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Undocumented migrants, refugees and asylum seekers: Can Minority Rights Law stabilise the Unsettled Order?

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Forced Migration continues to be one of the most important crises of the last decade.[1] Especially for Europe, migration has been at the top of the political agenda since 2015, when the so called 'refugee crisis'[2] emerged. Unfortunately, the continuing lack of political will to act on the international laws to which the States have already committed has been catastrophic for the rights of forced migrants. Limited and uncomplete responses to the continuing deaths in the Mediterranean, gross discrimination in all aspects of the newcomers' lives, and lack of an adequate standard of living confirm that migrants are failed every single day by the system and the law. In international law, the continuous lack of implementation of international standards on asylum and migration has wounded the credibility of international law and has proven that Europe is not the land of solidarity and human rights as the prevailing narrative goes.

In this unstable order of forced migration, as we experience it in Europe, with its incomplete list of rights, its vagueness and its gaps, the minority rights regime has been surprisingly absent. The link between minorities and refugees was acknowledged by the UN Human Rights Committee and the UNHCR in 2001,[3] but without any recognition that forced migrants are entitled to the minority protection. This chapter puts forward the argument that minority rights have been unjustifiably side-lined when it comes to these individuals. The chapter argues that migrants -and refugees- fall within the scope of minority rights that international human rights law has recognised; and as such, they are legally entitled to the protection recognised to minority groups. Minority rights add value to the protection that international law recognises to these newcomers and ultimately to the enjoyment of their rights. Equally, by not including the forced migrants to the scope of minority rights, the minority order becomes rather irrelevant and out of sync to the current developments in our world.

The politics of categorisation

[1] This chapter uses the generic term 'forced migrants' to refer to asylum seekers, refugees and undocumented migrants who are the focus on this chapter.
[2] G Gilbert, 'Why Europe Does Not Have a Refugee *Crisis'* (2015) 27 4 *International Journal of Refugee Law* 531–535.
[3] See UNHCR, Pamphlet No 12, *Protection of refugees who belong to minorities: The UN High Commissioner for Refugees* (UNHCR, 2001) in https://www.ohchr.org/Documents/Publications/GuideMinorities12en.pdf; K Lippert-Rasmussen & S Lægaard 'Refugees and minorities: some conceptual and normative issues' (2020) 13 1 *Ethics & Global Politics* 79-92; S Berry and I Taban, 'The right of minority-refugees to preserve their cultural identity: An intersectional analysis' (2021) 39 *Netherlands Quarterly of Human Rights* (forthcoming).

Who is a migrant or a refugee has a direct effect on the protection they enjoy from the state and international law. And such categorisation has not been without its problems. In actual truth, differentiating among migrants, refugees and asylum seekers is often a difficult exercise.

Migrants and refugees

At the international level, there is no universally accepted definition of a 'migrant'. The International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (Convention on Migrants) defines the 'migrant worker' as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'. The emphasis is on working migrants, so it is of limited applicability.[18] This definition is used by the International Data Survey and in turn by several national statistics.[19] Regular migrants have been given legal permission to move to the host state, either through bilateral or multilateral agreements (as is the case of EU citizens within the EU) or through a visa. 'Irregular' or 'undocumented migrants' are those who have not fulfilled the administrative requirements of the host state when moving. They have often left their country of origin because of emergencies or hardships they encountered. Lack of security, bad conditions of living or other important continuous violations of socio-economic rights often push them to migrate without fulfilling the domestic legal requirements of the host state.

In essence, a migrant is anyone who moves from their country to another, whatever the reasons. In this respect, refugees and asylum seekers also fall into the wider category of migrants. They have moved to another country. Traditionally though, refugees were recognised a distinct set of rights included in Refugee Law. This made sense, as the urgency of their fleeing and their unforeseen situations in the host state pushed the States to agree on specific rights that were different to the generic human rights. In any case, the distinction between migrants and refugees was not so important as the numbers were generally low in both categories. Recently though, as the numbers in both categories went up within Europe and the rights of these categories were put under scrutiny, reflective voices pointed to important similarities between refugees and migrants and it was revealed how blurred the distinction between migrants and refugees is.

As it stands, the definition of a refugee is anchored in the 1951 Refugee Convention and its article 1, together with the subsequent protocols. According to this Convention, a refugee is any person who 'owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' The temporary restriction has been lifted by the 1967 Protocol. What is important and complicates matters further is that the categorisation of a refugee as such does not depend on the state but on whether they fulfil the criteria of the Refugee Convention. The UN High Commissioner for Refugees (UNHCR) has insisted that 'a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition.

This would necessarily occur prior to the time at which his refugee status is normally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognised because he is a refugee' (sic).

Mourad and Normal argue that at the core of the Refugee Convention is the understanding of the specificity of refugees in relation to other migrants.[4] In actual truth though, the lines between irregular migrants and refugees are more blurred than ever. Forced migrants face very similar challenges in the host country. The 'fear of other' that they experience, the serious level of their human rights violations, including the often deplorable conditions of living, and their need for integration and flourishing in the host state are the same for both categories. Their stories before they arrive to the host state are often not too different either. Their ways of reaching the host countries and the traumas they have suffered are very often similar. The reason why they left their states of origin distinguishes the two categories; but yet again, usually irregular migrants suffered fear regarding their lives in ways equally violent to the fear of persecution. Irregular migrants have often faced "an existential threat to which they have no access to a domestic remedy or resolution".[5]

Asylum seekers and refugees

The declaratory nature of the recognition of asylum complicates the distinction between refugees and asylum seekers as well. According to the UNHCR definition, asylum-seekers are individuals who have sought international protection and whose claim for refugee status has not yet been determined, often waiting for the final decision. The definition of a 'final decision' varies between the signatory States to the Refugee Convention, since asylum procedures are not harmonised by the Convention. In view of the declaratory nature of the refugee title, the UNHCR has noted that 'every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined.'[6] In other words, people can be *prima facie* refugees whether they have requested asylum or not and whether such status has been recognised by the state or not. If they have left their country due to a fear of being persecuted, then they can be deemed a refugee.[7] For this reason, the term 'recognised refugee' is currently used when the individual is recognised by the state or the UNHCR as a refugee, whereas the term 'refugee' is used more widely for individuals who fulfil the criteria but have not yet applied or guaranteed the refugee status. Asylum seekers are in principle considered refugees and should enjoy many similar rights recognised in international law to refugees.[8]

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[4] L Mourad & K P Norman, 'Transforming refugees into migrants: institutional change and the politics of international protection' (2020) 26(3) *European Journal of International Relations* 687-713 at 688.

[5] A Betts, 'Survival Migration: A New Protection Framework, (2010) 16 *Global Governance* 361 at 362.

[6] UNCHR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc A/AC.96/815 at 5.

[7] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011) ("*Handbook*"), at [28].

[8] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011).

So far, I hope that I have demonstrated that the categories of asylum seekers, refugees and migrants are not as distinct categories as sometimes used. They all have several common characteristics and suffer from similar, albeit not always the same, challenges.

Minority rights: the forgotten link

In this debate about the categorisation of undocumented migrants, asylum seekers and refugees, the category of minorities has been completely ignored. One can only find only a couple of references linking the categories above. For example, in the context of Germany, the UN Human Rights Committee noted in 1996:

> The Committee is of the view that article 27 applies to all persons belonging to minorities whether linguistic, religious, ethnic or otherwise including those who are not concentrated or settled in a particular area or a particular region or who are immigrants or who have been given asylum in Germany.[9]

This statement by the Committee indicates that undocumented migrants, refugees and asylum seekers all fall within the minority protection.[10] The lack of citizenship should not be an issue: Contrary to the widely used Capotorti definition of the 1970s,[11] lack of citizenship of the host state is not considered anymore as an important criterion for minority protection. The Commentary of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities maintains that citizenship 'should not be a distinguishing criterion'.[12] In 2005, the UN Working Group on Minorities recommended that governments protect the rights of all minority persons within their territory 'irrespective of citizenship'.[13] Indeed, states should not be allowed to withhold protection to minority groups by denying them citizenship.[14]

The main question related to whether forced migrants are members of minorities is that of time, namely the time they have spent in the host state. Support from state practice on recognising recently arrived migrants as minorities is indeed very thin. If the group is well-established but

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[9] HRC, 'Concluding Observations of the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Report of Germany', UN doc CCPR/C/79/Add.73, para 13.

[10] G Gilbert, 'Refugee and Minority Rights Law Frameworks', p. 1, as found in https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/HRCouncil/MinorityIssues/Session9/Statements/GeoffGilbert_Refugee_and_Minority_Rights_Law_Frameworks.docx&action=default&DefaultItemOpen=1.

[11] Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 205.

[12] UN Commission on Human Rights, Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2005/2 paras 10–11.

[13] E/CN.4/Sub.2/2005/27, para. 16 (d).

[14] G. Alfredsson, 'A Frame with Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures', *International Journal of Minority and Group Rights* 9 (2011): 291 at 296.

the individuals have arrived recently, then the newcomers cannot but be considered as members of minorities: the Human Rights Committee (HRC) has been clear in its General Comment 23:

> Just as they need not be nationals or citizens, [members of minorities] need not be permanent residents. Thus, migrant workers or even visitors in the State party constituting such minorities are entitled not to be denied the exercise of [minority] rights'.[15]

And the reality is that most of the groups where the migrants, asylum seekers and refugees come from in Europe at the moment are well-established minority groups in the European states. Tunisia, Algeria, Bangladesh, Syria, Afghanistan, Turkey: these are the top states of origin of most of the migrants in 2020 as suggested by EU statistics.[16] These ethnic groups have been concentrating in parts of Europe for a long time and form established minorities.

However, if an ethnic group has arrived in Europe the last 30–40 years, it is not always accepted that they form a minority. The dichotomy between 'new' and 'old' minorities and the different treatment of the two categories has attracted criticism. The Commentary on Minorities has expressed the need to abandon such an approach.[17] Also, the Advisory Committee of the Framework Convention on National Minorities has on several occasions discussed within the context of article 6 of the FCNM rights of 'new minorities'.[18]

Academic opinion also warns against such a differentiation: Packer has noted that the distinction would be discriminatory;[19] and Nowak has stressed that members of so-called 'new minorities' also must have the right 'not to be assimilated into a melting pot type of newly created "European citizens" but to enjoy their traditional culture, practice their own religion and speak their mother tongue'.[20] Medda-Windischer has noted that the differences between migrants and traditional minorities are mainly down to their respective formal legal status and the state's perceptions of them, rather than objective differences.[21] Berry has also clearly argued that even most recently arrived migrants fall in the definition of 'new minorities'.[22] Henrard has noted that 'there seems to be an emerging consensus that "(…)

[15] UN Human Rights Committee, General Comment No. 23 on 'The Rights of Minorities (Art 27)', UN Doc. CCPR/C/21/Rev.1/Add.5 para. 5.2.
[16] 'Infographic- Migration flows: Eastern, Central and Western routes, Top nationalities per route (2020)' in Consilium.europa.eu.
[17] UN Working Group on Minorities, *Commentary to the UN Minorities Declaration*, E/CN.4/Sub.2/AC.5/2005/2, para. 7.
[18] S. Berry, 'Integrating Refugees: The Case for a Minority Rights Based Approach', *International Journal of Refugee Law* 24 (2012): 1.
[19] J. Packer, 'Problems in Defining Minorities', in *Minority and Group Rights in the New Millennium*, ed. B. Bowring and D. Fottrell (The Hague: Martinus Nijhoff, 1999), 264.
[20] M. Nowak, 'The Evolution of Minority Rights in International Law, Comments', in *Peoples and Minorities in International Law*, ed. C. Brolmann, R. Lefeber and M. Zieck (Dordrecht: Martinus Nijhoff, 1993), 118.
[21] B. Medda-Windischer, *Old and New Minorities: Reconciling Diversity and Cohesion – A Human Rights Model for Minority Integration* (Nomos: Verlagsgesellschaft, 2009), 247–8.
[22] S. Berry, '"New Minorities", Integration and the UN Declaration on Minorities', in *The United Nations Declaration on Minorities, An Academic Account on the Occasion of its 20th Anniversary (1992–2012)*, ed. U. Caruso and R. Hofmann (The Hague: Brill Publishers, 2015), 192.

'new' minorities should be considered 'minorities' for the purposes of minority protection"'.[2331]

Unfortunately, State practice does not concur with this view. Forced migrants are not given the protection of minorities.

Why the neglect of the minority rights protection?

The clear side-lining of minority rights in the crisis of migration has been disappointing. When the world is seriously concerned with the situation of forced migrants; when new instruments on their rights do not fully cover their needs; when discussions on all international fora and domestic space have been dominated by the migration and refugee so called crisis; keeping the minority norms separate from these debates seems illogical and out of date.

Of course, such a side-lining comes down to the lack of political will of states to expand their obligations towards the newcomers as much as possible. The world has already seen European states refusing to allow asylum seekers to enter their territory in complete violation of international law. Ignoring to recognise minority rights protection to forced migrants is a continuation of these polices. And States' reluctance has not been new: Berry and Taban note that States sought to reserve a right to assimilate refugees even during the drafting process of the UN Refugee Convention.[24]And many States who have received a large number of newcomers, including Turkey, Greece and Germany, have been long resistant to extend the protection of minorities to newer groups.[25] States seem to make a distinction between old, well-established minorities, and new minorities. Partly this reluctance may be down to the States' concern that members of new minorities will not stay permanently in the state and do not contribute to the matrix of the society. Therefore, any positive action to protect them that usually needs efforts and has financial implications will be in vain as these individuals will soon return to their countries of origin.

In its 5th report to the Advisory Commitee of the FCNM, Germany has stated:

> Germany finds unacceptable the Council of Europe's press release accompanying the Fourth Opinion of the Advisory Committee entitled "Anti-immigrant sentiment was rising in Germany before refugee influx: Council of Europe committee on national minorities", which makes no reference to national minorities not only in the title, but also in the first two paragraphs and therefore almost completely misses the actual aim of the Framework Convention.

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[23] K. Henrard and R. Dunbar, eds, *Synergies in Minority Protection*(Cambridge: Cambridge University Press, 2008), 12.
[24] UN Ad Hoc Comzmittee on Refugees and Stateless Persons, Second Session, Summary of the Thirty Ninth Meeting, 21 August 1950, E/AC.32/SR.39. See also Article 34 UN Refugee Convention.
[25] See reservation of Turkey in https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec; HRC, 'Fourth Periodic Report of Germany' (22 February 1996) UN Doc CCPR/C/84/Add.5 [242]-[244]; HRC, 'Initial Report of Greece' (15 April 2004) UN Doc CCPR/C/GRC/2004/1, p. 895.

> The Advisory Committee's assumption that the Framework Convention is a flexible instrument which is supposed to apply in highly diverse social, cultural and economic contexts and in evolving situations is incorrect. This is true not only of the overly broad interpretation of Article 6 of the Framework Convention, but also of the Advisory Committee's request that individual articles of the agreement be applied to specific groups of migrants, which, given the clear definition of national minorities in Germany, is legally unfounded. [26]

However, it is surprising that States aside, neither has *the international legal community* made the link between undocumented migrants, asylum seekers and refugees; and the protection they can get from minority specific instruments, especially when they have been more focused much earlier than States on seeking long-term solutions. Such an exclusion by scholarship and practice, it is suggested, is mainly due to the fragmentation that exists between international refugee law and human rights law.

Fragmentation in international law has been defined as 'the profound systemic rupture in the structure of international law, reflected in the lack of well-developed and established hierarchies or other techniques to deal with normative conflicts and tensions between general international law norms and its specialized regimes, as well as between those regimes inter se.'[27] It has been widely argued that the expansion of international law 'has created problems of harmony between its different branches, institutions and norm-systems'.[28] Such developments have led to a lack of coherence of the various regulatory contexts in international law, which prevent the formation and application of shared principles and interpretations across international law.[29] I argue that one can clearly see the downsides of such fragmentation in the regimes of migrants, minorities and refugees: responses of international law to the challenges posed currently cannot be comprehensive unless they consider the common characteristics of these categories, accept the blurring of these categories in most situations, and re-examine the scope of minority rights norms to include such categories. Of course, at the same time, one has to recognise the tensions and the divergencies in these categories and norms. International lawyers can only reach an accurate interpretation of the existing law and suggest helpful ways forward, if they take into account the possible downsides of every such suggestion.

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[26] 5th report submitted by Germany to the Advisory Committee of the FCNM, ACFC/SR/V(2019)001, p 9.

[27] A Jakubowski and K Wierczynska (eds), *Fragmentation vs the Constitutionalisation of International Law* (London: Routledge, 2016), p. 1.

[28] Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report Finalized by M Koskenniemi, UN Doc. A/CN.4/L.682.

[29] Jakubowski and Wierczynska, p. 2, also citing MA Young (ed), *Regime Interaction in International Law Facing Fragmentation* (CUP 2012); N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP 2010).

The main reason why fragmentation has been allowed to develop between refugee and minority protection and why minority protection has not been discussed with regards to refugees is, I believe, the emphasis on the pressing needs of asylum seekers and refugees, the need to cover urgent, life-threatening situations. Indeed, the emphasis in the law has so far been on securing the rights of these individuals during their first steps in the host country. The journey to safety has been so difficult and dramatic that has understandably been the focus of States and international organisations. The principle of non-refoulement and non-penalisation have been essential principles that required a lot of attention. Also the short-term living conditions of asylum seekers have been essential for their well-being. Therefore, these rights have formed so far the focus of international law and its bodies. The European Court of Human Rights judgments on non-refoulement, living conditions and police brutality regarding forced migrants have really made a difference in clarifying and evolving the norms to react to the current situation.[30] United Nations bodies have also been pre-occupied with such life-threatening issues; most of their concluding observations concerning forced migrants refer to such rights. On forced migrants, the UN Human Rights Committee has indeed asked EU states in its concluding observations to ensure that the non-refoulement principle is respected;[31] and no pushbacks take place;[32] and that an effective mechanism for vulnerable persons is established.[33] The Committee has emphasised that the detention of migrants and asylum seekers must be 'reasonable, necessary and proportionate' and alternatives are favoured.[34] The Committee has further asked that excessive use of force and cruel, inhuman and degrading treatment is prohibited;[35] that trafficking of persons is investigated and victims of trafficking have access to asylum procedures;[36] and that unaccompanied minors are not detained except as a measure of last resort.[37]

During this time of continuous incoming flows of refugees, States have focused on these pressing needs of the refugees. Long-term solutions and their integration have not really been discussed in depth till very recently. And it is within these discussions that minority protection would fall. Discussions about positive measures for the protection of these groups' identity are only now starting. One would hope that within these discussions, the international legal standards of minority rights will take a central position.

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[30] For example, see ECtHR, *Hirsi v Italy*, Appl. No. 27765/2009, Judgment of 22.2.2012; ECtHR, *Khlaifia and others v. Italy*, Appl. No 16483/12; *M.S.S v Greece and Belgium* and *Khan v France*, Appl. No. 12267/16.

[31] UN HRC, Concluding Observations on Norway, UN Doc. CCPR/C/NOR/CO/7 of 25 April 2019, para. 33; UN HRC, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019, para 45. UN HRC, Concluding Observations on Belgium, UN Doc. CCPR/C/BEL/CO/6 of 6 December 2019, para 32; also see Portugal para 34.

[32] UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of 15 November 2018, para 45.

[33] UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 April 2020, para. 34; UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of 15 November 2018, para 30.

[34] UN HRC, Concluding Observations on the Netherlands, UN Doc. CCPR/C/NLD/CO/5 of 22 August 2019, para 19; also see Portugal para 34; and Chechia para 16.

[35] Portugal, para 34; Bulgaria, para 30.

[36] UN HRC, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019, para 16; and See eg. UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 April 2020, para 34.

[37] See eg. UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 April 2020.

The international refugee and migrant law regimes

Indeed, the regimes of forced migration have not really been focusing on the protection of identity of migrants. In addition, recent developments have revealed the cracks in the systems of protection of forced migrants. This makes the recognition that forced migrants are entitled to the protection recognised to minorities essential.

Concerning migrants, the *International Convention of All Migrant Workers on Members of their Family*, signed by only 63 and ratified by 55 states, focuses on labour law and migrant workers, regular or irregular. The Convention requires the development of sound, equitable, humane and lawful conditions for migration, not just with regards to pay but also to the social, economic, cultural and other needs of migrant workers and members of their families involved. The Convention has not been signed, nor ratified by any EU state. The small number of signatories and its emphasis on working migrants render the convention of limited applicability.[38]

In addition to the above, there are a number of conventions sponsored by the International Labour Organisation (ILO) protecting specific rights of migrants. The Convention concerning *Migration for Employment (Revised),* 1949 (No. 97), *the Migrant Workers Convention (No. 143*) concerning migrants in abusive conditions, the *Convention concerning Forced or Compulsory Labour (No. 29),* the *Convention Concerning Abolition of Forced Labour (No. 105), the Equal Remuneration Convention (No. 100), the Discrimination (Employment and Occupation) Convention (No. 111), the Convention on the Maintenance of Migrants' Pension Rights (No. 48)*; all compliment the international legal framework related to migration. These conventions address specific issues relating to migrants mainly socio-economic ones.

Refugees rely on the (1951) United Nations *Convention relating to the Status of Refugees* and its (1967) *Protocol*. The main principles of the convention is that refugees should be guaranteed non-refoulement, non-penalisation and non-discrimination. The principles of non-refoulement and non-penalisation have been quite prominent in the discussions and action for the protection of refugees, as these principles often ensure the survival of these individuals. However, the principle of non-discrimination has been mainly interpreted as a negative obligation, an obligation of the state not to interfere with the right. The Convention also guarantees socio-economic rights, including rights to acquisition of moveable and immovable property (Art 13), free access to domestic courts (Art 16(1)), rationing (Art 20), primary education (Art 22(1)), and fiscal equality (Art 29). If they are physically resident, refugees are entitled to the same treatment recognised to nationals the delivery of identity papers (Art 27), and the prohibition of penalties on account of illegal entry (Art. 31(1)). If they have a lawful presence, they benefit from the most favourable treatment accorded to nationals of a foreign country in the same

[38] United Nations, Department of Economic and Social Affairs, *Recommendations for Statistics of International Migration, Revision 1*(New York: United Nations, 1998), para. 36.

circumstances regarding their right to association (Art 15) and wage-earning employment (Art 17) and to engage in self-employment (Art 18), to move freely within the host territory (Art 26) and to be protected against expulsion (Art 32). And refugees have treatment not less favourable than that accorded to aliens generally in the same circumstances regarding liberal professions (Art 19), housing (Art 21), and freedom of movement (Art 26).

Regarding rights that revolve around identity, the Convention offers very limited protection: it makes a reference to the right to religion by saying that refugees should receive the same treatment as nationals regarding freedom of religion (Art 4); and they should also have the same rights as other aliens in education other than elementary education (Article 22(2)). In other words, refugees must also rely for most of their identity rights on general standards.

The migration and refugee regimes are also very silent on identity rights of asylum seekers. In actual truth, the legal framework of asylum seekers is not completely settled and rather vague. As the refugees' status is declaratory, hence asylum seekers can be refugees before and after status determination, asylum seekers are also entitled to some rights recognised by the Refugee Convention. The UNHCR has noted that 'the graduations of treatment allowed by the Convention… serve as a useful yardstick in the context of defining reception standards for asylum seekers.[39] However, this is something that States do not fully respect; certainly asylum seekers have the general rights recognised to everyone within the states. Rights relating to their identity has not been the focus of the asylum and refugee regimes, even though these individuals can stay legally in the host country for years in anticipation of the decision regarding their status.

In addition to the binding instruments, soft law has recently been added to the relevant instruments. The *New York Declaration for Refugees and Migrants* was adopted by UN Member States in 2016 to address the large movement of refugees and migrants with 193 unanimous State signatories. It is a political document that affirms States' commitment to fully protect the human rights of all refugees and migrants.[40] It recognises that migrants and refugees may face many common challenges and similar vulnerabilities. It notes: 'Though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms.'[41] In this respect, the text implies that by being recognised as refugees or migrants, these individuals are not excluded from the protection of other specific human rights regimes, including the minority one. The Declaration includes a set of commitments for refugees and migrants, and elements towards the achievement of a *Global Compact on Refugees* and a *Global Compact for Safe, Orderly and Regular Migration*.

[39] UNHCR 'Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems' (4 September 2001) UN Doc EC/GC/17, para 3.
[40] https://www.ohchr.org/EN/Issues/Migration/Pages/NewYorkDeclaration.aspx
[41] New York Declaration for Refugees and Migrants

The *Global Compact for Migration* is the first-ever inter-governmentally negotiated UN agreement on a common approach to international migration, approved by 164 states on 10th December 2018, and endorsed by 152 countries in the UN General Assembly on 19th December 2018.[42] It is non-binding and is grounded in values of state sovereignty, responsibility-sharing, non-discrimination, and human rights and recognizes that a cooperative approach is needed. In the last of the five thematic parts, the Compact talks about improving the social inclusion and integration of migrants. The document includes the recognition that migrants have to be empowered to realise full inclusion and social cohesion (objective 16).

In order to achieve this, States commit to 'draw from the following actions' that include action to 'Promote mutual respect for the cultures, traditions and customs of communities of destination and of migrants by exchanging and implementing best practices on integration policies, programmes and activities, including on ways to promote acceptance of diversity and facilitate social cohesion and inclusion'.[43] It also includes the support of multicultural activities, and activities at school that promote respect for diversity and inclusion.

The Global Compact for Migration also includes the objective to eliminate all forms of discrimination (objective 17). Unfortunately the section that explains how this objective will be achieved does not include anything on positive protection of migrants. Therefore, the Global Compact for Migration does not address even in a limited level rights of migrants relating to identity.

The Global Compact on Refugees complements ongoing United Nations endeavours in the areas of prevention, peace, security, sustainable development, migration and peacebuilding. It calls all States and relevant stakeholders to tackle the root causes of large refugee situations, including through heightened international efforts to prevent and resolve conflict; to uphold international law; and to promote, respect, protect and fulfil human rights and fundamental freedoms for all. The Compact makes specific reference to the principle of non-discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status.[44] However, the text does not go any further into specific operative ways of realising such goals.

Can General Human Rights fill the gap?

The above analysis revealed that the specific regimes on migrants and refugees do not adequately protect the rights relating to identity of these individuals. General human rights standards can fill the gaps that exist. United Nations bodies have realigned the States' efforts

[42] The United States, Hungary, Israel, Czech Republic and Poland voted against it, while 12 countries abstained. The European states that abstained were Austria, Bulgaria, Italy, Latvia, Liechtenstein, Romania and Switzerland.

[43] Objective 16 (a), pages 20-21.

[44] Report of the United Nations High Commissioner for Refugees, Part II, Global compact on refugees, UN Doc A/73/12 (Part II) (2018), para 9.

towards the protection of identity of these individuals who may be in the host countries for a number of years.

The UN Committee on the Elimination of All Forms of Racial Discrimination has been the most vocal body in this respect; understandably so, as the Committee focuses on racial discrimination. Recently, the Committee has made some remarks on the extent and nature of non-discrimination measures that the States must take. The Committee has noted that States must ensure that they take positive measures for migrants, refugees and asylum seekers, when need be; and they focus on non-discrimination in practice not merely in law.[45] The Committee has also asked states to address intersectional discrimination [46] and has referred to gender-based violence of migrant women of irregular status.[47] It has commented on the inadequate integration measures taken by states,[48] and has asked States to address discrimination in labour;[49] and in health care.[50] It has also reinforced the importance of States addressing hate speech against these individuals effectively,[51] and to ensure the participation of migrants in all levels of political and public life and in public services. [52]

The UN Human Rights Committee has also made some sparring comments on migrants and asylum seekers but has not linked article 27 ICCPR to the rights of migrants and refugees. It has commented that some measures taken to address the influx of migrants may infringe the rights protected under the Covenant[53] and has been concerned for many practices of the EU states that violate the standards of the Covenant. However, it has kept a rather conservative view by mentioning rights relating to hate speech and health: it has asked EU states to take measures against hate speech, intolerance, stereotypes, prejudice and discrimination towards these vulnerable individuals.[54] It has affirmed the positive obligation of states to ensure that everyone has access to the essential healthcare necessary to prevent foreseeable risks to life, regardless of migration status; and has encouraged the human rights training of staff dealing with migrants and refugees.[55] One can view the committee's approach as a missed opportunity

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[45] UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 13.
[46] Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 23. UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 39.
[47] UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 39. UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 21.
[48] Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 23(c).
[49] UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 20.
[50] CERD, Concluding Observations on the Czech Republic, UN Doc CERD/C/CZE/CO/12-13 of 19 September 2019, para. 23.
[51] UN CERD, General Recommendation No. 15 (1993) on article 4 of the Convention and No. 35 (2013) on combating racist hate speech. See UN CERD, Concluding Observations on Iceland, UN Doc CERD/C/ISL/CO/21-23 of 18 September 2018, para. 14. Concluding Observations on the Czech Republic, UN Doc CERD/C/CZE/CO/12-13 of 19 September 2019, para. 11. UN CERD, Concluding Observations on Poland, UN Doc CERD/C/POL/CO/22-24 of 24 September 2019, para. 15. UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 19.
[52] UN CERD, Concluding Observations on Ireland, UN Doc CERD/C/IRL/CO/5-9 of 23 January 2020, para. 25.
[53] UN HRC, Concluding Observations on Portugal, UN Doc. CCPR/C/PRT/CO/5 of 28 April 2020, para. 34.
[54] UN HRC, Concluding Observations on Czechia, UN Doc. CCPR/C/CZE/CO/4 of 6 December 2019, para 16.
[55] UN HRC, Concluding Observations on Bulgaria, UN Doc. CCPR/C/BGR/CO/4 of 15 November 2018, para 30. Also, Portugal, para 34.

to make a statement that these individuals are entitled to the minority protection under Article 27 ICCPR.

The Committee on Economic, Social and Cultural Rights has also recently made some comments on forced migrants. It encouraged EU states to reverse retrogressive measures that do not meet the criteria of ‘necessity, proportionality, temporariness and non-discrimination’;[56] and to ensure that non-discrimination law is effective in the workplace, housing and education.[57] The Committee has talked about the need for permanent housing for refugees, has criticised segregated approaches of states towards migrants,[58] and guarantees that these persons will have a ‘decent standard of living’.[59] The Committee has identified that poverty is more widespread among migrants and refugees and states must take measures to mitigate against it.[60]

The Committee has asked for the adoption of ‘specific measures to promote the social integration of migrants, asylum seekers and refugees, in order to ensure their enjoyment of their economic, social and cultural rights in particular access to employment, education, housing and health’. [61] But even though the reference for cultural rights is there, the committee has not made the link between article 15 ICESCR that protects cultural rights with forced migrants yet. Therefore, the obligation of states to protect the cultural rights of these persons has yet to be reinforced in the general human rights system.

The added value of recognising minority status

As mentioned above, the international community and states are gradually realising that many forced migrants will continue to live in the host states for some time. Some will stay because they are recognised as refugees; but some will stay even after they have been refused refugee status. Some will remain undocumented migrants living lives not formally recognised in the state. Yet all these individuals, who are in many states of substantial numbers, need to enjoy the human rights protections recognised to inhabitants. This is especially important as states realise the need to integrate these persons in the domestic society. Unfortunately, Berry and Taban also report that ‘host States have adopted dispersal policies that purposefully separate culturally similar refugees in the name of ‘integration’.[62] Recognition of forced migrants as minorities at least by scholarship and international bodies would put pressure on states to stop such polices.

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[56] UN CESCR, Concluding Observations on Denmark, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 13. UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 14.
[57] UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 18.
[58] UN CESCR, Concluding Observations on Denmark, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 52.
[59] UN CESCR, Concluding Observations on Belgium, UN Doc E/C.12/BEL/CO/5 of 26 March 2020, para. 23.
[60] UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 34.
[61] For example, UN CESCR, Concluding Observations on Spain, UN Doc E/C.12/DNK/CO/6 of 12 November 2019, para. 40.
[62] As above.

General human rights bodies have gone some way in protecting their rights, as seen above, especially non-discrimination and socio-economic rights. And of course, general human rights work together with minority rights to ensure the adequate protection of minorities, so the standards are not different. The one set reinforces the other and vice-versa. However, the focus of general human rights instruments and the respective bodies has been mainly to allow individuals to have access to the same services (eg education, cultural activities, health etc) as everyone else. And this has indeed been the focus of many states. For example, Greece has created a well-meaning educational system for migrant and refugee children where they attend both general education and specific classes that introduce them to the Greek educational system.[63] This is good practice. But now that we know that forced migrants will stay in the states for much longer, this protection is not adequate. They need the additional protection as members of minorities. In education for example, the states need to offer migrants and refugees the possibility to learn and improve on their mother tongue and to include in the national curriculum intercultural exchanges and knowledge. This is of particular importance as the emphasis has been now moved to the integration of these individuals in the host societies. Real integration cannot take place without protection of their identity and interculturalism.

Recognition of these individuals as members of minorities will push States to go beyond the non-discrimination provisions, to take measures to recognise and protect their specific elements of identity, and facilitate and encourage interculturalism. As a result of the establishment of specific rights in minority rights instruments, in addition to a general right to culture, minority rights standards establish more robust rights than generally applicable human rights standards and provide a clearer understanding of the measures required to preserve minority cultural identity.

In practice, this would mean that States have to ensure equal access of these persons to cultural activities of the state, but also measures to allow them to practice their own cultural activities. For example, States would have to guarantee that refugees have access to the national celebrations but must also take measures to allow them to organise their own cultural events and inform the rest of the population on the meaning of such celebrations for the refugees and migrants. Indeed, minority rights provisions recognise the right of members of minorities to enjoy and practice their culture (article 27 ICCPR and article 2(1) UN Declaration on Minorities). Article 1(1) UN Declaration on Minorities also recognises the need of states to protect the minorities cultural identity. Article 5 FCNM also places an obligation upon States Parties to facilitate the preservation of minority cultural identity. States are encouraged to take specific measures that enable the development of minority cultures, traditions and customs, and assimilation is clearly prohibited. Policies using integration as a vehicle to eliminate migrant cultures in essence violate the rights of individuals to enjoy their own cultures and religion on an equal par to the majority cultures and are contrary to minority protection. This double focus of international law to ensure that individuals have real access to the national culture but can also maintain their own culture is especially important for forced migrants.

[63] The Greek Ombudsman, *Migration flows and refugee protection, Administrative challenges and human rights issues* (Athens, 2017), p. 62.

Berry and Taban remind us that 'many refugees experience cultural bereavement as a result of the loss of familiar cultural practices, languages, religious customs, and difficulties associated with adjustment to a new culture in host States.[64]

This duality in the protection of minorities, namely access to national services but also establishment of specific measures to protect their specific identity applies also to religious rights,[65] linguistic rights,[66] and the right to establish and access minority media.[67] Minority rights instruments also contain additional elements, including the right to maintain cross-border contacts[68] and the need for intercultural dialog and education.[69]

In addition, the relationship of these persons who will be permanent residents in the host state with the local population has to be on equal basis. The Greek Ombudsman has rightly recommended that now is the time for the 'reinforcement of the interconnection with the local communities, in conditions far different from those experienced by all involved parties in the past which has an emergency character.'[70] Indeed, minority instruments insist on the 'effective participation' of members of minorities in the life of the state.[71] Forced migrants will have to become active members in the designing and delivery of services and programmes that affect them. Measures will need to be taken for the empowerment of these individuals.

Conclusions

This chapter has discussed how migrants, asylum seekers and refugees fall within the protection of minorities under international law. It suggested that the reason for the neglect of these persons as members of minorities is to a large degree because of state attempts to limit their obligations towards these newcomers and because of the fragmentation that exists within current international law. The chapter also showed that the existing regimes for migration and refugees are incomplete and inadequate in dealing with all current challenges of forced migrants, as they have recently evolved. Forced migrants are based in host States for much longer periods and as such, they need protection of their identities in such a way that they will develop and flourish. The migration and refugee regimes do not focus on this aspect of protection. General Human Rights standards may be able to fill this gap but so far have been quite silent on such rights of migrants, asylum seekers and refugees. In any case, the minority regime is much clearer about the additional protection that these persons are entitled to. The

[64] S Berry and I Taban, 'The right of minority-refugees to preserve their cultural identity: An intersectional analysis' (2021) 39 *Netherlands Quarterly of Human Rights* (forthcoming)
[65] Article 7-8 FCNM; articles 2(1), 2(2) and 4(2) UN Declaration on Minorities.
[66] Articles 9-11 FCNM; article 4(3) UN Declaration on Minorities.
[67] Articles 9(2), (3), (4) FCNM; Human Rights Council, 'Recommendations of the Forum on Minority Issues at its Fifth Session: Implementing the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Identifying Positive Practices and Opportunities (27 and 28 November 2012)' (28 December 2012) UN doc A/HRC/22/60 para 47.
[68] Article 17 FCNM; article 2(5) UN Declaration on Minorities.
[69] Articles 6(1), 12 FCNM; article 4(4) UN Declaration on Minorities.
[70] The Greek Ombudsman, *Migration flows and refugee protection, Administrative challenges and human rights issues* (Athens, 2017), p. 84.
[71] Articles 2(2) and (3) UN Declaration on Minorities; article 18 UNDRIP; article 15 FCNM.

realisation of minority protection for specific refugees and migrants can differ to fit their specific circumstances and better address the situations of each State, but any such measures will satisfy the minority standards of protection which in issues of identity and existence go further than both the refugee law and the general human rights law standards. Therefore, the unsettled order of forced migration has a lot to benefit from by the recognition of the minority status to migrants, refugees and asylum seekers.