

## A fragmented landscape of protection

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**Changing concepts of protection and a growing diversity in the practice of protection, and in the range of humanitarian and other actors doing protection work, have led to a fragmentation of effective protection for forced migrants.**

Over the last decade, in response to the changing dynamics and increasing complexity and unpredictability of forced and irregular migration, there has been a significant remaking of the concept of protection, a diversification of the practice of protection and an expansion in the range of humanitarian and other actors doing protection work. In principle, at least, these developments have the potential to reduce the risks to which forced migrants are exposed and their vulnerability to those risks, and to allow people to flee conflict, violence and human rights abuses in security.

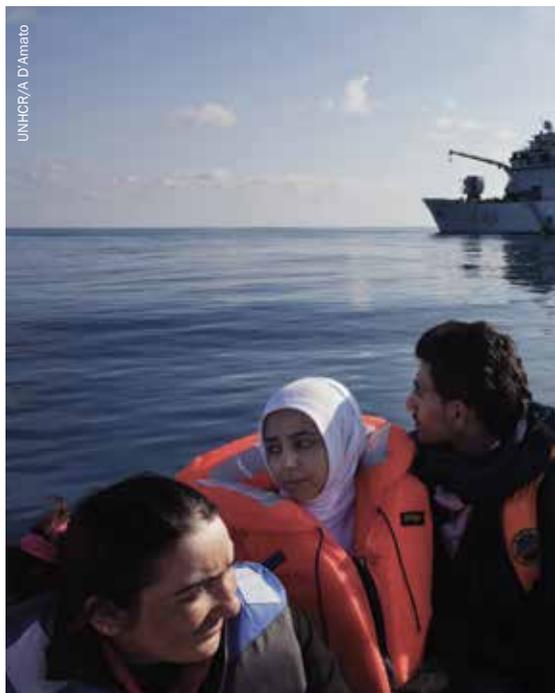
However, this has led to a fragmented landscape of protection which is conceptually problematic, and which has divergent standards, procedures and governance. The result has been increasing vulnerability of forced migrants and a protection regime that lacks coherence and fairness.

### Remaking protection – changing norms and practice

Some progress has been made in developing norms of protection. At the 2005 United Nations (UN) World Summit, the doctrine of the Responsibility to Protect (R2P) was adopted,<sup>1</sup> a far-reaching attempt to protect people exposed to the extreme human rights abuses that lead to forced displacement; however, the international community has stopped short of giving it any teeth and R2P lies fallow. With norms endeavouring to keep pace with the changing dynamics of forced displacement, especially for those who do not fall within the provisions of the 1951 Refugee Convention, we have seen adaptations such as subsidiary forms of protection – ‘humanitarian protection’, ‘complementary protection’ and ‘temporary protection’. And a recent report from the Office of the High Commissioner for

Human Rights advocates and refines the norms of protection which should be provided at borders and entry points.<sup>2</sup>

Whereas this normative development of protection has been rather limited, practice has developed and diversified both rapidly and extensively. While the International Committee of the Red Cross (ICRC) continues to lead the development of Protection Standards, a wide range of non-governmental, intergovernmental and UN humanitarian organisations have developed strategies for emergency humanitarian evacuation and basic civilian protection in war zones. Self-protection is widely advocated by a number of NGOs. The Global Protection Cluster



Syrian refugees are rescued in the Mediterranean Sea by crew of the Italian ship, Grecale. March 2014.

September 2015

www.fmreview.org/dayton20

has played an important role in setting and disseminating protection standards and policies and in capacity building. For urban areas, protection tools and instruments are being refined. Within Europe the 2013 Common European Asylum System (CEAS), although heavily criticised, is a wide-ranging instrument seeking to ensure consistent protection standards and performance in all European member states.

The normative protection gap for third-country nationals indirectly caught up in conflict countries – so-called stranded migrants such as the 800,000 migrant workers and migrants in transit in Libya in 2010 – has been pragmatically filled by joint International Organization for Migration-UN High Commissioner for Refugees action. The European Commission has adopted Regional Development and Protection Programmes, a potentially valuable instrument adding to the quality and reliability of protection for forced migrants in regions of origin.

Given this expanding portfolio of protection standards and practice, it may seem that progress has been made but this is primarily for refugees, not the wider categories of migrants who are forcibly displaced but who do not meet the normative definition of a refugee. Thus there are significant conceptual and operational questions which suggest that protection space and the quality of protection (discussed below) have diminished, and that international norms and standards have been sacrificed to operational and political imperatives, creating a fragmented landscape of protection.

### From protection norms to protection management

Alongside the ‘soft-law’ normative initiatives mentioned above, there is now a much sharper focus on the policies and operational instruments for protection. This reflects and reinforces a profound transformation in the underlying rationale and practice of protection. This is the transformation from norms-based principles to the ‘management’ of protection, linked to a reconfiguration of institutional structures and responsibilities. One example is within the European Union (EU), where the Global Approach to Migration and Mobility (GAMM – the EU’s principal strategic policy) and the CEAS reveal the way the management of protection has displaced the search for normative conditions of protection that might address the new dynamics of international migration.

In other words, protection has been appropriated by international agencies and humanitarian actors as an institutionalised and operational task. The consequent loss of the normative supremacy of protection is potentially one of the most critical outcomes of the way in which the protection challenges posed by the contemporary dynamics of forced migration have been addressed.

### Conceptual diversity and uncertainty

There is increasing debate, but little consensus, as to whether protection should continue to be ‘status-based’ or whether ‘needs-based’ or ‘rights-based’ protection



might better address the diverse range of vulnerabilities and risks which forced migrants face. **Status-based** determination – contingent on international legal and normative frameworks such as the 1951 Convention which designates certain categories of forced migrant and as laid out in the 1998 Guiding Principles on Internal Displacement – has dominated both the protection discourse and operational considerations. But the disaggregation of protection challenges into constituent statuses does not accurately address contemporary protection needs.

By contrast, some humanitarian actors, for example the ICRC, contend that there is a demand for protection from a wide range of threats – such as direct physical violence, coercion and exploitation and deliberate deprivation – irrespective of the category or normative status of the individual. Indeed, with violent conflict and forced migration taking on new manifestations, these agencies argue that protection should be predicated on a **needs-based** approach which responds to these vulnerabilities, and not on a specific legal status. Another line of argument, promoted by some humanitarian NGOs and the International Federation of Red Cross and Red Crescent Societies, proposes a **rights-based** approach for recognising and determining the protection entitlements of forced migrants. In other words, the right to protection, like many other rights, is an entitlement that belongs to all human beings and most certainly to forcibly displaced people. It is not contingent on a particular legal (or social or political) status.

Irrespective of the basis for protection, all three approaches point to the need for a framework that is as inclusive as possible but this aspiration, as yet, remains fragmented.

### Structural ambiguity of protection

There is a distinct and growing dichotomy between the concepts and practice of protection in regions of mass forced displacement in the Global South, compared to the Global North where regimes that simply do not allow in refugees, asylum seekers and other forced migrants are

becoming increasingly embedded. From a single starting point of international legal and normative standards set out in international law, a twin-track protection model has now emerged. Within regions that generate most of the world's forced migrants, improved standards and expanded protection capacity are promoted by external, usually Global North, actors. These same post-industrial countries are simultaneously giving diminished access to fair asylum procedures and showing a progressively reduced commitment to refugee resettlement.

Nowhere is this dichotomy more evident than in the regime of the EU. The EU has enabled extra-territorial processing of migrants and asylum seekers through its Mobility Partnerships and Readmission Agreements with neighbouring and transit countries, a process known as 'rebordering'. Meanwhile, closer to Europe itself, a battery of instruments and interventions, mainly in southern Member States and the Mediterranean, has been created to enhance security of the common external border – Frontex, EUROSUR, EASO<sup>3</sup> and The Task Force for the Mediterranean. Constructed to manage the security of Europe and to meet the challenge of mixed migration flows, this process has relentlessly diminished the quality of protection for forced migrants.

This twin-track approach to protection is further evidence of the fragmented landscape.

### Fragmented practice and institutional delivery

The proliferating protection practices noted above lack a coherent, systematic framework or over-arching normative architecture of support. Instead, an extensive array of policies, instruments and operational responses has been created which are largely reactive and often pragmatically tailored to specific protection contexts and protection gaps.

Even where coherence and convergence is the aim, as with the CEAS, there is still vast policy and operational divergence, as a recent Eurostat report noted.<sup>4</sup> There is divergence in procedures (reception, admission, status determination, nationality and age

verification tests, appeals and removals) and divergence in standards and practices (for example, access to legal advice, detention, deportation and temporary protection).

This lack of coherent practice is paralleled by the lack of a comprehensive institutional response to protection. Many of the initiatives have been developed by international agencies, governments, the EU or humanitarian NGOs on an individual basis to meet their specific institutional goals, programming strategies or political priorities. What is significant here is that whilst the international duty to protect rests with a very small number of agencies such as UNHCR and the ICRC, many humanitarian organisations, notably NGOs, now include protection in their response to forced migration almost as if they have a mandate to do so. Many humanitarian organisations now have specialised protection staff and well-developed policies and strategies on protection. It could be argued that this plurality of protection better tailors protection activity to particular situations and needs, and to the capacity of the actor.

However the impact of this proliferation of protection has been to reinforce the disaggregated response to contemporary protection challenges and thus the fragmentation of the normative basis of protection.

### The politicisation of protection

Finally, the most disturbing evidence of the fragmentation of protection is the highly politicised milieu within which protection is now located, far removed from the normative precepts on which it was originally based. Protection has, in effect, been co-opted and instrumentalised to serve national interests and a political discourse which reinforces the securitisation of migration and asylum (predominantly in post-industrial countries) at the expense of the rights and protection of migrants. The fact that protection now lies at the cross-over of human rights, legal and normative precepts, and politics is potentially the most disturbing evidence for the fragmented landscape of protection.

Nowhere are the issues of rebordering and the protection for forced migrants so highly politicised in public discourse as in Europe in relation to international migration, mixed migration, mobility between European countries, and asylum seekers and refugees. National elections, elections to the European Parliament in 2014, and rising xenophobia all provide ample evidence of this. Only Australia rivals the EU in the fragmentation of protection brought about by contemporary political discourse.

### Conclusion

Instead of enhanced protection, this fragmented landscape has resulted in a protection regime that lacks coherence and fairness and in a growing protection crisis, especially at Europe's borders. As a consequence, forced migrants are increasingly vulnerable and their dignity and rights are less and less respected.

How to develop and adapt protection norms and practices that respond to profoundly different patterns and dynamics of population displacement in the contemporary world, compared with the situation when the normative principles and international frameworks were originally established, is the challenge that remains.

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This article draws on the analysis of a recent study for the Swiss Federal Commission on Migration.<sup>5</sup>

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2. OHCHR (2014) *OHCHR Recommended Principles and Guidelines on Human Rights at International Borders*. [www.ohchr.org/Documents/Issues/Migration/A-69-CRP-1\\_en.pdf](http://www.ohchr.org/Documents/Issues/Migration/A-69-CRP-1_en.pdf)
3. Frontex: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; EUROSUR: European External Border Surveillance System; EASO: European Asylum Support Office.
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