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THE PROTECTION OF MIGRANTS IN DISASTERS

*Alice Sironi and Lorenzo Guadagno**

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,¹ and many more circulate across borders for shorter periods.² 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.³ 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.⁴

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 disasters⁵ and reduce disaster risk: inclusive disaster prevention, mitigation, preparedness, response and recovery efforts increasingly need to account for migrants' presence,⁶ 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,⁷ 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.⁸

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.⁹ 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.¹⁰ The document aims to guide efforts by both State and non-state actors to improve protection 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 (i.e. origin, 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 perception 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 due, for instance, to fear of arrest or to 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 whenever explicit legal provisions exclude (some) migrants from accessing (some forms of) assistance and support.¹¹

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.¹² 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 disasters. 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.¹³ Many countries do not guarantee all non-nationals full access to the broad spectrum of measures citizens can leverage to cope with disasters (e.g. unemployment benefits, housing reconstruction assistance, medical care and psychosocial assistance).¹⁴ In general, while disaster management actors all over the world tend (at least formally) to provide relief assistance in a non-discriminatory manner, non-nationals have much more limited access to

longer-term assistance and resources and information that are needed for prevention, 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. losing savings or documentation withheld by employers or recruitment agencies, being exposed to increased risk in affected areas that they are not able to flee, being abused while trying to evacuate and having to accept underpaid jobs in exploitative conditions throughout the reconstruction phase). After hurricane Katrina, in 2004, as well as after the 2011 floods in Thailand, for instance, many undocumented migrants stayed in affected areas due to fear of being arrested and deported by police and immigration officials.¹⁵

Asylum-seekers may be required to stay in a given area due to restrictions linked with the processing of their asylum claim, as was the case in Japan after the 2011 Tohoku triple disaster.¹⁶ Stateless persons might lack the documentation needed for evacuation 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.¹⁷

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 State obligations. It explores the role of the State of origin 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 affected State and aims at describing the obligations that this State has with regard to 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.¹⁸ Diplomatic protection can however play a limited role to help States protect their nationals affected by disasters abroad. It is primarily remedial and therefore does not cover the preventive actions 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 resorted to after exhaustion of domestic remedies, which can be problematic in contexts in which action is urgently needed, as it implies that a long time elapses between the injury and the remedy. In fact, relevant practice is almost inexistent, 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 preventive²⁰ 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 main consular functions, many of which are relevant in disaster situations. These include: (i) the general protection of the interests of the sending State and of its nationals (Article 5.a), which is particularly pertinent to the pre-disaster phase, when it is key to including non-nationals in disaster risk reduction and preparedness measures,²³ and (ii) the 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 disaster²⁴ or organization of evacuation operations.

Most consular functions are routinely performed in normal times and can be simply adapted to the circumstances in 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 them. 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 statehood. The discussions around the protection of nationals abroad have focused on forcible forms of protection, and many authors concur in denying 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 hostages in another State, for instance, are considered forcible 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, evacuations in response to disasters usually involve a larger set of actors who do not operate with the same modalities 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 areas 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 intervention 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 applicability of the responsibility to protect doctrine in the context of disasters,³¹ which is generally denied, contained within very narrow limits³² or looked at through the different lens of the existence of a right to humanitarian assistance of the affected population³³ and of the related obligation for the affected State to consent to external assistance if domestic resources are insufficient to adequately protect people.³⁴

With regard to interventions aimed at saving a State's own nationals, instead, there is a growing tendency, highlighted by some scholars,³⁵ to condone or acquiesce to unauthorized operations by States to evacuate and assist their nationals in distress abroad. This tendency is *a fortiori* confirmed in 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.³⁶

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.³⁷ 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.

As the State of nationality of a large group of affected persons has a qualified interest in protecting its own nationals, it should be allowed to provide assistance for its nationals even if the assistance has already been provided for the broader population by other sources. The withholding of consent to the assistance proposed by such a State should then be considered as not arbitrary, only if the affected State has the capacity and is willing to provide sufficient assistance both for the nationals and for the non-nationals who are on its territory³⁸ or in the cases in which the offer does not comply with humanitarian principles.³⁹ Nonetheless, the intervention of the State of nationality of affected persons should respect the primary role of the affected State in the direction, control, coordination and supervision of any assistance provided by foreign actors.⁴⁰ However, conditions imposed on the assistance provided by the State of origin of non-nationals should take into consideration the qualified interest of this State in protecting its disaster-affected nationals and their specific needs.⁴¹

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.⁴² 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.⁴³

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

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.⁴⁴ Extraterritorial jurisdiction in the human rights domain is based on the concept of effective control⁴⁵ and not on the nationality link. Under human rights law, a few rights are granted exclusively to nationals.⁴⁶ 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 objective 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)⁴⁷ recognizes the importance of looking at the whole migration process⁴⁸ and, specifically, at the role of States of origin in assisting their nationals, including by protecting their rights when they are abroad.⁴⁹ 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, 65.1(b), 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 (i.e. international civil servants, investors, refugees and stateless persons, students and trainees and seafarers and workers on an offshore installation). The Migrant Workers Convention is poorly ratified,⁵⁰ but most of its provisions reflect rights that are already recognized for everyone by other human rights conventions ratified by a more significant number of States.⁵¹ 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 requiring reduction or waiving of relevant exit fees for their nationals).⁵² Finally, the right of information and appropriate assistance regarding formalities and arrangements for departure, travel, arrival, stay, exit and return (Articles 65.1(d) and 33.1(b)) may also apply in disasters. It is particularly relevant to ensure effective information on options and requirements for evacuation out of an affected country and back to one's country of origin. The Migrant Workers Committee, in its first General Comment, recommended States to train domestic workers before departure on, *inter alia*, 'contact information for emergency assistance, including embassies and consulates, and relevant civil society organizations in countries of employment'⁵³ and underlined the active role that embassies and consulates should have in protecting nationals abroad.⁵⁴

A more complex question is whether any of these rights can be considered customary law.⁵⁵ 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 Relations⁵⁶ recognizes such an individual right (in addition to the right of the State to carry out its consular functions in another State) is debated. 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ The wording of Article 36.1 seems to point to the same conclusion with regard to its let. (a).⁶⁰ The Inter-American Court of Human Rights (IACtHR) more clearly considers the whole Article 36 as granting rights directly to individuals.⁶¹ 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.⁶²

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 among 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).⁶³ 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 objective of the intervening State. Therefore, unless the intervention is regulated under a specific 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.⁶⁴

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, evacuations and assistance for nationals are coupled with the assistance provided for the broader population.⁶⁵

In addition, eligibility criteria for international evacuations are often extended to dependents of the State citizens and to nationals of third States, albeit on a case-by-case decision.⁶⁶ In the context of the European Union (EU), Article 23 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.⁶⁷ 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.⁶⁸

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.⁶⁹

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.⁷⁰ 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 (unaccompanied migrant children or 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.⁷¹ In the absence of a human rights convention specifically dealing with all categories of non-nationals, there is often confusion on the exact content and scope of their 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,⁷² refugees,⁷³ victims of trafficking,⁷⁴ smuggled migrants,⁷⁵ migrant children,⁷⁶ migrant women,⁷⁷ disabled migrants⁷⁸ and even non-nationals caught in an armed conflict.⁷⁹ All these instruments help clarify the scope of the application of general human rights conventions to non-nationals. A rich literature exists on the rights of migrants in both regular and irregular situations.⁸⁰ 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 universal human rights conventions that contain a non-discrimination provision.⁸¹ Nationality⁸² is explicitly mentioned in the most recent instruments, including the ICRMW, 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 enshrined in the relevant human rights treaty and be aimed at promoting the general welfare in a democratic society. Lastly, there must be a clear and reasonable proportionality between the aim to be achieved and State actions or omissions (and their effects).⁸³

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.⁸⁴ In the United States, the Robert T. Stafford Disaster Relief and Emergency Assistance Act states that disaster assistance should be provided without distinctions on the grounds of race, colour, religion, nationality, sex, age or economic status. In addition, an August 2000 Executive Order directs each Federal Agency to work 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.⁸⁵ 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,⁸⁶ 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 Saragosa, Texas,⁸⁷ as well as of some foreign residents in the areas of Japan affected by the 2011 triple disaster.⁸⁸

Non-nationals are likely to show specific behaviours in disasters, as a consequence of different culturally learned habits, limited trust in warnings and in authorities and fear of leaving their houses.⁸⁹ 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 house and belongings, with little access to legal remedies.⁹⁰

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.⁹¹

Without proactive efforts on the part of disaster management actors, it is likely that non-nationals suffer more significant short-term and long-lasting impacts, which can further exacerbate their vulnerability. The palette 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.⁹² Measures to provide flexibility on immigration regulations in the aftermath

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of a disaster (including the possibility to overstay a visa without consequences or simplified procedures and documentation requirements for renewing one's visa) and 'firewalls' between disaster relief efforts and the enforcement of immigration regulations are also important.

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.⁹³ 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 such groups and contribute to ensuring that they are consulted in planning and operations.⁹⁴ In addition, they are key disaster response actors, as they are often able to operate effectively and inclusively on the ground when hazards strike.⁹⁵ They may have well-established knowledge of and contacts with non-nationals, including those in irregular status, as they may work with them on a daily basis, and may be perceived as trustworthy actors, more easily approachable than any public authority.⁹⁶

In line with the general approach of this chapter which primarily 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). It is further elaborated with specific regard to migrant workers in Article 26 ICRMW, 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)).⁹⁷

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.⁹⁸ Reforming laws, policies and practices that prohibit or limit such freedom is critical to better protecting and assisting migrants in disasters.⁹⁹

The right to seek, receive and impart information, a corollary of the right to freedom of expression, is stipulated in various human rights conventions (Article 19 ICCPR), including the Migrant Workers Convention (Article 13 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.¹⁰⁰

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, travel, arrival, stay, exit 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, while employers can help ensure effective evacuation and relief assistance for their migrant employees.¹⁰¹

Both in normal times and in times of disasters, States have to adopt measures to prevent migrant workers from being submitted to exploitative conditions or abuses.¹⁰² More specifically, States also have to compel recruiters and employers to prepare for and respond to disasters, including protecting their non-national employees. In order 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 vis-à-vis their employees (as well as due diligence in choosing their subcontractors), so that they are accountable for protecting and assisting their migrant workforce in the event of a disaster.¹⁰³ Due diligence for the recruiters may imply that they have to check that the prospective employer has an adequate contingency plan, that an appropriate insurance policy is 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 entitle migrant members to repatriation and medical assistance in the event of a disaster.¹⁰⁴ For employers, complying with their duty of care may 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.¹⁰⁵

The State of destination should also promote bilateral agreements with countries of origin to clarify the respective responsibilities in regulating the obligations of the recruiters and employers.¹⁰⁶

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 evident when it comes to protecting non-nationals. This section will look at the obligation of cooperation in the relevant human rights framework and at examples of good practices of its operationalization. While cooperation can be key to strengthening the overall response system by allowing different State actors to pool resources, capacities and information, coordinating with foreign actors also requires additional

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 an additional burden.

States' obligation to cooperate is 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 most 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 sound, equitable and humane conditions of migration.¹¹⁰ Article 64.2 urges States to pay attention not only to their labour needs but also to the social, economic, cultural and other needs of migrant workers and members of their families involved', as well as to the impacts of migration on the communities concerned in the countries of origin and of destination.¹¹¹ Furthermore, States need to maintain appropriate services to ensure an exchange of information and consultation with other States concerned by labour migration (Article 65.1(b) ICRMW). These services can play a key role in ensuring effective circulation and verification of information 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 those 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, evacuation of non-nationals and administrative flexibility for leaving the country and to reissuing lost documents, in order to ensure that migrants are protected when a disaster strikes.¹¹²

Efforts led by the State of citizenship to evacuate their nationals out of disaster-affected areas, or provide relief assistance to their nationals or to the whole affected populations, can help reduce pressures 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,¹¹³ as well as to prevent possible tensions with other affected persons (whether locals or non-nationals) who may lament unequal access to assistance.¹¹⁴

Cooperation between actors of the State of origin with 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 warnings 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 (re-)issue lost documents.¹¹⁵ These coordinated efforts however require information disseminated through multiple channels to be consistent, failing which the trustworthiness of the whole emergency communications system 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 foreigners residing 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 coordination in disasters (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 require 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 authorization for re-entering their territory (Article 8.4). A similar provision is contained in Article 18.4 of the Smuggling Protocol.¹¹⁹ Returns shall always be carried out in an orderly manner and with due regard for the safety and dignity of the person.¹²⁰ Lastly, 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'.¹²¹ 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 visa 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 dealing 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 bodies jurisprudence in the area of disaster.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 promoted when addressing climate change, including all disaster-related work that falls within the scope of climate change adaptation.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 sectors and the civil society). It has shown that the interpretation of the relevant legal framework, and notably of how human rights specifically apply to migrants in these situations, requires further elaboration. In line with a general trend towards a more consensual approach to the development of human rights law on environment-related matters – where States prefer to be assisted in adopting effective policy solutions, instead of having to reach an agreement on new binding instruments – the MICIC Initiative represented a key contribution to this elaboration. The stakeholder consultations and the resulting set of guidelines and effective practices shall help States include migrants more systematically and effectively in efforts to prevent, prepare for, respond to and recover from disasters. Alongside broader endorsement and use of the MICIC outcome documents, targeted efforts from human

rights bodies, both universally 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

- H. Duncan, 'Immigrant Integration as a Factor in Disaster Preparedness: The Case of the 2011 Tōhoku Earthquake in Japan' 3 *Migration Policy Practice* (April 2013–May 2013) 9.
- International Organization for Migration and the Council of Europe 'Migrants in Disaster Risk Reduction Practices for Inclusion'. Geneva and Strasbourg: 2017. <https://publications.iom.int/books/migrants-disaster-risk-reduction-practices-inclusion>, accessed on January 1 2018.
- T. Ruys, 'The "Protection of Nationals" Doctrine Revisited' 13 *Journal of Conflict & Security Law* (2008) 233.
- K. Tindall, 'Governments' Ability to Assist Nationals in Disasters Abroad: What Do We Know about Consular Emergency Management?' 20 *Journal of Contingencies and Crisis Management* (2012) 102.
- S. Weerasinghe and A. Taylor, 'On the Margins: Noncitizens Caught in Countries Experiencing Violence, Conflict and Disaster' 3 *JMHS* (2015) 26.

Notes

- * The authors would like to thank Ms Chiara Milano for her continued support and advice on the practices cited in this chapter.
- 1 UNDESA, Population Division, International Migration Report 2015 – Highlights, UN Doc. ST/ESA/SER.A/375 (2016) 1, available at www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf, accessed on 14 June 2017.
- 2 C. Tacoli, 'Migration as a Response to Local and Global Transformations: A Typology of Mobility in the Context of Climate Change' in G. Martine and D. Schensul (eds), *The Demography of Adaptation to Climate Change* (United Nations Population Fund, International Institute for Environment and Development and El Colegio de Mexico, 2013) 41.
- 3 IOM, World Migration Report 2015, 'Migrants and Cities: New Partnerships to Manage Mobility' (2015) 39, available at http://publications.iom.int/system/files/wmr2015_en.pdf, accessed on 14 June 2017.
- 4 S. Castles, 'Understanding Global Migration: A Social Transformation Perspective' 36 *Journal of Ethnic Migration Studies* (2010) 1565.
- 5 For the aims of this paper, and in accordance with the definitions elaborated by UNISDR (3 February 2017), a disaster is considered
- 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 12 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.
- 9 More information about the Initiative is available at www.micicinitiative.iom.int, accessed on 14 June 2017.
 - 10 MICIC Initiative, 'Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disasters' (June 2016) (MICIC Initiative Guidelines), available at http://micicinitiative.iom.int/sites/default/files/document/micic_guidelines_english_web_13_09_2016.pdf, accessed on 14 June 2017.
 - 11 S. Weerasinghe and A. Taylor, 'On the Margins: Noncitizens Caught in Countries Experiencing Violence, Conflict and Disaster' 3 *JMHS* (2015) 26, 41; K. Khoser, 'Protecting Non-Citizens in Situations of Conflict, Violence and Disaster' in S.F. Martin S. Weerasinghe and A. Taylor (eds), *Humanitarian Crises and Migration* (Routledge, 2014) 268, 270.
 - 12 L. Guadagno, 'Reducing Migrants' Vulnerability to Natural Disasters through Disaster Risk Reduction Measures' MICIC Issue Brief 1 (Geneva: Migrants In Crisis Initiative, 2015), available at <https://micicinitiative.iom.int/sites/default/files/brief/MICIC%20Issue%20Brief%201%20%20DRR.pdf>, accessed on 14 June 2017.
 - 13 For the case of Thailand, for instance, see A. Beesey, S. Limsakul and E. McDougall, *Hazard Exposure and Vulnerability of Migrants in Thailand* (IOM, 2016), available at http://micicinitiative.iom.int/sites/default/files/resource_pub/docs/micic_thailand_desk_study_web.pdf, accessed on 27 June 2017.
 - 14 Make the Road New York, 'Unmet Needs: Superstorm Sandy and Immigrant Communities in the Metro New York Area' (December 2012), available at www.maketheroadny.org/pix_reports/MRNY_Unmet_Needs_Superstorm_Sandy_and_Immigrant_Communities_121812_fin.pdf, accessed on 14 June 2017.
 - 15 Beesey et al. (n. 13).
 - 16 K. Koike, 'Forgotten and Unattended: Refugees in Post-Earthquake Japan' 38 *Forced Migration Review* (2013) 46.
 - 17 J. Marlowe and L. Lou, 'The Canterbury Earthquakes and Refugee Communities' 25 *Aotearoa New Zealand Social Work Issue* (2013) 58.
 - 18 A. Vermeer-Künzli, *Diplomatic Protection as a Source of Human Rights Law* (Oxford University Press, 2013); G. Di Stefano, 'The Position of Individuals in Public International Law through the Lens of Diplomatic Protection: The Principle and Its Transfiguration' in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing, 2012) 65, 74.
 - 19 P.N. Bhagwati, 'Environmental Disputes' in P.H. Sand (ed), *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (Grotius Publications Limited, 1992) 449; ILC, Summary records of the meetings of the 54th session, 2712th meeting (30 April 2002), Discussion on Diplomatic Protection, Yearbook of the International Law Commission 2002, vol. I, UN Doc. A/CN.4/SER.A/2002 paras 51, 54 and 55, 10–11.
 - 20 R. Perruchoud, 'Consular Protection and Assistance' in R. Cholewinski, R. Perruchoud and E. MacDonald (eds), *International Migration Law* (TMC Asser Press, 2007) 71, 74.
 - 21 A. Vermeer-Künzli, 'Diplomatic Protection and Consular Assistance of Migrants' in V. Chetail and C. Bailoz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing, 2014) 265, 276.
 - 22 Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261. See L.T. Lee and J. Quigley, *Consular Law and Practice* (3rd edn, Oxford University Press, 2008) 118.
 - 23 The importance of including migrants in preparedness 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 governments to 'engage with relevant stakeholders, including . . . migrants . . . in the design and implementation of policies, plans and standards'.
 - 24 The Mexican consulate gave 500 USD, replaced lost documents and provided psychosocial support to its citizens affected by Hurricane Sandy in the US; 24 Horas, 'Entrega consulado mexicano en NY, as de 700 mil dolares a afectado por hurican Sandy' (3 May 2013), available at www.24-horas.mx/entrega-consulado-mexicano-en-ny-mas-de-700-mil-dolares-a-afectados-por-huracan-sandy/, accessed on 14 June 2017.

- 25 Art 5(m) of the Vienna Convention on Consular Relations refers to functions entrusted to a consular which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.
- 26 K. Tindall, 'Governments' Ability to Assist Nationals in Disasters Abroad: What Do We Know about Consular Emergency Management?' 20 *Journal of Contingencies and Crisis Management* (2012) 102, 106.
- 27 Asiaone, 'Seoul to Evacuate Koreans If Japan Crisis Worsens' (18 March 2011), available at <http://news.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20110318-268763>. Html, cited from Weerasinghe et al. (n. 11) 41. Evacuations were also organized by Belgium, France, Italy, the Philippines and the UK; see J. Groves, 'Japanese Drop Giant Water Bombs on Stricken Reactors as Foreign Office Promises Rescue Charter Flights to Get Britons Out of Tokyo' *Daily Mail* (17 March 2011), available at www.dailymail.co.uk/news/article-1366670/Japan-earthquake-tsunami-Waterbombs-dropped-nuclear-reactors.html#ixzz48C5BjGnR, accessed on 14 June 2017.
- 28 Office of Refugee Resettlement (US), 'About Repatriation', available at www.acf.hhs.gov/programs/orr/programs/repatriation/about, accessed on 1 May 2017.
- 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 used to respond to an armed attack. According to Ronzitti, it is possible that harm to State's citizens could reach the level of armed attack; there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately construed as an attack on the state itself'. N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, 1985) 468. State practice is not sufficiently uniform for the right to rescue to be part of customary international law (ibid 463–464).
- 30 For a discussion on the use of military assets in humanitarian interventions, see V. Wheeler and A. Harmer, 'Resetting the Rules of Engagement: Trends and Issues in Military – Humanitarian Relations' in V. Wheeler and A. Harmer (eds), *Resetting the Rules of Engagement*, HPG Report (21 March 2006) 5, available at www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/273.pdf, accessed on 7 June 2017.
- 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* (TMC Asser/Springer, 2012) 221, 233–236, and the literature cited therein. L. Boisson de Chazournes, 'Responsabilité de protéger et catastrophes naturelles: l'émergence d'un régime?' *Société Française de droit international. Colloque de Nanterre* (Pedone, 2008) 149.
- 32 M. Massouri, 'La responsabilité de protéger' in L. Moreillon, A. Bitcovsky and M. Massouri (dir), *Droit pénal humanitaire* (2nd edn, Helbing Lichtenhahn Verlag, 2009) 197. States are also opposed to the applicability of the responsibility to protect doctrine in disaster situations: see the debates within the UNGA on the reports by ILC on the topic, and in particular, among others, UNGA, Summary Record of the 23rd Meeting, UN GAOR, 63d Sess., 23d meeting, UN Doc. A/C.6/63/SR.23 (2008) (China) para 31; USA (2008/23rd) para 86; Japan (2008/23rd) para 42.
- 33 See A. Creta, 'A (Human) Right to Humanitarian Assistance in Disaster Situations? Surveying Public International Law' in de Guttry et al. (eds) (n. 31) 353 and the chapter by Hesselman in this volume.
- 34 See also art 13.2 of the Draft Articles of the of the ILC on the Protection of Persons in the Event of Disasters and paras 3–6 of its commentary, UN Doc. A/71/10 (2016).
- 35 See T. Ruys, 'The "Protection of Nationals" Doctrine Revisited' 13 *Journal of Conflict & Security Law* (2008) 233; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005) 170; K. Eichnscher, 'Defending Nationals Aboard: Assessing the Lawfulness of Forcible Hostage Rescues' 48 *Virginia Journal of International Law* (2008) 451, 460. *Contra*, see the Independent International Fact-Finding Mission on the Conflict in Georgia. The report states:
- it is also true that since 1945, numerous states have led military actions by pointing to the need to protect their own nationals abroad. In many cases the legality of these actions was disputed. There is no customary law allowing such actions. If at all, such actions should be limited in scope and duration and exclusively focused on rescuing and evacuating nationals.
- Independent International Fact-Finding Mission on the Conflict in Georgia, Report (September 2009), vol. 1, 23.

- 36 See D. Fisher, 'Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis' 89 *International Review of the Red Cross* (2007) 345, 356. However, see the case of the 2008 Myanmar Cyclone, *Costas Trascaxas* (n. 31) 236–239.
- 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 3), 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 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).
- 44 M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, 2011); K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill-Martinus Nijhoff Publishers, 2013).
- 45 *Isa and Others v. Turkey*, App. No. 31821/96 (ECtHR, Judgment of 16 November 2004) paras 69–71; *Ocalan v. Turkey*, App. No. 46221/99 [GC] (ECtHR, Judgment of 12 May 2005) para 91.
- 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 HRCComm, General comment No. 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.9 (1999); HRCComm, *Stewart v. Canada*, Comm. No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996); HRCComm, *Nystrom v. Australia*, Comm. No. 1557/2007, UN Doc. CCPR/C/102/D/1557/2007 (2011).
- 47 International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.
- 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.

- 53 Committee on Migrant Workers (CMW), General Comment No. 1: Migrant Domestic Workers, UN Doc. CMW/C/GC/1 (2011) 29.i.
- 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).
- 57 *LaGrand (Germany v. United States of America) (Judgment)* [2001] ICJ Rep. 501, para 466.
- 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 communication with and access to consular officers of the sending State' (emphasis added).
- 61 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, IACHR, Opinion OC-16/99 (1 October 1999) paras 83–84.
- 62 *Ibid.* paras 79 and 87.
- 63 The application of these principles also in disaster situations is confirmed in art 6 of the Draft Articles of the ILC 2016 (n. 34).
- 64 For a discussion on the application of the responsibility to protect in disaster situations, see Da Costa's chapter in this volume.
- 65 After the 2015 earthquake in Nepal, Israel supported the evacuation of its nationals while setting up field hospitals to assist all affected persons; D. Kamin, 'Israel Evacuates Surrogate Babies from Nepal but Leaves the Mothers Behind' *Time* (28 April 2015), available at <http://time.com/3838319/israel-nepal-surrogates/>, accessed on 14 June 2017. Indonesia evacuated 26 nationals from the area and sent disaster relief and supplies, as well as a relief team, to support response operations *The Jakarta Post*, 'National Scene: Indonesians Repatriated from Nepal' (7 May 2015), available at www.thejakartapost.com/news/2015/05/07/national-scene-indonesians-repatriated-nepal.html#sthash.JQYMFuEH.dpuf, accessed on 14 June 2017.
- 66 E.G. Brown, Jr. (Governor) et al., 'State of California Emergency Repatriation Plan' (February 2014) 8, available at www.caloes.ca.gov/PlanningPreparednessSite/Documents/State%20of%20California%20Emergency%20Repatriation%20Plan.pdf, accessed on 14 June 2017.
- 67 OJ L 314/75 (1995). F. Forni, 'The Consular Protection of EU Citizens during Emergencies in Third Countries' in de Guttry et al. (eds) (n. 31) 155. See also M. Moraru, 'Securing Consular Protection of the EU Citizens Abroad: What Role for the EU?' in I. Govaere and S. Poli (eds), *EU Management of Global Emergencies* (Brill Nijhoff, 2014) 147.
- 68 Kamin (n. 65).
- 69 On the obligation 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.
- 70 UNGA in its Resolution 46/182 recognised that
4. Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.
- UNGA, Res 46/182: Strengthening of the coordination of humanitarian emergency assistance of the United Nations, UN Doc. A/RES/46/182 (19 December 1991) para 4. See also UNGA, Res 70/107, UN Doc. A/RES/70/107 (13 January 2016).
- 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.

- 72 ICRMW (n. 47).
- 73 Convention relating to the Status of Refugees (adopted on 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, and its Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.
- 74 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol), (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.
- 75 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol), (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507.
- 76 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
- 77 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 2131 UNTS 83.
- 78 Convention on the Rights of Persons with Disabilities (ICPRD) (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.
- 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.
- 80 See, *ex multis*, V. Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' 28 *Georgetown Immigration Law Journal* 225 (2013); R.D. Weissbrodt and M. Divine, 'International Human Rights of Migrants' in B. Opekin, R. Perruchoud and J. Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 152. For a specific discussion on how economic, social and cultural rights apply to migrants in an irregular situation, including in the relevant jurisprudence of the human rights bodies, see OHCHR, 'The Economic, Social and Cultural Rights of Migrants in an Irregular Situation', HR/PUB/14/1 (United Nations Publications, 2014) 31, available at www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf, accessed on 7 June 2017.
- 81 Except for the CEDAW (n. 77) and ICRPD (n. 78). The role played by non-discrimination in disaster settings is explored in Casolari's chapter in this volume.
- 82 For a distinction between national origin and nationality see CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art 2, para 2 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20 (2009) paras 24 and 30.
- 83 *Ibid* para 13. See also Sommariva's chapter in this volume.
- 84 D.J. Cantor, Regional Discussion Paper, Focus on the Latin American Experience' MICIC Regional Consultation on Latin America, 17–18 February 2016 (Bruxelles: International Centre for Migration Policy Development), available at https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/djcantor_micic_feb_2016.pdf, accessed on 27 Jun 2017.
- 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.
- 86 O. Carter-Pokra, R.E. Zambrana, S.E. Mora and K.A. Aaby, 'Emergency Preparedness: Knowledge and Perceptions of Latin American Immigrants' 18 *Journal of Health Care for the Poor and Underserved* (2007) 465.
- 87 B.E. Aguirre, 'The Lack of Warnings before the Saragosa Tornado' 6 *International Journal of Mass Emergencies & Disasters* (1988) 65.
- 88 Duncan (n. 69).
- 89 R.W. Perry and M.K. Lindell, 'The Effects of Ethnicity on Evacuation Decision-Making' 9(1) *International Journal of Mass Emergencies & Disasters* (1991) 47.
- 90 The New York Times, "'Never Again,' Again", Editorial (20 September 2008), available at www.nytimes.com/2008/09/21/opinion/21sun2.html?_r=1&scp=1&sq=never%20again%20again&st=cse&oref=slogin, accessed on 27 June 2017.
- 91 B. Bolin, 'Race, Class, Ethnicity, and Disaster Vulnerability' in H. Rodriguez, E.L. Quarantelli and R.R. Dynes (eds), *Handbook of Disaster Research* (Springer, 2007) 113.
- 92 L. Guadagno, M. Fuhrer and J. Twigg, 'Migrants in Disaster Risk Reduction: Practices for Inclusion' (Geneva and Bruxelles: IOM and CoE, 2017), available at http://micicinitiative.iom.int/sites/default/files/resource_pub/docs/migrants_in_drr_230517_02.pdf, accessed on 27 June 2017.

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- 93 A. Clapham, *Human Rights Obligation of Non-State Actors* (Oxford University Press, 2010).
- 94 MICIC Initiative (n. 10) Guideline 4, 27.
- 95 MICIC Initiative (n. 10), Practices to implement Guideline 11: Provide humanitarian assistance to migrants without discrimination, 108–109.
- 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 in art 15 of the 1951 Convention Relating to the Status of Refugees (n. 73) and the Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.
- 98 Global Coalition on Migration and MADE, Mid-Term Report: Civil Society Regional Consultations (January 2016) 2–3, see reference to GCC, available at <http://gcmigration.org/wp-content/uploads/2016/04/Mid-Term-Civil-Society-Report-MICIC-Regional-Consultations.pdf>, accessed on 14 June 2017.
- 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 1: Track information on conflict and natural disasters, and the potential impact on migrants, 43–44, and Practices to implement Guideline 4, 50.
- 101 MICIC Summary Report on Private Sector Consultation states that: 'By Ensuring That Migrants Are Not Exploited during the Recruitment Process, Employers and Recruiters Empower Them to React More Robustly and Effectively as Agents of Their Own Safety/Destiny in the Event of a Crisis' (Geneva, Switzerland, 2–3 December 2015) 5, available at http://micicinitiative.iom.int/sites/default/files/resource_pub/docs/summary-report_private-sector-consultation.pdf, accessed on 14 June 2017.
- 102 See R. Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' 24 *International Journal of Refugee Law* (2012) 181.
- 103 MICIC Initiative, Summary Report Private Sector Consultation (Geneva, Switzerland, 2–3 December 2015) 21, available at http://micicinitiative.iom.int/sites/default/files/resource_pub/docs/summary-report_private-sector-consultation.pdf, accessed on 14 June 2017. See also MICIC Initiative (n. 10), Practices to implement Guideline 3, 57 and 58.
- 104 MICIC Initiative, 'Guidelines and Effective Practices Private Sector Consultation' (Geneva, Switzerland, 2–3 December 2015) 10, available at http://micicinitiative.iom.int/sites/default/files/resource_pub/docs/guidelines-and-practices_private-sector-consultation_0.pdf, accessed on 14 June 2017.
- 105 MICIC Initiative, Summary Report Private Sector Consultation (n. 103) 9–13.
- 106 MICIC Initiative, Private Sector Consultation: Guidelines and Effective Practices (n. 104) 6–7.
- 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 Arts 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 33.1(b) and 65.
- 112 MICIC, IGC Plus Consultation: Guidelines and Effective Practices' (Geneva, Switzerland, 2–3 February 2015) 11, available at https://micicinitiative.iom.int/sites/default/files/resource_pub/docs/guidelines-and-practices_igc-plus-consultation_0.pdf, accessed on 14 June 2017.
- 113 National Audit Office, 'Joint Findings on Lessons to be Learned from the Handling of the Response to the Indian Ocean Tsunami' (UK, October 2005), available at www.nao.org.uk/wp-content/uploads/2005/11/tsunami_jl_report.594.pdf, accessed on 14 June 2017.
- 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_Emilvia_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.F. Martin, S. Weerasinghe and A. Taylor (eds), *Humanitarian Crises and Migration* (Routledge, 2014) 268, 270.
124 M. Hesselman, 'Establishing a Full "Cycle Protection" for Disaster Victims: Preparedness, Response and Recovery according to Regional and International Human Rights Supervisory Bodies' 18 *Tilburg Law Review* (2013) 106, 122; HRCComm, Concluding observations on Thailand, UN Doc. CCPR/CO/84/THA (2005) 23; CommIRC, Concluding Observations on the Republic of Korea, UN Doc. CRC/C/KOR/CO/3-4 (2012) para 19(f); CommIRC, Concluding Observations on Panama, UN Doc. CRC/C/PAN/CO/3-4 (2011) para 18(f).
125 Sendai (n. 8) paras 7, 27(h), 36(a)(vi).
126 Paris Agreement (n. 8) Preamble.