mobility Partnerships may seem to represent a positive response to the challenges of migration management; however, they have many counter arguments. The report of Amnesty International asserts that the EU is supporting this system of migration control in neighboring countries in the exclusive effort to stop migrants and refugees before they reach EU's frontiers[185]. Cooperation arrangements involve operations of funding equipment for border surveillance, training activities of guards at the borders and coastguards, and the creation of networks aimed at sharing information in order to stop migrants before they can reach Europe. The EU supported and financed also the construction of detention centers to contain and block migrants from entering Europe. Readmission agreements for returning irregular migrants from EU Member

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[181] IOM, "Euro-Africa Dialogue on Migration and Development (Rabat Process)," 2006, https://www.iom.int/eu-horn-africa-migration-route-initiative-khartoum-process.

[182] Economic Community of West African States (ECOWAS), http://www.ecowas.int/. ECOWAS was established in 1975 with the Treaty of Lagos. It consists of a 15-member regional group aiming at promoting integration in all fields of activity among Member States. In particular, ECOWAS represents one of the pillars of the African Economic Community and, as such, it mainly promotes economic cooperation and integration, considering the economic and social development challenges of African countries.

[183] IOM, "EU-Horn of Africa Migration Route Initiative (Khartoum Process),"2014, https://www.iom.int/eu-horn-africa-migration-route-initiative-khartoum-process.

[184] Ibid.

[185] Amnesty International, *The Human Cost of Fortress Europe*, 13.

States to countries of partnership or directly to the countries of origin have been concluded, resulting in a new instrument of push back.

Despite the support of EU Member States, third countries raise many concerns about protection capacities and full respect of migrants' human rights[186]. In some cases, Partnerships tend also to develop a system for migrants' processing before arriving to Europe, with the consequence that weak civil society organizations, not particularly accountable in democratic terms and quality of protection, become responsible of extra-territorial processing[187]. Thus, migrants end up being at risk of prolonged and arbitrary detention, refoulement, and ill-treatment.

From a financial perspective, also the funding invested by the EU in securing borders reveals how EU's priorities towards migration policy have been clearly concerned with borders' protection rather than human rights obligations[188]. The report of Amnesty International analyzed the budget that the EU allocated under the Solidarity and Management of Migration Flows Programme (SOLID) to support asylum-related activities carried out by Member States (4 billion Euros in the period 2007-2013), comparing the 1,820 million Euros allocated for activities and infrastructures focused on the control of the EU external border and just the 17% of the total budget (700 million Euros) devolved to support asylum procedures, reception services, and refugees' resettlement and integration. Moreover, funding allocations for individual Member States further shows this contrast, as, for instance, in Bulgaria, only the 8% was allocated for activities of the Refugee Fund, whereas the 74% was for activities funded by the External Borders Fund. When the Asylum, Migration and Integration Fund (AMIF) was established by the EU in 2014, with a budget of 3,137 million Euros, the regulation forces Member States to spend at least the 20% of the fund on asylum-related activities, but without any provision related to human rights monitoring mechanisms.

Thus, as for the EU level, instruments adopted so far have not been consistent with principles aimed at protection policies for the migrants, respect of human rights, and vulnerability reduction. The framework established by the GAMM to tackle the problem of migration, reveals a strong tension between the objective of protecting the migrants and the political interests in ensuring the security of EU Member States. Two general propositions characterizing this framework designed to manage the migrants have been identified by Zetter. First, a non-entrée regime, well described by the concept of "Fortress Europe", also already mentioned in Chapter 1, based on both principles of free mobility and elimination of internal borders and, at the same time, on policies of restrictive external borders and borders management, leads to a decreasing quality of protection of the migrants, irrespective of whether they are refugees, asylum seekers, or mixed migrants. The construction of fences, the CEAS, the Dublin III Regulation, the Post-Stockholm Programme, extensive border surveillance, Mobility Partnerships, RDPPs, and all the instruments intended to enhance security of the common external border, namely Frontex, EUROSUR, and the Task Mediterranean Force, are part of a fragmented and resistant humanitarian system, promoting resettlement policies and a political

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[186] Zetter, "Protecting Forced Migrants," 65.
[187] Zetter, "Protecting Forced Migrants," 66.
[188] Amnesty International, *The Human Cost of Fortress Europe*, 9-10.

discourse "which reinforces the securitization of migration and asylum at the expense of the rights and protection of migrants"[189].

These measures, mainly focused on strengthening control at borders, stimulate an important reflection. The EU lacks both the necessary means to contain mass migration influxes and the absence of a definitional and procedural framework aimed at distinguishing the different categories of migrants, also in order to address differentiated protection needs. In addition, legal channels to the EU are insufficient to provide an alternative to irregular access. At the end "irregularity is intrinsically linked to policies aimed at limiting access to EU territory"[190].

The second propositions characterizing the EU framework, Zetter identifies the second as the one expressed by the dichotomy between protection in the global North and protection in the global South. The former embodies the dominant model of norms and procedures of the typical Northern European non-entrée regime, whereas the latter is actually experiencing the massive part of the current migration crisis. As Zetter states, "when the bi-polar protection machinery seems, increasingly, to serve the interests of restrictionism, then questions of proportionality of response and the equity of burden sharing need to be asked"[191].

3.2.4.2. The Dublin III Regulation

The Tampere Conclusions, beyond determining the establishment of the CEAS, also included in the System a method for determining the Member State responsible for the examination of asylum applications. In 2014, Dublin III came into effect to replace the precedent Regulations and it further clarifies the criteria for determining responsibility in order to "guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection"[192]. The Regulation sets a hierarchical system to allocate responsibility for a claim on the basis of elements represented by family unity, legal residence or visas, illegal entry, and place of application. Specifically, with regard to illegal entry (which is of major concern for the present analysis), the applicant without documents or family present, when entering a territory of the EU, is responsibility of the first Member State in which he/she arrives[193]. Instruments that have been developed in order to implement the Regulation are many. Alongside the European Asylum Support Office (EASO) for the strengthening of asylum capacity in non-EU countries and the support for resettlement activities[194], the EURO-DAC created a database and a system for storing fingerprints of asylum applicants and migrants arriving to the EU borders.

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[189] Zetter, "Protecting Forced Migrants," 68.

[190] Zetter, "Protecting Forced Migrants," 70.

[191] Ibid., 68.

[192] Regulation 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2013 O.J. L 180/31, (5).

[193] Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System*, (Brussels: Migration Policy Institute Europe, 2015), 5.

[194] Commission Communication "The Global Approach to Migration and Mobility".

By providing a mechanism to determine responsibility, Dublin is able to fill some important gaps in the CEAS; however, at the same time, the system tends to push major responsibilities to the external borders, to States that are not sufficiently equipped to face this additional burden. Despite the harmonization that CEAS aims at achieving, the diversity of EU Member States in dealing with asylum applications, due to different asylum and migration policies, results in lack of coherence in the EU. Different reception, admission, return policies, as well as different status determination system, are all evidences of divergence in standards that, at the end, leads to weaker protection for the migrants and higher vulnerability. Solidarity, which in principle characterizes the CEAS burden sharing system, is replaced by a division between Northern and Southern EU States, with States on the external borders facing heavy burden on their capacities[195].

As to the instruments used to ensure external borders control and surveillance, beyond EASO, Frontex, the European Border Surveillance system (EUROSUR), and the Task Force for the Mediterranean must be discussed. In 2002, the EU Commission submitted the communication "Towards Integrated Management of the External Borders of the Member States of the Union" for the establishment of a common policy on management of the EU external borders[196]. Frontex was established in 2004[197] and became operational in 2005, with the aim at coordinating border management operations such Triton and Poseidon and return operations. In 2011, it was renewed[198] to include mechanisms of human rights monitoring and the respect of the non-refoulement principle. However, Frontex continues to raise concerns in matter of human rights[199]. Push-back operations conducted with Frontex's partners, such as the Joint Operation Poseidon Sea along the Greek border with Turkey, were reported by Amnesty International[200] because of persistent human rights violation and lack of transparency and accountability as for human rights standards within the Agency[201]. Amnesty International also criticizes the absence of mechanisms within Frontex for dealing with complaints related to human rights violations[202].

With regard to this, in 2015, the Ombudsperson opened a case aimed at investigating Frontex's compliance with human rights standards and with the requirements of the EU's Charter of Fundamental Rights and then asking support on the matter to the European Parliament[203]. The case highlights the existing tension between the interest in controlling immigration and the respect of human rights for asylum seekers

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[195] Zetter, "Protecting Forced Migrants," 73.

[196] Commission Communication to the Council and the European Parliament entitled "Towards integrated management of the external borders of the Member States of the European Union", COM(2002), 233 final.

[197] Council Regulation No. 2007/2004/EC establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004, O.J. L 349.

[198] Regulation 1168/2011 of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2011 O.J. L 303/1, (9).

[199] Samuel Cogolati, Nele Verlinden and Pierre Schmitt, *Migrants in the Mediterranean: Protecting human rights*, (Belgium: European Union, 2015), 40.

[200] Amnesty International, *The Human Cost of Fortress Europe*.

[201] Cogolati, Verlinden and Schmitt, *Migrants in the Mediterranean*, 41.

[202] Amnesty International, *The Human Cost of Fortress Europe*, 16.

[203] European Ombudsman, Special Report in own-initiative inquiry concerning Frontex, OI/5/2012/BEH-MHZ.

entering a territory illegally. The investigation revealed that "Frontex had no mechanism in place by which it could deal with individual incidents of breaches of fundamental rights alleged to have occurred in the course of its work", resulting in "a significant gap in Frontex's arrangements"[204]. Frontex, in this way, does not have responsibility over individual incidents in Member States' territories. The opinion of the Ombudsman is shared also by the Parliamentary Assembly of the Council of Europe (PACE), that called Member States and Frontex to comply with their human rights obligations[205]. Moreover, cooperation agreements on border surveillance, return, and interception operations are often concluded with third countries where migrants' human rights are doubtfully respected[206].

The EUROSUR Regulation, introduced in 2013, integrates Frontex with technology-driven projects. EUROSUR's activities is mainly dedicated to the control of the movements across the Mediterranean with drones, offshore sensors and satellite tracking systems[207]. Even though, the Regulation contains provisions related to human rights' protection, respect for human dignity, non-refoulement and non-discrimination[208], still it is oriented towards sea borders surveillance, not rescue operations[209]. More importantly, the Regulation does not give information on how these rights will be monitored or enforced[210].

The Task Force for the Mediterranean, set up in 2013, following the Lampedusa shipwreck, where more than 360 migrants died, encompasses all the measures established by the EU with the aim at preventing further deaths in the Mediterranean. However, solutions of cooperation with third countries, such as the RPPs[211], regional protection initiatives, resettlement programs, are all actions that have been already discussed highlighting their inadequacy. Amnesty International confirms how the EU Communication on the work of the Task Force[212] is still mainly focused on border control.

Vis-á-vis the EU border protection policies described so far, the Lampedusa shipwreck led also to the establishment of the Mare Nostrum Operation in 2013, producing an important shift in the EU approach towards the management of increasing mass migratory flows. Mare Nostrum empowered the already existing Migration Flows Control activities, implemented in the context of the Italian Navy Operation Constant Vigilance, on the basis of a 2004 national law. Naval and air units were deployed to the Operation in order to "improve maritime security, patrol sea lanes, combat illegal activities, especially human trafficking, and tackle the Mediterranean humanitarian emergency in the Sicily Straits, averaging 5 Italian Navy ships and their air units at any given time"[213]. The units were controlled by the Italian Navy's Operations Command through the Operations Center, headquartered in the base of Santa Rosa, in Rome.

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[204] Ibid.
[205] Ibid.
[206] Cogolati, Verlinden and Schmitt, *Migrants in the Mediterranean,* 41.
[207] Ibid.
[208] Regulation 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System (Eurosur), 2013 O.J. L 295/11.
[209] Cogolati, Verlinden and Schmitt, *Migrants in the Mediterranean,* 41.
[210] Amnesty International, *The Human Cost of Fortress Europe*, 18.
[211] See para 3.2.4.1. The EU Global Approach to Migration and Mobility.
[212] Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, COM(2013), 869 final.
[213] Marina Militare, "Mare Nostrum Operation", http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx.

Here, the Inter-ministry Maritime Surveillance Integrated Office coordinated the activities of all the other institutions involved in the Operation, namely Public Agencies, Ministries, and Armed Forces. Detention and push back operations were substituted in favor of search and rescue at sea and safe landing; migrants' vulnerability was reduced and the measures to prevent trafficking and smuggling intensified. Mare Nostrum had the positive outcome also of delaying push backs and improving protection. Though, Zetter remembers how, in the meantime, border control measures with the escort of boats outside the territorial waters, sent-back operations, and processes of expulsion still took place[214]. Additionally, the Operation became politically unsustainable, as it was subject to high pressure for border control agencies to reinforce their action, when many started to say that the Operation provided incentives for migrants to take the sea route to the EU. The British Refugee Council chief executive, Maurice Wren, for instance, responded to the Foreign Office refusal to take part in future search and rescue operations in the Mediterranean assessing that "the only outcome of withdrawing help will be to witness more people needlessly and shamefully dying on Europe's doorstep"[215].

Operation Mare Nostrum ended at the end of October 2014 and was superseded by Frontex's Operation Triton which has restricted budgets (Mare Nostrum cost 9 million euro per month[216], whereas Triton has a budget of 2.9 million euro per month[217]) and diminished capacity. Triton does not operate in international waters, as Mare Nostrum did, but is rather active within 30 miles off the Italian coast. Securitization of Southern borders thus substitutes the humanitarian aspect characterizing Mare Nostrum; as Frontex said "while saving lives is an absolute priority in in all maritime operations coordinated by Frontex, the focus of Joint Operation Triton will be primarily border management"[218]. "Mare Nostrum saved 200,000 lives between October 2013 and December 2014"[219]; Triton is a much smaller Operation managed by a border protection agency.

In conclusion, despite temporal shifts, "the structure of border control has been progressively reinforced resulting in the commensurate diminution of access to protection for forced migrants"[220].

3.2.5. Migration as a Consequence of Climate Change: the Nansen Initiative

Legal and operational gaps in terms of the protection of environmental migrants emerge from the fact that general immigration laws do not recognize people who migrate for causes of environmental disasters or

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[214] Zetter, "Protecting Forced Migrants," 70.
[215] Alan Travis, "UK axes support for Mediterranean migrant rescue operation," *The Guardian*, 27 October 2014, http://www.theguardian.com/politics/2014/oct/27/uk-mediterranean-migrant-rescue-plan.
[216] Lizzy Davies and Arthur Neslen, "Italy: end of ongoing sea rescue mission puts thousands at risk," *The Guardian*, 31 October 2014, http://www.theguardian.com/world/2014/oct/31/italy-sea-mission-thousands-risk.
[217] European Commission, Memo on the Frontex Joint Operation 'Triton' – Concerted efforts to manage migration in the Central Mediterranean, 7 October 2014, MEMO/14/566.
[218] Frontex, "Frontex launches call for participation of the EU Member States in Joint Operation Triton", 26 September 2014, http://frontex.europa.eu/news/frontex-launches-call-for-participation-of-the-eu-member-states-in-joint-operation-triton-b9nupQ.
[219] William Lacy Swing, "Statement by IOM chief William Lacy Swing," 20 April 2015, http://www.thelocal.it/20150420/iom-urges-restoration-of-italy-rescue-mission.
[220] Zetter, "Protecting Forced Migrants," 71.

climate change. As mentioned above[221], a significant initiative has been taken by Sweden and Finland. It provides less restrictive temporary protection provisions for causes of displacement resulting from environmental causes. However, the extension of protection to people already residing in the country makes the reforms useless for protecting people who suffer from environmental changes and seek protection crossing international borders. Rather, the Nansen Initiative represents a decisively more important step towards a successful framework aimed at protecting environmental migrants.

Led by the governments of Norway and Switzerland, the Nansen Initiative[222] was established in 2011. It outlines a protection agenda for people displaced across borders after environmental disasters or dramatic environmental conditions resulting from climate change. The difference with measures taken, for instance, at the national level, is indeed represented by the recognition of a moving component. In this perspective, not everybody can find refuge within their own country, but they have to seek protection abroad. In fact, the Initiative highlights how people displaced internally are already covered by national laws, international humanitarian law, or by other framework emerging from a soft-law perspective, such as the UN Guiding Principles on Internal Displacement. The Initiative identifies the problem with the lack of international protection for people moving across international borders following a climatic calamity, as environmental migrants are not classified as refugees according to international refugee law. Thus, after the 2011 Nansen Conference on Climate Change and Displacement, the Nansen Initiative was born for promoting an inter-governmental process to address this protection gap. It is based on an approach developing case study scenarios of five sub-regions, namely Cook Island and Fiji, Costa Rica and Guatemala, Kenya, and Philippines and Thailand. Legal standards are not the final aim of the project, but rather the Initiative wants to build consensus among States on the main principles of protection for environmental migrants, that may have as an outcome the development of standards of treatment. At the regional or global level this may lead to the establishment of new laws or soft law instruments. The protection agenda is based on three pillars represented by cooperation and solidarity at the international level, standards of treatment, and operational responses.

3.2.6. Internal Displacement

Almost the majority of displaced people remain in their country of origin. Challenges of protection regimes are thus even higher in epicenters of mass displacement than in the countries of arrival. Internal displacement often represents a first step of migration, a "precursor of cross-border movements"[223], and, thus, a potential warning of mass displacement. At this level, in fact, people are exposed to a series of vulnerability due to the erosion of livelihood and human rights protection; conditions that may trigger then cross-border displacement.

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[221] See para 3.2.3. "Complementary Protection."
[222] The Nansen Initiative, https://nanseninitiative.org/.
[223] Zetter, *Protection in crisis. Forced Migration and Protection in a Global Era*, 8.

In considering the different patterns of the migration crisis, in contrast to cross-border movements, the normative framework addressing internal displacement has a substantial consensus at the international level. As already mentioned in Chapter 1[224], the definition of IDPs includes all people who are forced to leave their home due to natural or human-made disasters. The definition given by the Guiding Principles on Internal Displacement is shared also by the Kampala Convention. Both these instruments are important for the scope of this thesis, as they apply broadly to crisis in which migrants move internally also in anticipation of harm associated, for instance, to situations related to environmental change[225].

The principles on internal displacement were presented by the Representative of the Secretary General to the UN Commission on Human Rights in 1998. The UN Commission and the General Assembly adopted them unanimously and encouraged agencies and organizations to apply them.

The principles are based upon international humanitarian and human rights law and aim at creating an international standard to guide Governments and humanitarian and development agencies to provide assistance and protection to IDPs. Situations of displacement may be due to ethnic cleansing, armed conflict, disasters, and collective punishment. Protection during displacement must be guaranteed on the basis of the principle that every human being has the inherent right to life and the right to dignity and physical, mental, and moral integrity. In particular, IDPs should be protected against genocide, murder, arbitrary executions, enforced disappearances (abduction, unacknowledged detention), indiscriminate attacks, acts of violence, rape, mutilation, torture, cruel, inhumane or degrading treatment or punishment, outrages against personal dignity, and slavery.

Moreover, IDPs have the right to move freely. Thus, the displaced person has the right to seek safety in another part of the country, the right to leave the country, the right to seek asylum in another country, the right to be protected against forcible return or resettlement in a place different from where his or her life, safety, liberty, and health would be at risk.

Essential are then the right to be recognized as a person before the law, the right to freedom of thought, conscience, religion or belief, opinion, and expression, the right to seek opportunities for employment and participate in economic activities, the right to associate freely, the right to vote, and the right to education.

The African Union Convention for the Protection and Assistance of Internally Displaced Persons (IDP) in Africa, signed in 2009 in Kampala, is probably "the most radical and far-reaching normative development in protection since the 1967 Protocol"[226], addressing internal displacement caused by armed conflict, natural disasters, and large-scale development project in Africa. The relevance of the Convention is indeed given by the fact that it provides legal protection to IDPs by reinforcing States' responsibilities, addressing causes of displacement, enshrining individuals' right to be protected from displacement and States' duty to adopt all measures needed to prevent it, providing adequate protection and assistance to IDPs

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[224] See para 2.1. "Definition of Migrant."

[225] Martin, Weerasinghe and Taylor, *Humanitarian Crises and Migration*, 20.

[226] Zetter, *Protection in crisis*, 19.

according to their vulnerability, and encouraging the creation of conditions required for durable solutions[227]. The Convention broadly outlines States' obligations to take all necessary measures to protect and assist persons who have been internally displaced due the following causes:

a. Displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population;

b. Individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law;

c. Displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict;

d. Displacement caused by generalized violence or violations of human rights;

e. Displacement as a result of harmful practices;

f. Forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected;

g. Displacement used as a collective punishment;

h. Displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law[228].

The main issue concerning the Kampala Convention is related to the uneven adhesion it is having across the continent, as some States are making steps towards implementation, whereas others are still at the ratification stage[229].

Internal displacement now exceeds the number of refugees and shows how, beyond refugees and persecution, many other vulnerable populations have protection needs. Within the current condition characterized by an expanding range of displacement drivers, the provisions described above address, to a certain extent, protection gaps for the protection of IDPs[230]. In fact, IDPs cannot claim the status of refugees and are not entitled to international protection. The recognition by both the Guiding Principles on Internal Displacement and the Kampala Convention of the existence of a protection gap led to the reinforcement of the principle that "national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction"[231]. However, many challenges arise as the same States that are primarily responsible for the protection of their own citizens may

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[227] Internal Displacement Monitoring Centre, "The Kampala Convention two years on: time to turn theory into practice," 2014, http://www.internal-displacement.org/assets/publications/2014/201412-af-kampala-convention-brief-en.pdf.

[228] African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, 22 October 2009, Article 4.

[229] Internal Displacement Monitoring Centre, "The Kampala Convention two years on."

[230] Zetter, "Protecting Forced Migrants," 27.

[231] United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, Principle 3.1.

also be themselves "complicit, or direct perpetrators of the violence and conflict that force displacement, for example in countries such as Sudan and Syria"[232]. In these cases, "supporting governments to protect their own people, while at the same time diminishing a population's exposure to protection risks, is not easy in these situations where state sovereignty is inviolable"[233]. The protection tool provided by the Guiding Principles is consistent with the norms of international humanitarian law, which obliges the international community to provide humanitarian assistance and to work in order to ensure that the parties to a conflict respect humanitarian and human rights law. Other States may intervene by means of advocacy, capacity building, support to humanitarian operations, and prosecution or extradition of those responsible for violations of the law[234]. In cases where the protection of IDPs fails and people are forced to migrate across international borders, the protection crises analyzed above emerge[235].

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[232] Zetter, "Protecting Forced Migrants," 34.
[233] Ibid.
[234] Global Protection Cluster (GPC), *Handbook for the Protection of Internally Displaced Persons*, June 2010, http://www.unhcr.org/4c2355229.pdf.
[235] See Chapter 1 "The Multifaceted Aspects of Migration."

Chapter 3
Operational Policies of Humanitarian Organizations

Protection policies adopted by international humanitarian organizations have advanced greatly. Soft-law provisions as well as operational strategies for responding to the current migration crisis have been developed at several levels. UN agencies, intergovernmental, and non-governmental organizations set up programs aimed at providing humanitarian support and protection for migrants, particularly in view of the diversity and vulnerability characterizing mass mixed fluxes.

The approach to migration adopted by international organizations is based on the principle that each person is entitled to receive human rights protection regardless of their normative and legal status. A human rights approach places the migrant at the center of migration policies and management. States, thus, have obligations to respect in protecting and fulfilling the human rights of all individuals, regardless of their origin or immigration status.

The rights/needs-based projects elaborated by international humanitarian organizations to address the crisis are sometimes specifically related to one stage of migrants' journey though comprehensive of many aspects of it. In other cases, the projects have been developed to provide hints also for longer-terms objectives, highlighting the existing correlation between migration and development. The engagement of these organizations is based on the principle of partnership with local authorities, international or national civil society organizations, and the private sector.

For instance, IOM activity is aimed at making sure that people affected by crises can access protection and assistance. The delivery of IOM's humanitarian response has at its core the IOM's principles for humanitarian action[236]. Humanity, neutrality, independence, and impartiality are the four main humanitarian principles characterizing IOM action. Protecting life and health, ensuring the respect for human rights, trying to alleviate suffering, and preserving human dignity are all priorities for IOM's humanitarian action. IOM's main focus is assistance, but this sector is combined with other activities relevant to migration crisis response, namely transition and recovery activities and migration management activities.

Instances of mechanisms designed by humanitarian organizations to tackle protection gaps in migration crises are the IOM Migration Crisis Operational Framework and the OHCHR Principles and Guidelines on Human Rights at International Borders, both aimed at providing operational tools to support States in addressing migration emergencies both in countries of origin and at borders. The Praesidium Project, that saw the engagement of a partnership of different humanitarian organizations with experience in migration management collaborating for assisting the State in the reception of migrants on the Italian coasts is now considered a best practice for the provision of direct assistance to migrants arriving by sea.

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[236] IOM Council, *IOM's Humanitarian Policy – Principles for Humanitarian Action*, 12 October 2015, C/106/CRP/20.

4.1. The IOM Migration Crisis Operational Framework

In view of the vulnerability affecting migrants during crises, at the request of IOM Member States, IOM developed in 2012 a response plan to the gap generated by migration management challenges: the IOM Migration Crisis Operational Framework (MCOF)[237]. The Framework represents an operational tool to improve the way in which IOM supports Member States in responding to crisis and protection needs of crisis-affected populations residing on their territory, in a manner consistent with international humanitarian and human rights law. The MCOF is a pragmatic approach centered on human rights principles to address the needs of displaced persons and migrants in situations of crisis either in their destination or transit countries. The Framework is designed to respond to unaddressed migration dimensions of a crisis, "by complementing existing humanitarian systems as well as other systems addressing peace and security, and development issues"[238] and build partnerships with States, international actors, and all the other actors involved in the fields of humanitarian response and migration. Particularly important is the attention given to the dimensions of crises that are usually overlooked, because it includes the humanitarian perspectives related to massive humanitarian needs, migration management perspectives, and, especially peace and development perspective. Essential, in fact, is also the mentioning of longer-terms development goals and the reference to the inadequate existing mechanisms for the protection of vulnerable populations caught in crises in their destination or transit countries. The approach used is represented by the migration crisis approach, which

> is based on the recognition that not all patterns of mobility during crises and not all those on the move during crises are comprehensively covered by the current frameworks at the international, regional and national levels. This approach therefore seeks to complement systems that privilege certain categories of affected populations through a focus on the vulnerabilities of a variety of people on the move and the affected communities[239].

Particular groups affected by the crisis are thus addressed according to needs and specific vulnerabilities of population that are overlooked in crisis response.

The Operational Framework aims at tackling migration crises on the basis of the different sectors of assistance emerging from an emergency. Response varies also according to the different phases of a crisis, which involve the before, during, and after stages. Camp management and displacement tracking, shelter and non-food items, transport assistance for affected populations (evacuations, resettlement, repatriation, return of internally displaced persons, assisted voluntary return and reintegration, relocation, or emergency

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[237] Resolution 1243 of the IOM Member States endorsing the IOM Migration Crisis Operational Framework, 15 November 2012, MC/2355.
[238] Ibid., 3.
[239] Ibid., 4.

transportation), health support, psychosocial support, reintegration assistance, are all examples of sectors in which IOM provides assistance.

Large part of IOM activities are represented by counter-trafficking and protection assistance to vulnerable migrants, victims of trafficking, exploitation or abuse, and unaccompanied children during crises. IOM dedicates training programs to immigration and border management officials on TiP and, generally, on topics related to human rights in order to establish a system to "better monitor border movements and shape migration policies"[240]. Projects like these include capacity-building in countries affected by severe cases of displacement, such as Iraq, Somalia, and, with regard to the Libyan crisis, by offering support to the Tunisian authorities.

The attention is then given also to the period following a crisis for activities to support stabilization and transition in order to find durable solutions and sustainable development. In this case, security and peace-building frameworks in post-conflict, institution-building, and transition phases are an essential IOM target for which IOM acts as key partner. Activities may be thus focused on security sector reform, disarmament, reintegration, electoral assistance, establishment of the rule of law, reconciliation, reparation, and reconstruction. It is indeed in post-conflict and post-disaster needs assessment that IOM has worked to "promote productive and beneficial linkages between migration and development"[241].

In the MCOF, IOM remarks its approach towards migration, characterized by the central understanding that, generally, flows consist of people moving for different reasons and having different needs and vulnerabilities. Particularly, mixed migrants" do not fit any particular label and are not covered by a specific protection regime"[242], but still have humanitarian needs that, in some cases, may arise also from the journey. Thus, "IOM's objective is to provide assistance to all those involved in mixed migration flows while meeting the different protection and assistance needs of the various groups"[243].

4.2. OHCHR Principles and Guidelines on Human Rights at International Borders

In 2014, the OHCHR traced a document containing principles and guidelines that States are obliged to fulfill in order to respect human rights at international borders. The Guidelines have the purpose to offer practical support to States, but also to international organizations, civil society, and private actors concerned, to manage borders according to international human rights law and standards.

The principles and guidelines elaborated by the OHCHR are focused on the idea that States exercising jurisdiction in the pursuit of international borders control must respect human rights obligations. The approach adopted towards migratory fluxes is implemented in view of the complexity characterizing contemporary mobility. The Guidelines remark how difficult it is to separate neatly people into different categories, as most of the times migrants do not fit one single category, but may change or simultaneously fit

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[240] Ibid., 9.
[241] Ibid., 13.
[242] Ibid.
[243] Ibid.

several of them. The focal point is that "every individual who approaches an international border has different motivations and it is important to remember that under international human rights law, States have obligations towards all persons at international borders, regardless of those motives"[244]. For this reason, the term adopted by the Guidelines to indicate the migrants at international borders indicate all international migrants. The objective is thus "translating the international human rights framework into practical border governance measures"[245] by adopting a "human rights-based approach deriving from the core international human rights instruments and anchored in the interdependence and inalienability of all human rights"[246]. The OHCHR builds its premises also on the idea that States, by curtailing migration with the consequence of creating lawlessness at the borders, only exacerbate migrants' risks.

Thus, the Guidelines are centered on the primacy of human rights in the management of States' borders. These rights include the implementation of international legal obligations, the fight against transnational organized crime (smuggling and trafficking of migrants), the treatment of children according to their best interest, the respect of the right to due process of migrants regardless their status, the promotion of non-discrimination for all border governance measures, the respect of the principle of non-refoulement and the prohibition of arbitrary and collective expulsions, and the establishment of monitoring and reporting mechanisms of human rights at international borders. The Guidelines provides then measures for systems related to investment, recruitment, and training and capacity building and measures that States should consider in order to ensure human rights in rescue and interception operations, in the context of immediate assistance, screening and interviewing, identification and referral, and return or removal. The Guidelines state that "human rights obligations, including in respect of civil, political, economic, social and cultural rights, must take precedence over law enforcement and migration management objectives"[247].

4.3. The Collaborative Approach: Praesidium Project

Praesidium, "strengthening of reception capacity in respect of migration flows reaching the island of Lampedusa"[248] is a project launched in 2006, when the Italian Ministry of Interior signed a series of bilateral partnerships with different humanitarian organizations with the aim at developing a standard of reception and assistance in the management of irregular/mixed migration flows arriving to the Southern border of Italy by sea. Essential to the project is the value of fundamental human rights that must be fully respected in assisting the migrants. At first, it was intended to cover only the area of Lampedusa, which is the first port of access to Europe from North Africa; then, it was extended to other areas of Sicily and to the regions of Apulia, Calabria, Campania and Marche.

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[244] OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, (Geneva: OHCHR, 2014), 3.
[245] Ibid.
[246] Ibid.
[247] Ibid., 6.
[248] Italian Red Cross, IOM, UNCHR and Save the Children-Italy, *Praesidium Project, Recommendations and good practices in the management of mixed migratory flows by sea*, 1.

The project multi-agency approach involves the different expertise that the Italian Red Cross (CRI), the IOM, the UNHCR, and, from 2008, also to Save The Children-Italy have developed over the past years of experience. The organizations provide a range of services mainly related to legal information services, assistance to the institutions, social and medical assistance, cultural mediation, monitoring of compliance with reception and human rights standards. In order to achieve these goals effectively, each organization engaged in a specific activity according to its own general mandate. In particular, the Italian Red Cross (CRI) provides social and medical assistance to refugees and migrants by promoting activities related to health risk prevention, health education, and psychological support; the International Organization for Migration (IOM), on the basis of the principle of human dignity and well-being of the migrants, monitors landing and reception procedures at immigration centers, provides legal information on immigration regulations and human trafficking and assists victims of trafficking for labor and sexual exploitation and vulnerable migrants; the UNHCR activity is oriented towards the provision of material assistance and protection to refugees, the identification of asylum seekers, the guidance to asylum procedures and the supervision of reception centers and reception systems; Save The Children focuses on giving information, legal advice, and assistance primarily to minors arriving by sea.

Beyond establishing an architecture that recognizes the different organizations' expertise, the multi-agency approach is able to address a diverse group of beneficiaries, reflecting the configuration of the current mixed migration flows, namely voluntary migrants, asylum seekers, migrant minors, victims of trafficking, and all the other migrants in conditions of vulnerability due to their health or to violence and trauma suffered in the country of origin or during their journey to Italy. Nonetheless, the involvement of different humanitarian organizations has been characterized by a close cooperation, by means of regular meetings and through the adoption of joint procedures.

Institutions and stakeholders are included in this multi-agency approach. Specifically, the Coast Guard, the Italian Navy (Marina Militare) the Customs and Revenue Police, the Carabinieri, the Civil Protection Department, the Border Police, and the local Police Headquarters' Immigration Office are involved into rescue at sea operations and landings. Provincial Police Headquarters' work is oriented towards all the legal procedures that migrants may access, Prefect's offices are engaged in the management of reception, identification, and expulsion centers; local authorities, and the Protection System for Asylum Seekers and Refugees (SPRAR) work in the secondary reception phase and the integration of refugees and the beneficiaries of subsidiary protection; and, finally, all the local and regional authorities, the courts, the local association and the civil society cooperate with the organizations and the other institutions in managing the migration flows. Thus, rescue at sea operations are managed by the Coast Guard (Guardia Costiera), with the participation of the other Armed Forces.

When migrants are in danger, the alert is reported to the Coast Guard, who notifies the office of the Prefect and the Provincial Police Headquarters of the arrival. The alert is given also to the Ministry of Health

border health offices, the Civil Protection Department, the organizations and the local health authorities that can take the necessary measures in order to arrange the assistance needed by the migrants upon arrival.

The international legal system in this matter is solidly embodied, first of all, by the United Nations Convention on the Law of the Sea (UNCLOS), signed in 1982 in Montego Bay, Jamaica. Article 98 of the Convention is related to the "duty to render assistance". According to Article 98, "every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him"[249]. Furthermore, "every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose"[250].

The Search and Rescue service (SAR) is regulated by the 1979 International Convention on maritime search and rescue, concluded at Hamburg, and it promotes a plan for all the rescue of persons in distress at sea. The limits of the SAR zones in the Mediterranean are established by the "General Agreement on a Provisional SAR Plan", approved in 1997. According to the SAR Convention, State Parties are obliged to "…ensure that assistance be provided to any person in distress at sea…regardless of the nationality or status of such a person or the circumstances in which that person is found"[251] and to "[…] provide for their initial medical or other needs, and deliver them to a place of safety"[252].

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[249] UN, *United Nations Convention on the Law of the Sea*, 10 December 1982, Article 98. See also para 2.4.3. "Fortress Europe."
[250] Ibid.
[251] UN*, International Convention on Maritime Search and Rescue*, Treaty Series vol. 536, p. 456, 27 April 1979, Chapter 2.1.20.
[252] Ibid., Chapter 1.3.2.

Chapter 4
Ways Forward

Several proposals have been presented by the current doctrine. The elaboration of a soft-law framework, the extension of the current definition of refugee to include also economic and environmental migrants, the resuscitation of the Responsibility to Protect Doctrine, and the use of a human security principle as legal basis for asylum are all valuable ideas for a reform of the current failing system of protection that has been described so far.

Lenzerini presented an innovative proposal based on the extension of the purpose of the 1951 Geneva Convention to economic and environmental migrants. In this way, the essential contradiction in terms characterizing the Convention which, being a humanitarian instrument, restricts the possibility to enjoy human rights only to certain categories of migrants, would be overcome[253]. Specifically, Lenzerini's proposal consists of leaving unchanged the current text of Article 1A (2) of the Geneva Convention with the addition of the following sentence:

the term "refugee" shall apply to any person who: (I) […]; (II) 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 a result of such events, is unable or, owing to such fear, is unwilling to return to it; or who in respect of whom significant grounds exist for believing that, if returned to his country of nationality, or, in the case of a person not having a nationality, to his country of former habitual residence, he would face a real risk of suffering serious harm, as he is at serious risk of, or has been the victim of, systematic, generalised or anyhow serious violations of his human rights. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

In contrast to what Zetter critically defines "managerial turn" in the provision of protection, with regard to the emerging operational initiatives in countries of origin, transit, or arrival elaborated by national, international, and intergovernmental actors, he proposes the revival of the Responsibility to Protect Doctrine (R2P) led by the United Nations[254]. The responsibility to protect consists of a political concept whose

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[253] Lenzerini, "Sixty-five Years and It Shows Them All," 6.
[254] Zetter, "Protecting Forced Migrants," 62.

relevance lays indeed in the attempt to develop a norms-based approach to protection[255]. In the case of the R2P, the international community is called to overcome the failure of national States to protect people from extreme abuses of human rights that governments are inflicting to their citizens. Genocide, ethnic cleansing, war crimes, and crimes against humanity are the four specific mass atrocities for which collective international intervention is called. Zetter advocates the resuscitation of the Responsibility to Protect Doctrine in the international political discourse on forced migration; however, he recognizes the controversies linked to the R2P in matter of legitimacy.

Betts' proposal focuses on the elaboration of a soft law framework for the consolidation of existing norms, to be built on the past experience related to the protection of IDPs. In particular, soft-law is "a form of non-binding normative framework in which existing (often 'hard law') norms from other sources are consolidated within a single document"[256]. Experts or inter-state agreements interpreting existing legal norms of a particular area represent the source of soft law guidelines. Past experiences are provided by the IDP protection characterized by recognized gaps in the past that led to the development of the Guiding Principle on Internally Displaced Persons, described above.

Afzal proposes a framework for reconceptualizing refugee law by introducing a new field of application as the criteria for refugee status determination: a human security construct, according to which "the individual protection seeker will simply need to prove that he or she has been subject to, or is at the risk of being subject to, a violation which impinges on his or her human security"[257]. By incorporating all forms of threats to individuals, "the human security threshold transforms the negative obligation not to refoule into a positive obligation to protect"[258]. Afzal's reasoning is based on the consideration that divisions between persons in absolute need of protection and economic migrants in the area falling outside asylum should be made bearing in mind that economic conditions are often linked with ethnic intolerance, human rights violations, and undemocratic governance.

5.1. Short-term Assistance VS Long-term Planning

Proposals discussed so far contribute all to the formulation of a new argument based on a system of protection for migrants that overcomes the current refugees' framework. The current system of international normative protection, as it is provided by the Geneva Convention and all the EU and non-EU frameworks descending from it, does not respond to the needs of the contemporary migration crisis, which now raises "new protection needs that extend beyond imminent danger and non-refoulement"[259]. Previous chapters demonstrated how fluid causes and reasons to migrate are and the inadequacy of a system that classifies individuals eligible for protection.

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[255] Zetter, "Protecting Forced Migrants," 63.
[256] Betts, *Soft Law and the Protection of Vulnerable Migrants*, 11.
[257] Afzal, "Rethinking Asylum", 23.
[258] Ibid.
[259] Zetter, *Protection in crisis*, 8.

First of all, future directions in mass migration crisis must begin from the recognition of the phenomenon of mixed migration as a phenomenon where migrants are always affected by a degree of compulsion. Thus, mass migration should start to be perceived always as forced migration. In this way, negative perceptions and attitudes towards migrants among the media, would be also overcome. Moreover, the high degree of politicization which is characterizing the contemporary discourse on migration among EU Member States should be revised.

The adoption of a humanitarian approach would have the effect of transcending national interests and separating the priority of human rights protection from the political discourse occurring now at both the national and the European level. An inclusive need/right-based approach have been used by many international humanitarian organizations in migration management projects and it must be assumed as core perspective when addressing the issue of migration vis-à-vis the status-based system of protection set up by the Geneva Convention. The framework in which discussions on migration take place should be thus characterized by the centrality of human rights.

Zetter identifies different reasons[260] to move from a status-based to a need-based approach. First of all, focusing on migrants' rights and needs draws attention to the diversity of protection. Then, if vulnerabilities and contemporary risks faced by the migrants are tackled, the limits of a status-based approach and the existing normative framework for protection tend to emerge more. Examples are provided by livelihood depletion, loss of assets, family separation, which are considered as primary risks by a right-based perspective. In addition, the human rights based approach enhances the identification of the duty bearers and has the best potential to alleviate the sufferance experienced by displaced persons[261].

Hence, human rights and development are intrinsically interrelated; "human rights and root causes of migration are cross-cutting topics of the present time"[262]. This interrelationship between human rights, migration, and development is particularly expressed by the progress made by the 2007 Brussels Global Forum on Migration and Development (GFMD), as expressed by the description of the 2008 GFDM:

There is increasing evidence that the benefits of international migration, not only for migrants themselves but also for origin and host societies, are contingent on the protection of migrants' rights. It is reasonable to assume that migrants are best able to contribute to development in both the countries of origin and destination, when they are protected and empowered socially, economically and in terms of their basic human rights, regardless of their migration status.

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[260] Zetter, "Protecting Forced Migrants," 54.

[261] Ibid.

[262] NGO Committee on Migration, *A call for a human rights-based approach to migration and development*, Statement for the 2008 Global Forum on Migration and Development, 1, http://www.un.org/en/development/desa/population/migration/events/coordination/7/docs/P18_NGO.pdf.

The previous Chapters described how recent increase in the number of migrants arriving in Europe is evidently linked with the worsening of conditions in the main countries of origin of the migrants, particularly those coming from African countries, and, thus, it is descriptive of the growing economic disparity between the rich and the poor countries in the world.

Thus, in order to address the root causes of migration, two questions must be raised: "(a) how is globalization contributing to migration? (b) what policies, including trade, agricultural subsidies, and others, are in place, particularly in receiving countries, that are exacerbating the growing international economic disparity, increasing rates of poverty, and rising international migration?"[263]

The main priority is thus represented by the need "to address the root causes of migration, including the violation of human rights"[264]. Patterns of contemporary mass migration show that numbers of arrival are increasing throughout the years[265].

Additionally, there are signs that the growing divide in wealth between sending and receiving countries will increase, as, for instance, "it is exacerbated by the environmental degradation caused by climate change"[266]. Thus, unless these factors "are addressed through policy initiatives to ensure support for those countries most affected", "they will contribute significantly to increased migration"[267].

Operational activities carried out by humanitarian organizations represent an essential contribution for the management of the current migration flows, in the context of immediate assistance and reception, but also in the recognition of the fundamental connection existing between migration and sustainable development, as shown by the IOM Migration Crisis Operational Framework (MCOF).

Thus, if, on the one hand, technical and operational skills provided by intergovernmental and humanitarian organizations are extremely important for a prompt response to the urgency of the migration crisis, as they address protection gaps, risks, and vulnerabilities affecting migrants in transit and at borders, on the other hand, humanitarian hints coming from humanitarian agencies, should serve for a more comprehensive long-term program in countries of origin, from which migrants are forced to depart.

Rethinking mass migration means that the reinforcement of short-term impact initiatives should be integrated by protection policies aimed at preventing migration crisis or tackling it by confronting the original causes. Protecting people from displacement by removing or preventing the conditions that are triggering the mass migration crisis represents the most desirable and incisive form of protection. Moreover, the resulting deaths registered in the Mediterranean due to dangerous border-crossings represent a humanitarian crisis "that must be addressed in a way that does not place blame on the migrants and which provides for opportunities to cross borders in a safe way"[268].

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[263] Ibid.
[264] Ibid., 3.
[265] See para 2.2. "Main Patterns of Mass Migration in the Mediterranean."
[266] Ibid., 3.
[267] Ibid.
[268] Ibid.

Strategies should be based on the development of both legal channels favoring the access of migrants that now rely on traffickers and smugglers and sustainable projects in countries affected by conflicts, State collapse, fragile governance, and all the factors previously described that constitute reasons for people's move. Policies should be elaborated in a way that enhances equitable distribution and governance and civil society re-building through the respect of human rights. Access to protection based on a categorization process, favoring strictly people that fall under provisions that had totally different purposes 65 years ago, is pointless and does no longer comply with international provisions based on human rights principles.

Recently, two important proposals have emerged at the international and EU level. The Valletta Action Plan represents, in this case, an important framework anticipating the relevance of an Africa-EU deepened partnership. However, particularly innovative and relevant for the purpose of this thesis is the Migration Compact recently proposed by the Italian Government. Based on the acknowledgment of how the phenomenon of mass migration is far from being temporary, the Migration Compact aims at creating more legal channels for the migrants and fighting the original causes of mixed fluxes with massive EU interventions in African countries.

5.1.1. The Valletta Action Plan

The two Processes of Rabat and Khartoum are used then as basis for monitoring the implementation of the Valletta Action Plan[269] within the framework of the Africa-EU Strategy. The Action Plan has been elaborated by EU and African leaders attending the Valletta Summit on migration that took place in November 2015. It is based on sixteen priority initiatives to be launched before the end of 2016 and was followed by a Political Declaration[270] remarking serious concern over the increase of flows of refugees and migrants and their suffering, abuse, exploitation and loss of life in the desert and sea. The first priority is identified in saving lives and rescuing and protecting migrants at risk. The participants to the Declaration reiterated the commitment towards the respect of international obligations and human rights and dignity of refugees and migrants, regardless of their status and recognize the Africa-EU interdependence in facing challenges having an impact on migration, namely, democracy, human rights, poverty, socio-economic development, and climate change.

Addressing the root causes of irregular migration and forced displacement, creating legal migration and mobility possibilities, strengthening the fight against irregular migration, preventing and fighting migrant trafficking and smuggling are listed as the actions that the Action Plan will pursue.

The Valletta Action Plan is built on priorities that highlights the connection between migration and development, as it promotes a system of investment and poverty eradication to be implemented in African countries, built on individual countries' specificities. The Plan calls for actions aimed at integrating migration in development and poverty eradication strategies in labor market and employment, in the private

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[269] European Council, Valletta Summit on Migration, Action Plan, 11-12 November 2015, http://ufmsecretariat.org/wp-content/uploads/2015/11/VALLETTA_ACTION_PLAN.pdf.
[270] Ibid.

sector development, in education, health, social protection and security in both regions of origin and transit. Socio-economic development is fostered by creating job opportunities, particularly for young women and men, through public and private investments in favor of agriculture and rural economy development, represented, for instance, by the terres fermes policy, "devoted to value chain development, support to agri-business and family farming"[271]. Assistance to youth is also enhanced through education, vocational training, access to technologies and through the support to micro, small, and medium enterprises that may have access to finance, micro-loans, and trainings.

A resilience agenda is supported for the most vulnerable with the aim at reducing food insecurity and under-nutrition, enhancing sustainable livelihoods and self-reliance, and addressing climate change problems with the development of sustainable and renewable energies and the provision of basic services such as education, water, and health. Central is also the promotion of initiatives aimed at addressing instability, crises, conflicts, human rights violations and abuses that generate internal displacement and irregular migration. Mechanisms of crisis settlement processes, but also initiatives for conflict prevention are supported. Linked to actions regarding conflicts are also the support promoted towards State building and the rule of law. Police and judicial cooperation as well as the respect of human right for all refugees and migrants are encouraged. Moreover, the improvement of legal frameworks for the access to the EU is promoted by the simplification of entry proceedings, such as family reunification.

Concerning protection and humanitarian response, the Valletta Action Plan states how further work is necessary to prevent loss of lives at sea through search and rescue operations and support to countries that are hosting large numbers of refugees and migrants. Life-saving assistance in affected countries is ensured by the provision of basic services to migrants, "regardless of their status". Longer-term measures should thus be strengthened in order to "improve livelihoods, self-reliance opportunities and to facilitate durable solutions"[272].

Furthermore, "access to adequate and credible information on legal migration opportunities and dangers of engaging in irregular migration, as well as giving a realistic view of living conditions in European countries" has to be provided[273], specifically in the context of migrant smuggling and trafficking in human beings, because migrants rely very often on false promises of possible job opportunities in the EU.

5.1.2. The Migration Compact

The Italian Government has elaborated its latest contribution for the suggestion of further measures for an EU strategy for external action on migration. The proposal contains interesting hints with regard to the priority of engaging in Partnerships with third countries, with the aim of developing sustainable programs

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[271] Ibid., 3.
[272] Ibid., 11.
[273] Ibid., 14.

for tackling main causes of migration coming from the African regions. Relevant is thus the foremost focus that the Migration Compact has on African countries of origin and transit.

Wide suggestions are contained in the document. The Italian Government warned that "the unprecedented phenomenon of growing migratory flows towards Europe is expected to last for decades due to various geopolitical dynamics in the neighbourhood and beyond"[274] and that "the migratory challenge is seriously jeopardising the fundamental pillars of European integration (e.g. integrity of the Schengen area) and solidarity among member states"[275]. The core concept is then that "migration may represent an opportunity both for the EU and partner countries, in terms of economic growth and development, for an ageing Europe in terms of sustainability of social security systems".[276]

First of all, the Migration Compact criticizes the proposals discussed so far at the EU level, due to their main focus on the EU internal dimension. The reform of the CEAS is mentioned, as well as the Communication "Back to Schengen"[277] and the "Smart Borders"[278] proposals. These measures represent only a component of the "comprehensive response needed", "which so far does not yet directly address the external dimension of our migration policy"[279]. A stronger joined external action is thus essential in order to overcome the current fragmentation of the EU approach to migration.

The strategy adopted by the Italian Government's proposal is firstly represented by the identification of key partner countries, on the basis of the definition of the different migratory features characterizing each country, including, thus, whether the country is a country of origin or transit or both. The cooperation is adapted to the different economic and social, security, and climatic characteristics and it is based on a needs assessment of the country. The EU effort is focused on the deployment of a series of actions for the enhancement of Country Specific Action Plans.

Investment projects with a high social and infrastructural impact may be developed in the partner country[280]. With this objective, external action financial instruments should be programmed and oriented towards the establishment of a new EU Fund for Investments. The new financial "instrument for the external action in the field of migration" has to be established in synergy with AMIF[281] and the Internal Security

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[274] Italian Government, "Migration Compact, Contribution to an EU strategy for external action on migration," 21 April 2016, 1, http://www.governo.it/sites/governo.it/files/immigrazione_0.pdf.

[275] Ibid.

[276] Ibid.

[277] Communication from the Commission to the European Parliament, the European Council and the Council entitled "Back to Schengen – a Roadmap," 4 March 2016, COM(2016) 120 final. The Communication has the objective to restore the Schengen area without controls at internal borders after the reintroduction of temporary internal border controls in reaction to the record numbers of refugees and migrants arriving to the EU. It aims at remedying to the deficiencies in the management of the external borders by Greece, re-affirming Member States' responsibilities, and establishing a coordinated approach to temporary border controls.

[278] The "Smart Borders" Package represents a proposal made by the European Commission in February 2013 aiming at improving the management of external borders of the Schengen area and the fight against irregular migration.

[279] Italian Government, "Migration Compact," 1.

[280] Ibid., 2.

[281] See para 3.2.4.1. "The EU Global Approach to Migration and Mobility."

Fund (ISF)[282]. More importantly is then the idea of a new EU Fund for Investments in third countries "to finance sustainable investments in the region and attract European investors, including through blending structures and operations by the Commission and the European Investment Bank (EIB)"[283].

Part of the proposal consists of the EU's offer of EU-Africa bonds "to facilitate the access of African countries to capital markets (with a medium-to-long-term perspective in order to ensure capital availability for growth and sustainable prosperity schemes), as well as other innovative financing initiatives"[284].

Additionally, the EU can encourage the establishment of projects of cooperation on security, specifically in the fields of border management and control, customs, criminal justice, and management of migrants and refugees. Existing missions, such as the EUCAP Sahel Niger civilian mission[285], can be extended in the Horn of Africa. The Migration Compact also highlights the current migration crisis as a cross-border phenomenon in Africa, for which organizing regional grouping of missions would represent the following logical step. Moreover, the Capacity Building for Security and Development concept (CBSD) has to be implemented practically, together with training initiatives.

The other essential component of the Migration Compact is the focus on the creation of legal migration opportunities. The Migration Compact cites the pillars of the agreement concluded in 1999 in Tampere by the European Council, as an incentive upon which building opportunities for migrants. Entry quotas for workers, true information on job opportunities offered in Europe, pre-departure measures, such as language and vocational training, are all valuable initiatives that link the discourse on migration to economic development. For this purpose, essential is also strengthening the fight against trafficking and smuggling.

The proposal considers also resettlement schemes that can be elaborated as "compensation for the burden on those countries that engage in establishing national asylum systems in line with international standards"[286]. These actions should be accompanied by a correspondent effort by the country of partnership. Border control and reduction of flows towards Europe, helped by capacity building initiatives and provision of equipment and technologies, and the participation to Search and Rescue activities are some of the activities in which third countries should engage. The Migration Compact contemplates also agreements

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[282] European Commission, "Internal Security Fund – Police", last update 11 February 2016, http://ec.europa.eu/dgs/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police/index_en.htm. The Internal Security Fund (ISF) was established for the period 2014-20 and consists of 3.8 billion Euros. It promotes the implementation of the Internal Security Strategy, law enforcement cooperation and the management of the EU's external borders. The ISF is composed of the ISF Borders and Visa and ISF Police.

[283] The European Investment Bank (EIB) is the EU's bank representing the interests of the EU Member States. It provides support to both sustainable investment projects contributing to furthering EU policy objectives and EU's external and development projects. Innovation and skills, access to finance for small businesses, environment and climate, and infrastructure are the main areas on which EIB's activities focus, http://www.eib.org/.

[284] Italian Government, "Migration Compact," 2.

[285] European Union External Action, "Common Security and Defence Policy, The EUCAP Sahel Niger civilian mission", September 2014, http://eeas.europa.eu/csdp/missions-and-operations/eucap-sahel-niger/pdf/factsheet_eucap_sahel_niger_en.pdf. The Common Security and Defense Policy (CSDP) civilian mission for the security and development in the Sahel Niger was launched in 2012. The objective was contributing to the development of an integrated, coherent, sustainable, and human-rights base approach to fight terrorism and organized crime, and other security threats. The mission includes the improvement of human resources, training, and logistic management policies and the support to regional and international coordination.

[286] Italian Government, "Migration Compact," 2.

with third countries favoring cooperation on returns and readmission; thus, the EU would give funds for reintegration programs for these purposes. The management of migration and refugee flows is encouraged by on-site screening and the establishment of reception centers on third countries' territories.

Libya is mentioned as a clear example of a possible target of the Migration Compact. According to the paper draft of the Migration Compact, "the stabilization of major transit countries … is a strategic priority of the first order"[287] to manage migration and refugee flows. Capacity-building programs aimed at improving the rule of law and Government's control over its territory represent the first priority of an EU partnership with Libya, and of all the main countries of origin and transit of the migrants.

5.2. Investment Projects in Africa and Legal Channels for Migration

The only viable possibility to rethink the system of protection of the migrants and address the mass migration crisis goes beyond emergency policies; it extends the EU migration policy to the main African countries of origin arriving through the Mediterranean routes.

The Migration Compact proposal is very valuable, as it considers the integration of the internal dimension of the migration phenomenon in EU policies with the EU's external dimension, particularly towards Africa. The Migration Compact wants to tackle the profound causes of illegal migration by creating a solid EU-Africa partnerships with existing and innovative instruments. In fact, beyond the reinforcement of the Khartoum and Rabat Processes, the Migration Compact also aims at creating new financial instruments, such as the EU Fund for Investments and the EU-Africa Bonds to facilitate African countries' access to capital markets. Besides, the African Development Bank has established in 2009 a Migration and Development Trust Fund that can integrate such financing initiatives providing also a legal framework[288].

According to the hints provided by the Migration Compact, the migration crisis should thus be addressed by creating more legal avenues of migration and development programs in the regions of transit and departure, maintaining a framework of short-term protection for migrants and emergency preparedness, as it has been provided by governmental and non-governmental humanitarian organizations in cooperation with national Governments, shown, for example, by the Praesidium Project. Irregular economic migration channels can be overcome by financing initiatives that support migrant skill development, improvements in the education systems in the countries of residence, improvement in the domestic and international job-matching, and by enhancing the integrity of international chains for recruitment[289].

Financial initiatives as those proposed by the Migration Compact with objectives related to sustainable development in African countries of transit and origin, with the reinforcement of existing EU-Africa programs of cooperation, such as the EU civilian mission Sahel Niger, must rely also on the UN framework represented by the Sustainable Development Goals. On September 2015, countries adopted a

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[287] Italian Government, "Migration Compact," 4.
[288] European Commission, "Internal Security Fund – Police."
[289] IOM, "Response Plan for the Mediterranean and Beyond", 17. A model of international recruitment chains have been already provided by the IOM's International Recruitment Integrity System (IRIS).

series of goals to be achieved over the next 15 years. Among these, poverty, hunger, health, education, clean water and sanitation, work and economic growth, infrastructure, inequality reduction, and climate action are core priorities to be addressed[290]. Indeed, the general long-term perspective for migrants' protection is conformed also to NGOs' positions towards the Migration Compact, as they tend to stress the necessity of a radical change of Northern policies towards the Southern regions of the world, that are shaped by the need of pacifying and stabilize African territories[291].

Additionally, investment and development projects needs to be thought within a framework primarily oriented by human rights protection. The rights/needs based standard which is characterizing humanitarian assistance mainly provided by international organizations to the migrants arriving to the EU would represent the key approach extended to those individuals that may become potential migrants.

Entry quotas to promote legal channels of migration and contrast the phenomenon of human trafficking, as mentioned by the Migration Compact, represent a viable solution now discussed at the EU level. Extremely important is also the reference that the Migration Compact makes in relation to migration positive impact on an ageing Europe. In this regard, an analysis conducted by Stratfor underlines the connection between immigration and demographic change[292]. In particular, the study shows how new workers can fill labor shortages, as "highly skilled immigrants contribute to specializing the economy, while low-skilled immigrants often take jobs that the local will not"[293]. EU countries that usually take strong positions of closure in the migration discourse are also those that will experience the highest risks in terms of fiscal challenges and demographic change due to ageing population and low fertility rates. For instance, Germany will lose 10 million people in the period 2020-2060 and the population will become much older according to a sharp increase of the old-age dependency ratio (the percentage of people between people aged 65 and over compared to people between 15 and 64). In this way, Germany's workforce will decline to 25 percent by 2060. Opening borders to migration will thus actually represent a benefit for EU countries to help bolster their population.

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[290] UN, "Sustainable Development Goals," http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

[291] Chiara Nardinocchi, "Il 'Migration Compact' non convince le Ong: 'Ci saranno altri muri'", *La Repubblica*, 28 April 2016, http://www.repubblica.it/solidarieta/immigrazione/2016/04/28/news/ue_il_migration_compact_proposto_dall_italia_non_con vince_il_terzo_settore_il_risultato_saranno_altri_muri_-138637609/.

[292] Stratfor Global Intelligence, "Why Europe is Conflicted over Immigration", 9 September 2015, https://www.stratfor.com/analysis/why-europe-conflicted-over-immigration.

[293] Ibid.

Conclusion

In conclusion, previous Chapters demonstrate how traditional label based approaches characterizing the current prevailing system of protection, mainly focused on the protection of refugees according to the definition of the Geneva Convention, do not capture the complexity and the multicausal dynamics of the migration crisis.

The current migration pattern is based on a mixed volume of individuals and families who come from different countries and conditions and move for different reasons. What is common to all is the element of compulsion characterizing their decisions to migrate and, especially, the need for protection, regardless of their status.

Thus, starting from IOM's definition of migrant, the irrelevance of status, willingness, and causes to access protection is demonstrated through the analysis of the conditions of risks affecting migrants in the countries of origin, transit, and arrival. Taking into account particularly the Central Mediterranean route, migrants' exposure to human rights violation is evidenced by the degrading conditions of livelihood that African populations experience. Additionally, when migrants cross international borders, risks increase due to the lack of accessible legal channels and the enactment of restrictive policies and physical measures that EU's Member States are carrying out to stop migrants both in transit regions and at arrival.

The existing international normative framework for protection has served the purpose, first of all, of identifying the theoretical core foundation of protection for all migrants in human rights international norms. The Geneva Convention, the principle of non-refoulement, and all the regional instruments descending from it are then investigated as basis of the right of asylum and refugees' protection. However, the Convention was written in a different era with a purpose that is no longer appropriate to deal with contemporary challenges. At the EU level, the framework designed to address the emergency of the migrants, consisting of complementary systems of protection and attempts to fill gaps by promoting uniform initiatives, is focused primarily on borders' control and is not accompanied by a framework dedicated to the protection of human rights. Emerging systems concern mainly displacement caused by environmental change and internal displacement with greater attention and soft-law frameworks.

Above all, humanitarian international organizations focus on the humanitarian dimension of the contemporary migration crisis. The rights based approach focuses on the individual instead of the status, with the idea that the protection of human rights must be extended to all, including mixed groups. Moreover, the activity pursued by humanitarian organizations for migration are based on the recognition that migration and development are intimately connected.

This same idea emerges from the recent Migration Compact and the plans focused on creating sustainable developments programs in countries of origin (in this case, Africa for migrants arriving through the Central Mediterranean route). Causes at the origin are thus addressed alongside with necessary plans aimed at creating new legal channels for facilitating migrants' arrival and strengthening the fight against

criminal organizations operating in transit countries and countries of arrival. The connection between migration and development can also benefit from a more adequate system of protection and migrants' integration. In this way, the increasing social and economic divide that is sharpening insecurity, poverty, and degrading conditions of livelihood would be mitigated, acknowledging that migration is likely to increase further in the next years. Within the context of conflicts and poverty that mixed migrants are experiencing, probably the main recommendation that should be made at the end is, as Zetter says, "a common humanity that calls for a more humane protection system that recognises the level of vulnerability and desperation that produces such traumatic outcomes for these people and many millions more who are forced to migrate"[294]. International human rights "do not distinguish between categories of people: human rights are universal"[295].

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[294] Zetter, "Protecting Forced Migrants," 79.
[295] NGO Committee on Migration, *A call for a human rights-based approach to migration and development*, 4.

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Summary

The current migration crisis, which is now affecting mostly Europe, shows how patterns of migration are changing. Recently, States' attitude towards migrants seems to be regressing. Consolidated catalogues of rights, such as the right to life, the prohibition of torture or cruel, inhuman or degrading treatment are generally perceived as binding; however, States' responses to the current mass migration crisis, predominantly focused on security dimensions, are threatening the most important principle of humanitarian ideology, namely equality of human beings. The protection offered by international refugee law, primarily based on the 1951 Geneva Convention relating to the Status of Refugees, does not apply to all people crossing international borders in irregular ways. The Convention is aimed at ensuring fundamental rights and freedom; however, its provisions are not consistent with humanitarian standards recognized at the international level. States' inadequate approach to migration in an international context addressing mainly refugees result in protection gaps. In fact, migrants frequently fall outside the category of people seeking asylum or refugees; nonetheless, they are entitled to receive protection due to the fact that they are, first of all, human beings. Reasons to migrate are complex and diverse: they can result from a combination of conflict, instabilities, environmental change, and resource scarcity. Additionally, these individuals face several risks in leaving their homes for greater security that can result in different types of vulnerability. Criteria based on the Geneva Convention are obsolete and incompatible with necessities raising from today's reality. Non-traditional forms of legal protection have been elaborated, especially at the EU level; however, a major reform is extremely necessary in order to address the huge humanitarian challenge now occurring in the Mediterranean.

Since the 19th century, history has been marked by mass migration crises that occurred in different periods and regions of the world. Following the two World Wars, the first norms and institutions to protect refugees have been established; the High Commissioner for Refugees and the Nansen passports were the first main proposals for mass migration response. After the Second World War, in 1951, a new legal and institutional framework was introduced with the creation of the UN High Commissioner for Refugees (UNHCR). After that, following the 1990s' refugee crisis, mainly due to the collapse of the Soviet Union, the wars in Yugoslavia, Iraq and Afghanistan, in 2001, again, another wave of instability in Syria, in the failed States of Libya, Afghanistan, Iraq, Somalia, Sudan, Republic of Congo and in the States of the Global South led to a mass migration emergency characterized by new routes in the Balkans and Eastern Europe towards Northern European countries, such as Germany, Sweden, Denmark and the UK, besides the more established Mediterranean routes. With the majority of people originating from Africa, the Middle East, and Central-Asia going towards richer countries and regions, such as the EU, the increasingly growing economic divide between the Northern and the Southern parts of the globe becomes evident.

The current mass flux of people arriving to Europe is a mixed migration crisis, as migrants have mixed motives to move. Broad definitions of migrant are thus taken into account to highlight the diversity of

contemporary patterns of migration and the complexity of factors pushing people to migrate. Beyond internal displaced people (IDPs), who remain in their country of origin in face of emergencies, people crossing international borders are not always refugees corresponding to the legal label provided by the Geneva Convention. On the contrary, this thesis reflects the idea that status, willingness, or causes for moving are irrelevant for the definition of migrant because there is no legal status, cause, or measurable degree of compulsoriness driving migration that can lead to a greater qualification for the protection of a migrant.

This thesis starts by exploring the contemporary phenomenon of mass migration according to its main characteristic of multicausality, for which conflicts, political and food insecurity, poverty, and environmental factors are only some of the factors triggering a humanitarian crisis and consequent potential mass displacement. Migrants may, thus, belong to more than one category and may have different protection needs. In this way, mixed migration flows call into question the status-based approach of the Refugee Convention.

In 2015, 1 million of people arrived to Europe through irregular channels and 3,771 died in the same year crossing the Mediterranean. Different nationalities, routes, causes, and risks are all evidences of the extreme diversity of the current migration trends. The flows consist mostly of men, but may also consist of women and children, including unaccompanied and separated children. Refugees flee from the Syrian Civil War and migrate along the Eastern route; whereas the Central and Western Mediterranean routes mainly deal with migrants escaping situations of poverty and economic issues, besides climatic changes, mirroring the typical nature of mixed migration fluxes. In the latter case, the main countries of origin are Eritrea, Nigeria, Somalia, Sudan, Morocco, Tunisia, and Libya.

The condition of vulnerability may persist or intensify also outside the country of origin. When travelling, migrants are exposed to several risks and potential human rights violations, especially when they are not covered by protection norms or legal frameworks. Most of them do not have the possibility of accessing legal channels to migrate in the country of origin. In absence of resources, travel documents, passports, and clear status, the only viable alternative is represented by moving in irregular ways. When migrants cross the Mediterranean, they are exposed to fatal risks and, throughout the journey, they may face also rough environmental conditions, limited access to basic survival needs that are often compounded by xenophobia, experiences of violence, exploitation, extortion, rape, abduction, robbery, abuse, torture, and other forms of human rights violation inflicted by smugglers or human traffickers. They rely on traffickers, organized-crime groups, and smuggling networks in order to be assisted in transportation and get documents. Reliable information on safe migration choices are absent and migrants receive false information about the journey, as well as false information about opportunities offered in Europe.

Moreover, reactions of EU's Member States in response to mass migration, influenced by a high degree of politicization resulting in perceived threat to sovereign control of national borders and security, represent further causes of the sharpening of migrants' vulnerability. The construction of physical fences and

the focus on restrictive measures centered on securing the borders revived the term "Fortress Europe" to indicate how Europe is now representing a space of protection denial rather than a space for protection. The migration policy framework determined by the closing down of legal channels to access the EU exacerbates migrants' vulnerability and prevent them to reach Europe and exercise their rights. Meeting refugee status' requirements is becoming increasingly difficult and States' current responses to mass migration are not only reluctant towards different forms of forced migration other than persecution, but sometimes result also in denied access to those that would be normatively legitimated to receive protection according to the Geneva Convention.

The international normative framework is then analyzed, starting from the premise of an existing humanitarian core of international norms, for which human dignity, but also an adequate standard of livelihood and health, must be assured to all human beings, including, thus, migrants. A notion of protection that encompasses all activities aimed at respecting the rights of the individual imply that States' sovereignty is constrained by international human rights and humanitarian obligations. Today, conflicts and violence threatening human rights and forcing people to leave their countries and seek a better life elsewhere make protection an integral part of humanitarian action. The current crisis and the increasingly complexity of motivations underlying migration make, thus, less clear-cut traditional distinctions of migrants and poses many challenges to the existing normative framework and international practice characterized by the Geneva Convention and the protection from refoulement. Reasons pushing people to migrate are multicausal and do not allow a clear and easy discern of precise causes and correspondent possible categorization. As a result, very few migrants are able to claim the refugee status and the majority fall outside the legal and normative framework regulating their reception and protection. Compared with the 1951 Geneva Convention for the protection of refugees, the existing international institutional framework for the protection of vulnerable irregular migrants has several limits.

At the regional level, many Conventions derive directly from the application of the Refugee Convention, even though, in some cases, they may be also more inclusive, as shown by the Cartagena Declaration. Attempts to fill the normative gap for the protection of all migrants not matching refugee requisites, have been made especially at the EU level. However, complementary forms of protection result to be inadequate. The EU architecture for external migration policy, built on the implementation of the Geneva Convention and outlined by the Global Approach to Migration and Mobility (GAMM), the Common European Asylum System (CEAS), and the Dublin Regulation III scheme, is far from being coherent and efficient in ensuring the respect of human rights for all migrants. Huge gaps are evidenced by investments mainly oriented towards initiatives of border surveillance, formal and informal push-back operations, and Partnerships with transit countries where human rights are doubtfully respected and the protection from abuses is not a core priority.

Among international practices, only some specific areas are covered by an emerging structure for protection, namely displacement as a consequence of natural disasters, climate change, and internal

displacement. The Nansen Initiative, the 1998 Guiding Principles on Internal Displacement, and the Kampala Convention represent all valuable instruments for addressing the challenge of migrants' protection gaps for cross-border and internal displacement by encouraging a soft-law sustainable approach of intrastate dialogue, international cooperation, and operational response.

The real commitment to the protection of human rights in the management of the contemporary mass migration crisis comes from the active involvement of international humanitarian organizations. UN agencies, intergovernmental, and non-governmental organizations engaged in migration management set up programs aimed at providing humanitarian support and protection for migrants, particularly in view of the diversity and vulnerability characterizing mass mixed fluxes. They have the merit of having established a rights/needs based approach in contrast to the status-based approach descending from the Refugee Convention. Humanitarian organizations are involved in activities that place the individual at the center of concern and recognize everybody's eligibility to protection, in view, first of all, of the complexity of displaced populations. The rights/needs-based projects elaborated by international humanitarian organizations to address the crisis are sometimes specifically related to emergency response. In other cases, the projects have been developed to provide hints also for longer-terms objectives of capacity-building and support in the country of origin, highlighting the existing correlation between migration and development.

The IOM Migration Crisis Operational Framework and the OHCHR Principles and Guidelines on Human Rights at International Borders are described as instances of mechanisms designed by humanitarian organizations to tackle protection gaps in migration crises, as both are aimed at providing operational tools to support States in addressing migration emergencies both in countries of origin and at borders. In particular, the Praesidium Project is illustrated as a best practice for the provision of direct assistance to migrants arriving by sea, consisting of a partnership of different humanitarian organizations with experience in migration management collaborating for assisting the State in the reception of migrants on the Italian coasts.

All the causes contributing to the vulnerability of migrants, whether represented by natural or human made disasters, or States' measures that deny access and protection, result in an increasingly divide between rich and poor countries of the Globe and, consequently, increasingly numbers of displaced people that are likely to cross international borders for improving conditions of livelihood.

Several proposals have been presented by the current doctrine. The elaboration of a soft-law framework, the extension of the current definition of refugee to include also economic and environmental migrants, the resuscitation of the Responsibility to Protect Doctrine, and the use of a human security principle as legal basis for asylum are all valuable ideas for a reform of the current failing system of protection and they all contribute to the formulation of a new argument based on a system of protection for migrants that overcomes the current refugees' framework.

Starting from the recognition of the phenomenon of mixed migration as a phenomenon where migrants are always affected by a degree of compulsion, rethinking mass migration will equate rethinking

the concept of protection on the basis of the existing connection between migration and development, in view of which, the framework represented by the 1951 Geneva Convention, based on a system of classification, seems to lose relevance. Conversely, interesting hints are provided by the latest contribution made by Italy in the draft proposal of the Migration Compact, that focuses on the creation of mechanisms facilitating the access to the European market for African countries and the establishment of new legal channels to the EU.

At the end, the only viable option capable to ensure protection to everyone is based on the integration of short-term emergency and humanitarian measures and existing operational frameworks with initiatives aimed at implementing sustainable development projects and legal channels for migration. The connection between migration and development can also benefit from a more adequate system of protection and migrants' integration. In this way, the increasing social and economic divide that is sharpening insecurity, poverty, and degrading conditions of livelihood would be mitigated, acknowledging that migration is likely to increase further in the next years.