Introduction: a focus on migrants in disasters

Today's societies, increasingly interconnected and globalized, in which circulation of people, goods and information is faster and easier than ever, are also characterized by an increasing number of people moving abroad for employment, family reasons or education or as a consequence of conflicts and instability, crime and violence and disasters. Globally, some 250 million people reside outside of their country of origin, and many more circulate across borders for shorter periods. Nationals abroad represent double-digit shares of some countries' population, and foreign-born and migrant-background residents compose large shares of many of the world's cities. As a consequence of these intense population flows, originating from and directed to countries in the global North as much as in the global South, communities and societies all around the world become ever more diverse, transnational networks tighter and cross-cultural fertilization more intense, all of which further drive and enable migration processes.

Consequently, everywhere in the world, in countries of origin, transit and destination alike, consideration of human mobility trends is becoming integral to the functioning of governmental institutions, public and private providers of basic services, employers and non-governmental entities. This includes efforts aiming to manage disasters and reduce disaster risk: inclusive disaster prevention, mitigation, preparedness, response and recovery efforts increasingly need to account for migrants' presence, for their diverse sets of skills and resources, and for the specific obstacles and barriers they face, compared to the native population. As recently shown by events such as the 2011 floods in Thailand, the Tohoku triple disaster in Japan, and superstorm Sandy in the United States, such characteristics shape the way migrants are affected by hazards – and often make them more vulnerable to short- and long-term negative impacts.

For countries of destination, whether more or less affluent, reducing such impacts means reducing the hazards' overall impacts on affected communities. Migrant-inclusive disaster risk reduction and disaster management are key to this end, as they allow protecting and leveraging all available resources and capacities to reduce risk and cope with and recover from disasters. For countries of origin, reducing the vulnerability to hazards of their nationals abroad helps protect the economic, social and cultural gains their citizens, as well as their whole societies, derive from migration. Over the last few years, attention to migrants' specific conditions of vulnerability and to the importance of including them in disaster risk reduction and management has increased.

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THE PROTECTION OF MIGRANTS IN DISASTERS

Alice Sironi and Lorenzo Guadagno

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The protection of migrants in disasters

The issue of migrants caught in emergency situations while abroad, both in cases of conflicts or disasters, and the search for effective collaboration mechanisms, were already among the focuses of the 2013 United Nations (UN) High-Level Dialogue on International Migration and Development. The following year, a group of Governments, together with international organizations and research institutions, launched the Migrants In Countries In Crisis (MICIC) Initiative. In 2016, as the result of a 2-year multi-stakeholder consultative process, the Initiative produced a set of non-binding, voluntary principles, guidelines and practices. The document aims to guide efforts by both States and associate actors to improve protections of, and assistance to, migrants before, during and after crises, including disasters. This chapter partially draws from the discussions and outcomes of these consultations.

Migrants’ specificities in disasters

Experience from diverse geographical settings shows that migrants are often disproportionately affected by hazards hitting their destinations. Migrants’ specific conditions of vulnerability are determined by the interplay of their individual and collective characteristics (e.g. origins, ethnicity, linguistic proficiency) and the social, cultural and political features of their host society and its institutions (including, crucially, its immigration regime). This interaction determines migrants’ status, rights, access to resources, services and opportunities in normal times, and consequently their conditions of safety and security, and their needs, in disasters.

Communication barriers (due to limited language proficiency, reliance on non-mainstream media, physical and social isolation) can reduce migrants’ access to information on hazards and risk management procedures, their understanding of early warnings and emergency communications and their access to relief and recovery assistance. Lack of knowledge of the social and environmental features of their destination can result in diverse perceptions of local risks, different reactions in the face of hazards and limited awareness of available options for assistance and support. Reduced participation in local social networks can reduce their access to material and immaterial support needed to anticipate and cope with a hazard’s impacts. Lack of trust in local institutions and communities also, for instance, in face of arrest or discrimination or xenophobic acts, can reduce migrants’ willingness to seek assistance and to comply with official instructions (e.g. for evacuation and sheltering). All these conditions are exacerbated when explicit legal provisions exclude (some) migrants from accessing (some forms of) assistance and support.

Characteristics such as gender, age, skill level, census, family situation, origin and migration status determine to what extent different migrants experience such barriers – and therefore their individual vulnerability. Migrants who have access to an extended pool of opportunities and resources (including through local networks, diasporas and home communities and institutions) may well be more resilient than some members of their host communities.

Migration status as a factor of vulnerability

In many geographical contexts, migration status is linked with administrative and legal barriers which contribute to their vulnerability to disaster. Work permits or visas tied to non-nationals’ permanence in a certain area or employment in a certain job can reduce their capacity to evacuate and repatriate. Many countries do not grant all non-nationals full access to the broad spectrum of measures citizens can leverage to cope with disasters (e.g. emergency food benefits, housing reconstruction assistance, medical care and psychosocial assistance). In general, while disaster management actors all over the world (and at least formally) provide relief assistance in a non-discriminatory manner, non-nationals have much more limited access to...
long-term assistance and resources and information that are needed for protection, preparedness and recovery.

Non-citizens lacking legal status can be particularly vulnerable. They are often unregistered and therefore unaccounted for in disaster management efforts by both their countries of origin and of destination. Due to fear of arrest and deportation, they tend to avoid seeking the support of disaster management actors and service providers and reduce movements (including life-saving evacuation) to the minimum. They are more likely to face risky choices during and after disasters (e.g. being willing to document themselves in order to receive assistance) and may have to accept underpaid jobs in exploitative conditions throughout the reconstruction phase. After Hurricane Katrina, in 2005, as well as after the 2011 floods in Thailand, many undocumented migrants stranded in affected areas due to fear of being arrested and deported by police and immigration officials.

Asylum-seekers may be required to stay in a given area due to restrictions linked with the processing of their asylum claims, as was the case in Japan after the 2011 Tōhoku triple disaster. Stateless persons might lack the documentation needed for evacuations and for accessing assistance – and might be refused access to third countries in the case of international evacuation. Refugees, instead, do not necessarily represent a particularly vulnerable group in disasters, as they can usually count on legal status and access to protection in their host State.

In the light of the foregoing, this chapter discusses the responses that international law, and more specifically the human rights regime, provide to address the plight of non-nationals in the context of disasters. While recognizing the important role that a variety of actors, such as civil society and international organizations, play in reducing the vulnerability of non-nationals in disasters, this chapter focuses exclusively on the role of States to protect both the individual rights of non-nationals in the protection of its nationals abroad as both a right and an obligation. It then looks at the protection of non-nationals in disasters from the perspective of the interested State, and aims at describing the obligations that the State has vis-à-vis non-nationals who are present on its territory when the disaster strikes. Lastly, it describes the articulation of the respective responsibilities of the State of origin and of the affected State, highlighting the need for establishing an effective cooperation among relevant institutions.

Protecting migrants: the role of the State of origin

This section looks at the role of the State of origin in protecting the rights of its nationals abroad in the context of disasters. It explores the theoretical frameworks that could underpin the protection of disaster-affected nationals as both a right of the State and of the individuals.

A State right to protect its nationals abroad

The first institution that may be relevant to the analysis of a State’s right to protect its nationals abroad is diplomatic protection. Diplomatic protection can be seen as a mechanism to help States protect their nationals affected by disasters, but it is not necessarily a complete solution and therefore does not cover the prevention efforts that a State could adopt to ensure that the rights of its nationals are taken into account as part of disaster risk reduction, preparedness and response efforts. Secondly, it can only be effective if other obligations of domestic States, which can be problematic in contexts in which there is a rapid response, are also fulfilled, which implies that a long time delay between the injury and the remedy. In fact, relevant practice is almost nonexistent, even though in a few cases
diplomatic protection has been used to address infringements of individual rights in the context of disasters triggered by technological hazards. 19

Consular assistance seems more suitable for addressing situations in which nationals abroad need support in a disaster. Consular assistance can be both reactive or preventive 20  and is not subject to the rule of the exhaustion of local remedies. 21  It is part of the right of a State to protect its interests and those of its nationals in another State (Article 5.a Vienna Convention on Consular Relations). 22  The right to consular assistance is to be exercised on another State’s territory; therefore, in compliance with the principle of State sovereignty, it is subject to the consent of the receiving State (Article 2.1 Vienna Convention on Consular Relations). Article 5 of the Vienna Convention lists the same consular functions, none of which are relevant to disaster situations. These include (i) the general protection of the interests of the sending State and of its nationals (Article 5 of the Vienna Convention) and (ii) disaster assistance States can provide for their nationals abroad (Article 5.e), for example through the targeted delivery of relief goods, emergency cash assistance, replacement of documents lost in the disaster 24 or organization of evacuation operations.

Most consular functions are routinely performed in normal times and can be simply adapted to the circumstances of a disaster, without requiring additional authorizations by the affected State. However, other functions specific to disaster situations risk infringing upon the territorial integrity of the affected State, unless a specific agreement between the affected State and the State of origin regulates these. "Extraordinary" functions are not specified in the list of Article 5 of the Vienna Convention and would fall under the residual category provided for in Article 5.m, which refers to "other functions entrusted to a consular post by the sending State". The affected State retains the possibility to object to these other functions, 25 particularly when they involve the entry into the State of qualified personnel of the State of nationality to provide emergency consular assistance on a large scale or to organize international evacuations. 26  The latter is an option States have resorted to in a number of circumstances. After the 2011 triple disaster in Japan, Korea evacuated its nationals within 20 kilometres of the disaster zone, including using military aircraft and coast guard boats. 27  The USA evacuated over 28,000 people, mainly US citizens, out of Haiti after the 2010 earthquake, 16,700 of which on military planes. 28

The question whether the State of nationality has a remedy against the refusal of the affected State to consent to such "extraordinary" consular functions or interventions on its territory should be addressed within the broader doctrine on the protection of nationals abroad. International Law recognizes the right of States to peacefully protect their nationals abroad as a State’s population represents an essential component of its nation. The discussions around the protection of nationals abroad have focused on "extraordinary" forms of protection, and some authors insist on deprecating their legality due to the prohibition of the use of force and the difficulty in considering them as a form of self-defence. 29  Evacuations of nationals taken hostage in another State, for instance, are considered "extraordinary" measures because they infringe upon the territorial integrity of the host State, even if the operation is not directed against the host State and is strictly limited to what is necessary for saving the nationals’ lives. However, situations in response to disasters usually involve a larger set of actors who do not operate with the same modality and rules of engagement. In most cases, hostage interventions are carried out by military or para-military forces using weapons, whereas evacuations out of disaster zones are coordinated under the responsibility of the foreign ministry, and very often, they rely on commercial airlines or vessels. Even when military personnel or equipment are used, the nature of the intervention remains purely humanitarian and does not involve the use of force. 30
In the absence of sufficient practice, both scholars and States are generally against the recognition of a State right to humanitarian interventions on the territory of another State when the affected State consent is lacking, even in the cases in which these interventions are exclusively directed at saving the lives of the population. The debate in this regard has focused on the capability of the responsibility to protect doctrine in the context of disasters, which is generally denied, contained within narrow limits or looked at through the different lens of the existence of a right to humanitarian assistance of the affected population and of the related obligations for the affected State to consent to external assistance if domestic resources are insufficient to adequately protect people.

With regard to interventions aimed at saving a State’s own nationals, instead, there is a growing tendency, highlighted by some scholars, to condone or acquiesce to unauthorized operations by States to evacuate and assist their nationals in distress abroad. This tendency is a priori conditioned to disaster situations, in which outright refusal by the affected State is relatively rare and the more common problems are delays in responding to requests by foreign States or facilitating the movement of foreign relief personnel.

If the affected State fails to protect non-nationals or particular groups of non-nationals, withholding consent to a foreign State’s entry in the territory to protect its nationals may be considered as arbitrary and as a possible breach of the right to life of the concerned persons. In its commentary to Draft Article 13 on this topic, the International Law Commission identifies three conditions that should be assessed when verifying whether the withholding of consent to external assistance is arbitrary. Firstly, the withholding of consent is not arbitrary if the State has the capacity and is willing to respond adequately to the disaster with its own resources. Secondly, such consent can be denied with regard to one source of assistance if the assistance provided by other sources is sufficient. Thirdly, the denial of consent is not arbitrary if the offer is not made in accordance with the humanitarian principles of humanity, neutrality, impartiality and non-discrimination.

The protection of its nationals as an obligation of the State of origin

Human rights law and the Vienna Convention on Consular Relations

Action and inaction by Governments in response to disasters, and in particular large-scale ones, are often thoroughly scrutinized by the media and the public. If, however, it is debatable whether, or to what extent, States have a legal obligation to protect their nationals in distress abroad under human rights law. The absence of a general obligation of States to protect their nationals abroad is embedded in the principle of respect for the sovereignty and territorial integrity of other States — which

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The protection of migrant workers reflects on the territoriality of State obligations under human rights law. An extension of the territorial dimension of human rights obligations is possible only in exceptional cases. Extraterritorial protection in the human rights domain is based on the concept of effective control and not on the nationality link. Under human rights law, a few rights are granted exclusively to nationals. However, except for these rights, there is no consideration of the specific interest of the State of nationality to protect its nationals. The protection of human rights of individuals is a common interest of the international community, which goes beyond the nationality tie, implies interactive obligations and is exempted from the application of the principle of reciprocity.

Still, the human rights framework sets forth a few but significant obligations for the States of nationality. The International Convention on the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention, ICRMW) recognizes the importance of looking at the whole migration process and, specifically, at the role of States of origin in assisting their nationals, including by protecting their rights when they are abroad. Particular emphasis is on the importance of cooperation among the States of origin and of destination to prevent abuses and ensure access to rights (Articles 64, 65, 67 and 68).

The Migrant Workers Convention only applies to migrant workers but defines this category in extensive terms in line with its consideration of the whole migration process. Migrant workers are persons who are to be engaged, are engaged or have been engaged in a remunerated activity in a State of which they are not nationals (Article 2.1). This definition is likely to capture the great majority of people moving abroad, although Article 3 excludes some specific categories (inter alia diplomats, students, trainees). The Migrant Workers Convention is poorly ratified, but most of its provisions reflect rights that are already recognized for persons in other human rights conventions ratified by a more significant number of States. The Convention provides guidance on how rights should be interpreted in the specific situation of migrants.

Critical for the protection of nationals affected by a disaster abroad are: the right to return to one’s own country (Article 67.1) and, for regular migrant workers, reintegration upon return (Article 67.2) and the right to have recourse to consular or diplomatic protection and assistance whenever their rights are impaired — coupled with an obligation upon the State of origin and of destination to facilitate the provision of adequate consular and other services (Articles 23 and 65.2). Diplomatic channels, for instance, can help States negotiate exit from the affected country and facilitate the right to return (e.g., by acquiring reductions or waiving of relevant exit fees for their nationals). Diplomatic channels, for instance, can help States negotiate exit from the affected country and facilitate the right to return (e.g., by acquiring reductions or waiving of relevant exit fees for their nationals). Finally, the right of information and appropriate assistance (regarding formalities and arrangements for departure, travel, arrival, stay and exit) (Articles 65.3; and Article 67.2) may also apply as do other relevant provisions of the Vienna Convention on Consular Relations.

A more complex question is whether any of these rights can be considered customary law. The answer is particularly relevant with regard to the right to consular protection and assistance that is only expressly recognized by the Migrant Workers Convention. The question whether the Vienna Convention on Consular Relations recognizes such an individual right is debatable. The International Court of Justice (ICJ) in the LaGrand case recognized that Article 36.1(b) of
the Vienna Convention on communication in case of arrest of a national of the sending State protects both a State and an individual right. The ICJ did not pronounce itself on whether Article 36.1(a) on freedom of communication and access to consular officers, apart from the case of arrest and detention, implies an individual right. Nonetheless, in its examination of the violation of Article 36.1 as a whole by the United States, it highlighted that this Article establishes an interrelated regime designed to facilitate the implementation of the system of consular protection and that the breach of Article 36.1(b) implied a violation of Article 36.1 as a whole. The wording of Article 36.1 seems to point to the same conclusion with regard to its let. (a).

The Inter-American Court of Human Rights (IACtHR) more clearly considers the whole Article 36 as granting rights directly to individuals. The IACtHR seems to have interpreted in the same way the broader right to consular protection and assistance referred to in Article 5(a) and (e) of the Vienna Convention.

Assistance to own nationals and non-discrimination

Lastly, a sensitive issue arising in disaster situations may be whether it is always justified for the State of nationality to give dedicated disaster assistance to its nationals. The question is particularly relevant because of the risk of unequal treatment among similarly affected persons, namely nationals of States which have the resources to provide dedicated relief or evacuation assistance and affected locals or nationals of other States with more limited capacities. Can foreign States come into the territory of the affected State, save their nationals and leave all other affected people unassisted?

The discussion is about whether a foreign State’s officials in a disaster area can prioritize their nationals in the delivery of assistance, or whether a strict application of the needs-first approach is required in observance with the basic principles of humanitarian interventions (notably the principles of humanity and impartiality). It needs to be considered that the authorities of the State of origin that usually intervene to protect nationals and to provide humanitarian assistance for the broader population are different, as are the rules that apply to these two types of interventions. For interventions by consular authorities, or otherwise under the responsibility of the Ministry of Foreign Affairs, the main objective is to provide assistance to nationals in distress abroad, and not to provide humanitarian assistance to the broader population. Humanitarian principles would still apply, although in a restrictive manner that takes into consideration the primary objectives of the intervening State. Therefore, unless the intervention is regulated under a special agreement between the intervening State and other States concerned, other individuals (nationals of the affected State or of other States) should be prioritized only when there is an imminent threat to their life or physical integrity and the intervening State’s nationals are safe.

The proposed reasoning does not exclude the possible existence of a responsibility to protect the broader population, which would apply to the States of origin in the same way as to any other State of the international community.

State practice in past disasters seems to have found a fair balance between the States’ interest to protect their nationals abroad and the interest of the international community to protect people in general. Rare are the cases when States intervene exclusively to evacuate their nationals, usually evacuation and assistance for nationals are coupled with the assistance provided for the broader population.

In addition, eligibility criteria for international evacuations are often extended to dependents of the State citizens and to nationals of third States, often on a case-by-case decision. In the context of the European Union (EU), Article 13 of the Treaty on the Functioning of the European Union (TFEU) requires Member States to provide diplomatic and consular protection

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to citizens of any Member State, on the same conditions as the nationals of that State. Decision 95/553 specifies that such consular protection also includes repatriation of distressed EU citizens on an equal footing with nationals. Despite the existence of some positive practice, States have not been exempted from criticism for having selectively chosen whom to evacuate, particularly in cases in which such decisions resulted in the exclusion of some particularly vulnerable individuals.

The evacuation of non-nationals out of affected areas can be a key measure for reducing pressure for assistance on the affected State. However, these efforts need to be coordinated with parallel local or international relief and assistance targeting the whole population.

Protecting migrants: the role of the affected State

The primary responsibility for protecting the population in the event of a disaster rests with the affected State. States’ policies and efforts in disasters need to be inclusive and address the specific needs of particularly vulnerable individuals. This includes people whose vulnerability results from their migration status (irregular migrants, asylum-seekers and refugees); individual circumstances (victims of trafficking or exploited, abused and marginalized migrants); and characteristics (minor or unaccompanied migrant children, disabled migrants). This section discusses the extent of the affected State’s obligations towards non-nationals in disasters and the implications of an application of the principle of non-discrimination on grounds of nationality or migration status as interpreted by human rights bodies.

The principle of equality and non-discrimination as a baseline for addressing migrants’ specific needs

Human rights conventions apply to everyone on the territory or under the jurisdiction of a State, with very few exceptions. In the absence of a human rights convention specifically dealing with all categories of non-nationals, there is often confusion on the exact context and scope of these rights, particularly for those who are in an irregular situation. Specific categories of migrants are expressly or implicitly protected under a number of international instruments, dealing with migrant workers, refugees, victims of trafficking, smuggled migrants, migrant children, migrant women, disabled migrants and even non-nationals caught in an armed conflict. All these instruments help clarify the scope of the application of general human rights conventions to non-nationals. Rich literature exists on the rights of migrants in both regular and irregular situations. In the absence of any express limitation of rights, the residual provision that applies to non-nationals is the principle of equality and non-discrimination. This section elucidates how this principle has been applied to address the situation of migrants in the context of disasters.

National origin is expressly included among the prohibited grounds of discrimination in almost all national human rights conventions that contain a non-discrimination provision. Nationality is explicitly mentioned in the most recent instruments, including the CRC, but it is considered as implicitly included in all other relevant conventions. To be justified under human rights law, any distinctions between nationals and non-nationals in the access to rights, including in the context of disasters, need to be verified against the principle of non-discrimination. Differential treatments need to pursue a legitimate aim, be compatible with the nature of the rights involved in the relevant human rights treaties and be aimed at promoting the general welfare in a democratic society. Lastly, there must be a direct and reasonable proportionality between the aim to be achieved and state actions or omissions (and their effects).
The implementation of the principle of equality and non-discrimination
to migrants in national contexts

Many countries have adopted laws or regulations that explicitly require disaster management actors to provide assistance in a way that does not discriminate affected persons on the grounds of their nationality, origin, migration status or language proficiency. The 2012 Colombian Law on Disaster Risk Management (No. 1523), for instance, recognizes the general principle that all persons have the right to receive the same assistance in the face of a disaster. The Mexican ‘Ley General de Población’ states that foreigners have the right to disaster assistance, regardless of their legal status. In the United States, the Robert T. Stafford Disaster Relief and Emergency Assistance Act states that disaster assistance should be provided without distinction on the grounds of race, colour, religion, nationality, sex or economic status. In addition, an August 2010 Executive Order directs each Federal Agency to ensure that people that are eligible for federally-funded programs and services (including those relevant for disaster risk management) are not discriminated on the basis of limited English proficiency.

Even in countries in which this principle is not explicitly stated in legal or administrative provisions, disaster management actors strive to ensure that their efforts are carried out in a non-discriminatory manner. However, making sure that non-nationals actually receive adequate assistance often requires targeted, proactive efforts – in the light of their specific capacities, conditions of vulnerability and needs in times of disaster. Understanding and addressing the obstacles that might prevent non-nationals from accessing information, resources and assistance in disasters is necessary to fulfilling the criterion of substantive equality that underpins international and national legal provisions on this matter. Conversely, failing to adequately address non-nationals’ diversity of conditions and behaviours all too often results in their exclusion and marginalization in times of disaster.

Limited linguistic proficiency, use of foreign or minority mass-media and social and physical isolation can reduce non-nationals’ capacity to receive and interpret warnings and communications, potentially resulting in their inability to protect themselves, evacuate or access support in the face of a hazard. This was the case of the Spanish-speaking community affected by the 1987 tornado in Bogotá, Colombia, as well as of some foreign residents in the areas of Japan affected by the 2011 triple disaster.

Non-nationals are likely to show specific behaviours in disasters, as a consequence of different culturally learned habits, limited trust in warnings and their inability to trust their homes. In the face of Hurricanes Katrina (in 2004) and Gustav (in 2008), vulnerable migrants refused to leave at-risk areas due to fear of arrest and deportation, and of losing their homes and belongings, with little access to legal remedies.

Adequate delivery of food and non-food items, emergency shelter, healthcare and psychosocial support is dependent on the recipients’ preferences and restrictions, which are part and parcel of their cultural background. Whenever cultural diversity is not factored in relief work, these core disaster management responsibilities are likely to go unfulfilled.

Without proactive efforts on the part of disaster management actors, it is likely that non-nationals suffer more significant short-term and long-term impacts, which can further exacerbate their vulnerability. The policies of options available in support of such efforts include organizational measures, standards and procedures, and operations. Programmes to involve non-nationals and their representatives in disaster management organizations, increase the cultural competence of emergency management personnel, develop targeted awareness-raising materials and work with relevant civil society and private-sector actors to deliver more adequate services can all be useful to this end. Measures to provide flexibility on immigration regulations in the aftermath
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of a disaster (including the possibility to create a visa without consequence or simplified procedures and the anonymous requirements for receiving one's visa), and formalised between states.
Specific efforts may be needed to account for the conditions of specific groups of non-nationals, including those in irregular status, who might be reluctant to seek official assistance, and newcomers and migrants in transit, who are likely to have reduced local knowledge and social networks.

The affected State as a catalyst of other actors’ compliance

Despite recent developments, non-state actors are generally not recognized as subjects of international law and therefore cannot be held responsible for wrongdoings against individuals at the international level. With this limitation in mind, this section will briefly outline the central role of Civil Society Organizations (CSOs), employers and recruiters for the protection of migrants in disasters.

The role of civil society in protecting migrants in disaster and States’ human rights obligations

Civil Society Organizations, including migrants and diaspora organizations, play a key role in ensuring that all sectors of the population, including marginalized non-nationals, are included in disaster prevention, preparedness, response and recovery. CSOs can facilitate the circulation of information to target groups and contribute to ensuring that they are consulted in planning and operations. In addition, they are key disaster response actors, as they are often able to operate effectively and sustainably on the ground where mainstream aid may be slow and inadequate, or may work with those on a daily basis, and may be perceived as trustworthy actors, more easily approachable than any public authority.

In line with the general approach of this chapter which predominantly looks at State obligations, this section briefly outlines the obligations States have under human rights law to ensure that CSOs can contribute to an effective protection of non-nationals in disasters.

Two rights are particularly relevant to this end: the right to freedom of association and the right to information. The right to freedom of association is enshrined in a number of human rights treaties, including Article 22 of the International Covenant on Civil and Political Rights (ICCPR), which stipulates that all migrants, including those who are in an irregular situation, should be able to take part in meetings and activities of associations “with a view to protecting their economic, social, cultural and other interests” (paragraph 1(a)); to join freely such associations (paragraph 1(b)); and to seek their aid and assistance (paragraph 1(c)). CSOs, and specifically migrants’ associations, may face obstacles in carrying out their activities. Non-nationals in the Gulf region, for instance, are often prevented from organizing and forming associations. Reforming laws, policies and practices that prohibit or limit such freedom is critical to better protecting and assisting migrants in disasters.

The right to seek, access and impart information is a corollary of the right to freedom of expression. It is stipulated in various human rights conventions (Article 19 ICCPR), including the Migrant Workers Convention (Article 14 ICRMW). The right to impart information implies that the State should not restrict or hinder CSOs from carrying out awareness-raising activities targeting, specifically, the migrant population. In light of the challenges in disseminating
emergency warnings and communications to non-nationals through official channels, efforts by CSOs (through social media, community meetings or door-to-door visits) are key to non-nationals’ preparedness and response capacity. The Migrant Workers Convention imposes on States the positive obligation of taking measures to disseminate relevant information to migrants on their rights under the Convention, as well as requisite authorizations, formalities and arrangements for departure, transit, arrival, stay and return (Article 33 and 65 ICRMW). CSOs can effectively support these efforts, as they relate to disaster situations.

Acknowledging the role of private recruiters and employers

Practices by employers and recruiters are a key determinant of migrants’ vulnerability. Migrants may work in risky, exploitative or abusive conditions or may be bound to their employers because their residence permit is linked to their contract or because their employer is withholding their documents or salaries. Employment conditions often contribute to determining whether migrants will be able to avoid, cope with and recover from disasters. The role of employers and recruiters includes promoting protective measures and policies, including protecting their non-nationals’ employees. To comply with this obligation, States may choose to include in the relevant national legislation an obligation of due diligence for the recruiters and a proper duty of care for employers to prepare for and respond to disasters, including planning for their non-national employees. In order to comply with this obligation, States may impose on employers an obligation to ensure that their employees are aware of the appropriate insurance policy in place and that it covers migrants and includes relevant disaster situations. To this end, governments can set up mandatory insurance schemes for employers that cover migrant workers’ evacuation and medical assistance in the event of a disaster. For employers, compliance with these duties of care over mean: (i) adopting a risk management policy; (ii) setting up a risk management team; (iii) developing a contingency plan taking into consideration the specific situation of non-national workers; and (iv) establishing systems for tracking and reaching out to their employees in disasters, including with a view to facilitating targeted assistance by response actors.

The articulation of the roles of the State of origin and the affected State and the obligation to cooperate

Disaster risk management and response cannot be successful in the absence of effective cooperation among the various actors involved. This is even more so evident when it comes to protecting non-nationals. This section will look at the obligations of cooperation in the relevant human rights framework and at examples of good practices of its operationalization. First, cooperation can be key to strengthening the overall response system by allowing different States to share resources, capacities and information, coordinating with foreign actors also requires additional
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efforts on the part of the affected State. The second part of the section will try to draw the fine line between ensuring that such interventions relieve some pressure on the affected State and the risk that they create further burdens.

States’ obligations to cooperate are well established in international law. It is stipulated in Articles 1(3) and 56 of the UN Charter. More specifically, the UN General Assembly, noting that the magnitude and duration of many emergencies is beyond the response capacity of many States, has recognized the crucial role of international cooperation in disaster situations. The same position was recently reiterated with regard to cooperation in disaster risk reduction.107 Similarly, the international legal instruments applicable to migration accord great importance to the cooperation between States of origin, transit and destination.108 The ICRMW recognizes ‘the importance and usefulness of bilateral and multilateral agreements’ and defines the scope of application of some of its provisions based on relevant inter-State agreements.109 Part VI of the Convention requires States to consult and cooperate to promote social, equitable and humane conditions of migration.110 Article 65 of the ICRMW is more specific in defining the scope of cooperation in times of disasters. In line with the right to information set forth in Article 33 ICRMW, which is applicable to all migrants, the relevant information has to reach all concerned. Particularly, non-nationals in irregular situations can be invisible and coordination among the States of origin and of destination often proves critical in locating, identifying and assisting them. Regular consultation between States of origin and of destination should also encompass disaster preparedness and response matters, including contingency planning, access to migrants, emergency communications, circulation of non-nationals and administrative flexibility for leaving the country and to reissue lost documents, in order to ensure that immigrants are protected during a disaster.111

Efforts led by the States of citizenship to evacuate their nationals out of disaster-affected areas, or provide other assistance to their nationals or to the whole affected populations, can help reduce pressure for assistance on the affected State. However, these efforts need to be coordinated with parallel disaster response efforts by the affected State or other international actors in order to avoid potential logistical challenges, as well as to permit possible timelines to other affected persons (whether locals or non-nationals) who may favour internal access to assistance.112 Cooperation between actors of the State of origin and the disaster management system of the affected State is also particularly important for addressing some of the non-nationals’ specific needs in emergencies. For instance, authorities of the State of citizenship can help circulate and validate emergency communications and early warning issued by the affected State’s authorities to their nationals, thereby improving outreach to potentially hard-to-reach groups. After the 2011 Bangkok floods, joint assistance desks were set up by the Thai authorities and the consular staff of relevant countries of origin within evacuation centres specifically dedicated to migrants, in order to provide information and rapidly reissue lost documents.113 These coordinated efforts however require information disseminated through multiple channels to be consistent, failing which the effectiveness of the whole system of communication may be undermined, resulting in lack of clear guidance and ineffective preparedness and response for the individuals. Such was the case of the circulation of information on the contamination after the Fukushima accident in 2011, when many foreign residents in Japan were advised by their home country
institutions to leave the country against the advice of the Japanese government. This resulted in criticism of the Japanese government by the Japanese population itself. 116

Pre-disaster arrangements and mechanisms that account for, and leverage, the capacities and resources of relevant actors both of the State of citizenship and of the affected State can help maximize benefits. Such tools may include: (i) bilateral agreements/memoranda of understanding with provisions on communication in disaster (e.g. consular access), (ii) information sharing between capitals, (iii) common alert systems and (iv) preparedness and emergency communication plans that include focal points in foreign posts. 117

Finally, a number of measures expire cooperation to be oriented towards ensuring that migrants, including those in irregular situation, can safely return to their country of origin, if they wish to do so. The ICRMW requires States to cooperate in this regard. 118 The Trafficking Protocol calls upon States of origin to facilitate the return of their nationals who are without proper documentation and to provide them with the necessary travel documents or other authorisations for re-entering their territory (Article 9). A similar provision is contained in Article 18.4 of the Smuggling Protocol. 119 Returns shall always be carried out in accordance manner and shall also respect the safety and dignity of the persons. 119 Finally, for migrant workers in a regular situation, the ICRMW obliges States to cooperate ‘with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin’. 120 In light of these provisions, the imposition of substantial restrictions on the right to exit by the affected State, such as the imposition of exit visas or exit fees, should be considered as infringing upon the affected State duty to cooperate. 122

Conclusions and the way forward

If the international legal framework to protect migrants is still somewhat underdeveloped, with no specific, convention-based tools with all categories of migrants, this is even more true when it comes to protecting migrants in the context of disasters. 123 In particular, migrants are rarely accounted for among vulnerable categories of individuals in the UN human rights treaty (other than in the context of disasters). 124 Nevertheless, a few recently adopted instruments have started to reverse this trend. The Sendai Framework for disaster risk reduction, adopted in 2015, acknowledges that migrants can be a group specifically affected by disasters and highlights the role that they can have in disaster risk management. 125 The Paris Agreement on Climate Change also mentions migrants among the specific groups whose rights have to be considered and protected when addressing climate change. 126 This chapter has moved from an acknowledgement of the critical role that the States of origin and destination can play in reducing migrants’ vulnerability to disasters, including by regulating or facilitating the intervention of other actors (notably, the private sector and the civil society). It has shown that the interpretation of the relevant legal framework, and notably of human rights, specifically as they apply to migrants in these situations, requires further elaboration. By fostering a general trend towards a more consensual approach to the development of human rights safeguarding measures and formulations on environment-related matters, agreements can benefit from the more effective policy responses. In turn, it is highly likely that these agreements, in turn, will benefit from the broader endorsement and use of the MICIC outcome documents, targeted efforts from human rights practitioners and scholars, and stakeholders, including the United Nations system, to build their capacities and engage with the MICIC process.

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right holders, both nationally and regionally, could help ensure that the principles described in this paper are further embedded in the human rights framework and that the practices that can effectively reduce migrants’ specific conditions of vulnerability to disasters are tied to States’ obligations under human rights instruments. The adoption of the Guidelines to Protect Migrants in Countries Experiencing Conflict and Natural Disaster should then be seen as a starting point for incentivizing further development of the human rights framework in protecting migrants in the context of disasters.

Selected bibliography


Notes

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4 See, for instance, the definition elaborated by UNHCR (2 February 2017), a disaster is a situation in which a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.

5 For the aims of this paper, and in accordance with the definitions elaborated by UNHCR (2 February 2017, a disaster is a situation in which a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.

6 The term ‘migrant’ is used in line with IOM’s broad understanding of this term to identify any person who is moving or has moved across an international border, regardless of his or her legal status, causes of the movement and length of stay. More specific categories, such as refugees, asylum-seekers, stateless persons, victims of trafficking, unaccompanied migrant children, etc. fall under the umbrella term ‘migrants’. IOM’s definition of migrants can be found here: www.iom.int/sites/default/files/about-iom/IOM-definition-of-a-migrant-15March2016.pdf, accessed on 7 June 2017. For the sake of avoiding repetition, the term ‘non-national’ will be also used as a synonymous to ‘migrant’.

7 For recent data about disasters and their consequences, see IFRC, World Disasters Report 2016 (IFRC, 2016).

8 The text of the Paris Agreement, in its Preamble, acknowledges the specific vulnerability of migrants and the need to protect their rights in the context of climate change Paris Agreement (adopted on December 2015, entered into force 4 November 2016), UN Doc. FCCC/CP/2015/L.9, Preamble.

9 For recent data about disasters and their consequences, see IFRC, World Disasters Report 2016 (IFRC, 2016).

10 The text of the Paris Agreement, in its Preamble, acknowledges the specific vulnerability of migrants and the need to protect their rights in the context of climate change Paris Agreement (adopted on December 2015, entered into force 4 November 2016), UN Doc. FCCC/CP/2015/L.9, Preamble.
The Sendai Framework also recognizes the contribution of migrants ‘to the resilience of communities and societies’ (para 36 a.vi) and recommends to local authorities to coordinate their disaster risk management efforts at the local level also with migrants (para 27 h). Sendai Framework for Disaster Risk Reduction 2015–2030, available at www.unisdr.org/we/coordinate/sendai-framework, accessed on 14 June 2017.


The importance of including migrants as protagonists is also acknowledged in the MICIC Initiative Guidelines (n. 10), Guideline 4: Incorporate migrants in prevention, preparedness, and emergency response systems, 26. Furthermore, paragraph 7 of the Sendai Framework on disaster risk reduction invites member governments to engage with civil society organizations, including migrants, in the design and implementation of policies, plans, and standards.

24 Consequently, for Crowley Holmes (cited 28 April 1913), water is over 5000 feet underground. Elsewhere in the United States (cit. supra), water is at 500 feet underground.
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25 Art 26(1), the Vienna Convention on Consular Relations refers to functions exercised in a consulate which are not prohibited by the laws and regulations of the receiving State or to which no restriction is taken by the receiving State or which are referred to in the international agreement as functions between the sending State and the receiving State.


29 The use of force is prohibited by art 2(4) of the UN Charter; the only exception being the case of self-defense stipulated in art 51 of the UN Charter. However, self-defense is only considered acceptable if it is needed to respond to an actual attack. According to Ruys, in a possible disaster scenario, states could reach the level of armed attack. 'There may be occasions when the threat of danger is great enough, or such threats in an application to a specific community as a whole' (ibid 463–464).


31 See the chapter by Da Costa in this volume and M. Costas Trascasas, 'Access to the Territory of the Disaster-Affected-State' in A. de Guttry, M. Gestri and G. Venturini (eds), International Disaster Response Law (Martinus Nijhoff Publishers, 1997) 149. States are also opposed to the application of the responsibility of the receiving State or which are referred to in the international agreements as functions (ibid 468). State practice is not sufficiently uniform for the right to rescue to be part of customary international law (ibid 463–464).


33 See T. Ruys, 'The "Protection of Nationals" Doctrine Revisited' in Proceedings of the 2nd Symposium on Human Rights Law, 170; 175. States are also opposed to the application of the responsibility of the receiving State or which are referred to in the international agreements as functions (ibid 468). State practice is not sufficiently uniform for the right to rescue to be part of customary international law (ibid 463–464).

34 See the Independent International Fact-Finding Mission on the Conflict in Georgia, Report (September 2009), vol. 1, 23.


36 See A. Creta, 'A (Human) Right to Humanitarian Assistance in Disaster Situations? Surveying Public International Law' in de Guttry et al. (n. 31) 353 and the chapter by Hesselman in this volume.

37 The Independent International Fact-Finding Mission on the Conflict in Georgia. The report states: 'The protection of migrants in disasters...  

37 UNGA, Res 43/131, UN Doc. A/RES/43/131 (8 December 1988) preambular para 8; UNGA Res 45/100, UN Doc. A/RES/45/100 (14 December 1990), preambular para 6. The Draft Articles of the ILC on the Protection of Persons in the Event of Disasters also recognize a duty on the affected State to seek external assistance (draft art 11). This duty also derives from affected State’s obligations under human rights treaties and customary international law (draft art 11, commentary para 7). ILC 2016 (n. 34).

38 In the commentary to draft art 11, it is specified that such a capacity should be verified with regard to its various aspects and not in absolute terms and that ‘[a]n affected State’s national capacity may be manifestly exceeded in relation to one aspect of disaster relief operations, although the State remains capable of undertaking other operations.’ Such an aspect could be the State’s capacity to effectively include the protection of non-nationals in its response. ILC 2016 (n. 34), para 2 of the commentary to draft art 11.

39 For a discussion on the tension between the humanitarian principles and an intervention aimed at assisting only the nationals of a State and on how to resolve it, see the section entitled ‘Assistance to own nationals and non-discrimination’ below.

40 ILC 2016 (n. 34) draft art 13, para 10 of the commentary and draft art 10, para 2, of the commentary.

41 ILC 2016 (n. 34) draft art 14.

42 K. Tindall (n. 36) 102, 106.

43 The ECtHR in the decision on the case Treska v. Albania and Italy stated:

Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.

Treska v. Albania and Italy, App. No. 26937/04 (ECtHR, Decision on Admissibility of 29 June 2006).


46 The right to take part in public affairs, to vote and to be elected (art 25 ICCPR) and the right to return to one’s own country (art 12.4 ICCPR), which however has been interpreted as applying also to stateless persons and permanent residents. See HRComm, General comment No. 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.9 (1999); HRComm, Stewart v. Canada, Comm. No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996); HRComm, Nystrom v. Australia, Comm. No. 1557/2007, U.N. Doc. CCPR/C/102/D/1557/2007 (2011).


48 Art 1.2 stipulates that the Convention applies during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

49 Right to consular assistance (arts 16.7.1, 23 and 65.2), right to vote and participate in elections of the State of origin (art 41), right to transfer their earnings and savings (art 32), right to social security (art 27.1).

50 At the time of writing the Migrant Workers Convention was ratified by 51 States.

51 Notably the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 and the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, which at the time of writing have been ratified by 165 and 169 States, respectively.

52 MICIC Initiative (n. 10), Guideline 10: Facilitate migrants’ ability to move to safety, 33 and the relevant practices regarding the Host State, 98. See also Guideline 13: Relocate and evacuate migrants when needed, 36.

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53 Committee on Migrant Workers (CMW), General Comment No. 1: Migrant Domestic Workers, UN Doc. CMW/C/GC/1 (2011) 29.

54 Ibid 62–64.

55 Lee and Quigley (n. 22) 124. With regard to the right to consular assistance, the authors report a certain number of State practices, which do not consistently recognize an individual’s right to request the protection of the consular authorities of their State of nationality.

56 Vienna Convention on Consular Relations (n. 22).


58 Ibid. The same was reiterated in the following judgment: Avena and Other Mexican Nationals (Mexico v . United States of America) (Judgment) [2004] ICJ Rep. (I) 48, para 40.

59 LaGrand (n. 57) paras 73–74; Avena (n. 58) para 99.

60 ‘Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communications with and access to consular officials as the nationals of the sending State living abroad’. Vienna Convention on Consular Relations of 24 April 1963, 1964 UNTS 65, article 3.


62 Ibid paras 79 and 87.

63 The application of these principles also in disaster situations is confirmed in art 6 of the Deal Annexed to the EU-2016 (n. 14).

64 For a discussion on the applications of the responsibility to protect in disaster situations, see Enio Cortés’s chapter in this volume.


68 Kamin (n. 65).

69 On the obligations of coordination between the State of origin and the affected State, see the section entitled ‘The articulation of the roles of the State of origin and the affected State and the obligation to cooperate’ below. See also H. Duncan, ‘Immigrant Integration as a Factor in Disaster Preparedness: The Case of the 2011 Tohoku Earthquake in Japan’ 3 Migration Policy Practice (April 2013–May 2013) 9.


71 The ICCPR recognizes the right to vote and to participate in elections only for nationals (art 25) and the right to return to one’s country for nationals and (based on the interpretation by the HRC) for permanent residents (art 12.4). The only express exception to the universal enjoyment of economic rights under the ICESCR is set forth in art 2.3, which states that: ‘[t]he developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals’. However, this exception does not apply to social or cultural rights.
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72 ICRMW (n. 47).
79 Arts 35 to 46 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.
81 Except for the CEDAW (n. 77) and ICRPD (n. 78). The role played by non-discrimination in disaster risk management is explored in Casolari's chapter in this volume.
83 Ibid para 13. See also footnote 81 of this volume.
85 The importance of the principle of non-discrimination in the provision of humanitarian assistance is also acknowledged in the MICIC Initiative Guidelines; see MICIC Initiative (n. 10) Guideline 11: Provide humanitarian assistance to migrants without discrimination, 34.
89 Duncan (n. 69).
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95 MICIC Initiative (n. 10), Practices to implement Guideline 4: Empower migrants to help themselves, their families, and communities during and in the aftermath of crises, 54.
96 Ibid and Guideline 4.
97 The right to freedom of association is also recognised for refugees and stateless persons lawfully resident in the country on or after 13 June 1951. Convention Relating to the Status of Refugees (adopted 28 September 1951, entered into force on 22 April 1954) 1897 UNTS 150
99 MICIC Initiative (n. 10), Practices to implement Guideline 3: Empower migrants to help themselves, their families, and communities during and in the aftermath of crises, 54.
100 MICIC Initiative (n. 10), Practices to implement Guideline 4, 50.
107 UNGA, Res 70/107 (n. 70) Preamble.
108 ILO Convention No. 97, Convention Concerning Migration for Employment (Revised 1949) (adopted 1 July 1949, entered into force 22 January 1952) 120 UNTS 71, art 3 on countering the misleading propaganda, and Annex II, art 12, on assistance provided to migrants on conditions of employment.
109 Art 2.2(h), 4, 5, 46 to 48, 52.3(b), 53.2, 59.2, 61.3 and 4, 69.2, 71.2 of ICRMW (n. 47).
110 Ibid., see specifically arts 64 and 65.1(b) on cooperation to provide information to migrants, and 67 on cooperation regarding the return of migrant workers.
111 Ibid., a number of other provisions impose an obligation of cooperation on States; see arts 55(b) and 57.
114 G. Bondi, ‘Una scossa all’integrazione – Gli immigrati e il terremoto in Emilia, sei mesi dopo’ Popoli (6 November 2012), available at www.popoli.info/EasyNe2/Primo_piano/Una_scossa_all_integrazione_-_Gli_immigrati_e_il_terremoto_in_Emilia_sei_mesi_dopo.aspx, accessed on 14 June 2017. See also the section entitled ‘Assistance to own nationals and non-discrimination’ above.
115 Duncan (n. 69).
116 Beesey et al. (n. 13).
117 MICIC Initiative (n. 10), Practices to implement Guideline 7: Establish coordination agreements in advance to leverage strengths and foster trust, 76–78.
118 ICRMW (n. 47) art 67.1.
119 Smuggling Protocol (n. 75).
120 Ibid art 18.5 and Trafficking Protocol (n. 74), arts 8.1 and 2.
121 ICRMW (n. 47), art 67.2.
122 MICIC Initiative (n. 10), Guideline 10: Facilitate migrants’ ability to move to safety, 33.
123 There are also discussions on whether the UN Guiding Principles on internal displacement would apply to non-nationals, see K. Khoser, ‘Protecting Non-Citizens in Situations of Conflict, Violence and Disaster’ in S. Martin, S. Weerassinghe and A. Taylor (eds), Humanitarian Crises and Migration (Routledge, 2014) 268, 270.
125 Sendai (n. 8) paras 7, 27(h), 36(a)(vi).
126 Paris Agreement (n. 8) Preamble.

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