Strategies for the Protection of Migrants through International Law

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Abstract

Migration is a complex phenomenon: on the one hand, it encompasses economic, political, historical, sociological and legal issues, and, on the other, it entails several dichotomies and a multitude of causes. Such complexity has created a myriad of obstacles to construct a normative system that addresses all aspects of this phenomenon through the adoption of hard international norms. In the current global political scenario, it seems counterproductive to exclusively invest in a pathway that has not been able to achieve much so far and that focuses on the phenomenon of migration rather than on its subjects: the migrants. In light of this, this article proposes four strategies to enhance the architecture of International Law in dealing with migration, so as to allow for its improvement. These are: 1) assuming the protagonism of migrants in migration and, thus, shifting the focus from the regulation of the phenomenon to the protection of its subjects and enhancing a human rights' approach to migration, 2) enhancing the dialogue between existing international regimes and International Law in the governance of migration with a human rights lens, 3) using less formalistic approaches such as soft law and the participation of stakeholders in the governance of migration with a responsibility-sharing approach, and 4) using regional approaches to facilitate the development of stronger cooperation and regional norms. These strategies should be informed by the principle of complementarity both among themselves and in seeking international hard norms. They ultimately need to be part of a larger international structure for the protection of human dignity and human rights. Presenting this approach and these strategies and assessing whether they would constitute a superior manner in which International Law should engage with issues that arise from migration and enhance the protection of migrants are the aims of this article.

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I. Introduction

Migration is a complex phenomenon. On the one hand, it encompasses economic, political, historical, sociological and legal issues, and on the other, it entails several dichotomies (such as internal v international, forced v voluntary, regular v irregular) and a multitude of causes (as persecution, economic – subdivided into lack of development, the search of a better life or brain drain -, environmental, etc.). This fact can be seen both currently, and throughout history, with the international dimension affecting around 3.3% of the World's population; amounting to 250 million people who were international migrants at the end of 2015 (of which 65.3 million were forcibly displaced).[1]

Such complexity has created a myriad of obstacles to construct a normative system that addresses all aspects of this phenomenon through the adoption of hard international norms. Although 2016 saw the first congregation of States comprehensively debating the creation of norms to address large movements of refugees and migrants, which culminated in the New York Declaration on Refugees and Migrants,[2] a global compact[3] of mandatory nature was postponed to 2018,[4] highlighting the difficulties of said construction.

In a global political scenario of exacerbated nationalisms, closed borders, security concerns, increased xenophobia, racism and discrimination, and economic crisis, it would seem counterproductive to exclusively invest in a pathway (i.e. international hard norms) that has not been able to achieve much. This paper will propose that it is, thus, necessary to create and examine more dynamic strategies to enhance the architecture of International Law in dealing with migration, so as to allow for its improvement.

One potential first strategy in this sense would be a shift of focus from the phenomenon of migration to the relevance of its subjects, the migrants. This would highlight the protagonist nature of migrants and, furthermore, would illustrate the vulnerabilities and the needs of different migrants within a complex migration scenario. This step would assist in creating protective regimes. By focusing on migrants, International Law would be dealing, albeit indirectly, with migration through its protagonists whilst incorporating a humane component to it. As migration only exists due to the acts of migrants,[5] one could argue that this approach would allow

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[1] Taylor, L, 'How many migrants are there in the world?' (Thomson Reuters Foundation, 18th December 2016) *at* <http://news.trust.org/item/20161218090425-31269/> (accessed 20 June 2017). The numbers were gathered from IOM, UNHCR, UNICEF and PEW Research Center.

[2] The Declaration resulted from the UN Summit on Refugees and Migrants of 2016 (United Nations, General Assembly, *New York Declaration for Refugees and Migrants*, A/71/L.1* (13 September 2016), *at* <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L> (accessed 20 June 2017).

[3] The Global compact will be 'for safe, orderly and regular migration' and to guide migration with a 'set of common principles and approaches'. Another commitment of the UN Summit is to 'develop guidelines on the treatment of migrants in vulnerable situations'.

[4] It seems – according to the UN website on the UN Summit, New York Declaration and the Global Compact – that in fact there will be two compacts in 2018: a global compact on migration, negotiated by states, and that will 'the first, intergovernmentally negotiated agreement, prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner' (United Nations, *Global Compact for Migration* (UN4Refugess, 2017) *at* <http://refugeesmigrants.un.org/migration-compact> (accessed 20 June 2017) and a global compact on refugees, proposed by the UN High Commissioner for Refugees to the UN General Assembly on his 2018 report (*Ibid*).

[5] The relationship of migration-migrants can be seen as an example of structural power, in the sense of 'co-constitutive, internal relations of structural positions', such as 'master-slave' or 'capital-labor'.

International Law to deal with migration in an enhanced manner. This approach would lead to the need of improving and increasing the dialogue between International Human Rights Law (IHRL), International Refugee Law (IRL), and International Law, which is the second strategy proposed by this paper.

The third and fourth strategies address the difficulties in creating hard law for the international protection of migrants, assessing manners to establish less formalistic processes in the governance of migration through the use of soft law instruments and the participation of other stakeholders. These would include stakeholders such as civil society and migrants themselves in the construction and implementation of the system(s); which needs to be based on responsibility sharing. These strategies would also take into account the role of regionalism as a locus for new norm-creation, with a goal to continuously increase migrants' protection. These strategies derive from a dialogue between International Law with the existing specific international regimes that focus on the protection of some categories of migrants (such as refugees and internally displaced persons (IDPs)), and also with debates held on the governance of international/global migration to learn and replicate their successes and avoid their shortcomings.

This proposed scenario of four strategies should be informed by the principle of complementarity, both among them and in communicating the pursuit of international norms and the implementation of specific protection regimes, i.e. as manners of improving what is already available in the architecture of International Law regarding migration and guiding the creation of new guidelines and international norms. The ideal scenario would, thus, combine the search for avenues for new treaties and new regimes with efforts to improve the implementation of existing ones. It would do so by combining general norms, applied to all migrants, and specific norms, taking into account individual needs. It would take into consideration all these strategies in all of its (existing or new) architecture.

This article presents the four above-mentioned strategies: 1) a focus on the main actors of the process by taking into account the centrality of migrants in dealing with migration, 2) a strengthened dialogue among International Law and its specific branches concerned with human rights, 3) the development of soft law, whose flexibility may be more attractive and appealing to sovereign States, and 4) the development of regional approaches for the protection of migrants and of migration. Moreover, it assesses whether this proposal would lead to a better manner in which International Law should engage with issues that arise from migration. In doing so, the article takes a panoramic and systemic approach in its arguments, analysis and proposals.

II. Strategies Rather Than Exclusively New Treaties or New Regimes

Migration is caused by and/or a consequential result of social, political, economic, geographic, cultural and historical changes, both in the country of origin and in the receiving country.[6] Migration can also be determined by personal circumstances. In addition, it is a phenomenon with different triggers, sometimes induced by violations of human rights, conflicts, or environmental disasters, while at other times having as its

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According to the structural power concept presented by Barnett, M and Duvall, R, *Power in International Politics* 59 International Organization (2005) 39, 52-53.

[6] See for instance the concepts of society of arrival and of society of departure in Duvell, F "International Relations and Migration Management: the Case of Turkey" 16 Inside Turkey (2016) *at* <https://www.questia.com/read/1G1-362274453/international-relations-and-migration-management> (accessed 20 June 2017).

driving force the search for employment and the desire to join family members.[7] Migration's complexity is strengthened in relation to its consequences as, on the other hand, human mobility facilitates trade in goods and services,[8] enhances culture and cultural exchange, and allows for both the increase in the quantity and quality of populations. On the other hand, it can also promote a variety of social tensions, ranging from issues relating to the regulation of the labour market to the need for humanitarian aid.[9]

Trying to establish a didactic scheme or model to tackle the complexity of migration and establishing categories (such as forced v spontaneous migration, respectively divided into refugees and displaced persons and into economic migrants and migrant workers, and documented or undocumented migrants),[10] may be tempting to facilitate the understanding and the thought process behind the creation of norms and regimes. However, these schemes or models cannot be rigidly applied as migration is a social complex phenomenon and concepts and 'categories' are fluid and in flux. Furthermore, as practice has shown, it is difficult to bundle a closed and comprehensive normative system that would contain simultaneously a general theory with general norms applicable to all cases of migration, and specific and particularized norms due to the peculiarities, needs and vulnerabilities of each kind of migrant, which demand different types of protection.[11] For instance, refugees lack protection by their respective States of origin or residence. Displaced people, however, due to 'environmental change, livelihood collapse, and state fragility',[12] may or may not lack such support, and do not always face the full impossibility of returning to the country of origin. This impossibility does not affect IDPs (internally displaced people) who are also forced migrants but not of an international nature, not due to the reasons behind their displacement but rather due to the fact that they have not crossed international borders.

Even when it comes to the question of voluntary migration, there are differences in the admission of low-skilled or highly-qualified migrants.[13] Although there is a need

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[7]   Inter-Parlamentary Union, 'Migration, Human Rights and Governance: Handbook for Parliamentarians' (Inter-Parliamentary Union and the International Labour Organization and the United Nations 2016 *at* <http://www.ohchr.org/Documents/Publications/MigrationHR_and_ Governance_HR_PUB_15_3_EN.pdf> (accessed 20 June 2017), 17.

[8]   'Being able to visit another country relatively freely has various consequences: free movement of people facilitates economic activity and growth ranging from tourism and shopping to business and trade, and helps to advance and grow regional economic, political, and cultural integration' (Duvell, *supra* nt 6). The United Nations Special Representative of the Secretary General on Migration also emphasizes that '[a]mong those migrants who remain abroad and succeed, some become investors in their countries of origin, bringing not only capital and trade, but ideas, skills and technology, thus enabling those countries to become more integrated into the global community' see United Nations, General Assembly, *Integrated and coordinated implementation of and follow-up to outcomes of the major United Nations conferences and summits in the economic, social and related fields*, Globalization and interdependence, Follow-up to the outcome of the Millennium Summit: Report of the Special Representative of the Secretary-General on Migration, A/71/728, February 2017.

[9]   Inter-Parliamentary Union supra nt 7, 24.

[10]   Jubilut, LL and Apolinário, SMOS, "Necessidade de Proteção Internacional no Âmbito da Migração" 6 Revista de Direito GV (2010) 275.

[11]   Perruchoud, R and Vohra, S, "Identifying Core Rights of Concern to Migrants" IOM Regional Consultation Group on Migration Seminar on Human Rights and Migrants Background Paper (1998).

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

[13]   'Young, well-educated, healthy individuals are most likely to migrate, especially in pursuit of higher education and economic improvement' (S. Dodani, S. and R. E. La Porte, 'Brain Drain from Developing Countries: how can brain drain be converted into wisdom gain', 98 Journal of The Royal

for both,[14] the former are more exposed to restrictive migration policies, sometimes even contradictory in the sense that, sometimes, irregular migration is tolerated to fill the labour market gaps. Whilst at the same time a public discourse of closing borders to protect this market is maintained.[15] On the other hand, although industrialized countries have been competing for skilled migrants over the years, host countries' policies do not always provide full access to the labour market as a whole.[16]

This brief outlook could aid in explaining the difficulties both in conceptualizing migration as an institute of Law indistinctly applicable to several categories and in creating legal structures that would apply to all migrants. There is, so far, no comprehensive legal instrument at the international level that establishes a framework for the governance of migration[17] or the protection of all migrants[18]. Nevertheless, 'the fact that no single set of standards exists does not mean that there are no standards for the protection of persons who cross an international border'.[19]

At the current stage of normative production by the international society, the protection of human beings finds a systematic normative support in different legal axes: International Human Rights Law (IHRL), International Refugee Law (IRL), International Humanitarian Law (IHL)[20], which, in turn, at least touch on migration issues.[21] International Labour Law,[22] International Criminal Law,[23] International

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Society of Medicine (2005) 487, 488 *at* < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1275994> (accessed 20th April 2017).

[14] Triandafyllidou, A and Marchetti, S, 'Europe 2020: Addressing Low Skill Labour Migration at times of Fragile Recovery', [2014] RSCAS Policy Paper, 2014 *at* <http://cadmus.eui.eu/bitstream/handle/ 1814/31222/RSCAS_PP_2014_05.pdf?sequence=1> (accessed 20 June 2017).

[15] *Ibid.*

[16] The Blue Card scheme, the United Kingdom open high-skill migration policy, for example, 'does not offer access to the EU labour market as a whole and is still related to rather cumbersome bureaucratic procedures if the highly skilled worker wants to take up a job in another EU country' (Triandafyllidou, A and Isaakyan, I, "EU Management of High Skill Migration" [2014] RSCAS Global Governance Programme 2014/4, 1 *at* <http://cadmus.eui.eu//handle/1814/34706> (accessed 20 June 2017).

[17] 'International Migration Law' (International Organization for Migration, 2017) *at* <http://www.iom.int/international-migration-law> (accessed 20 June 2017).

[18] It is important to mention the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, a core human rights document with a committee vested with the responsibility of its supervision. However, it is limited in its scope and applicability as only 51 states (and mainly from the Global South are States parties (*at* <http://indicators.ohchr.org> (accessed on 20 August 2017)). ('The Core International Human Rights Instruments and Their Monitoring Bodies' (Office of the High Commissioner for Human Rights, 2017) *at* <http://www.ohchr.org/EN/ProfessionalInterest/ Pages/CoreInstruments.aspx> (accessed 20 June 2017).

[19] Perruchoud and Vohra, *supra* nt 11.

[20] Jubilut, LL, *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro* (Método 2007).

[21] Inter-Parlamentary Union *supra* nt 7,41.

[22] A range of ILO Conventions set the rights of regular migrant labour and the ILO oversees and advises on states' implementation of these Conventions see Betts, A, "Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants" 22 International Journal of Refugee Law (2010) 209, 217.

[23] It is interesting to recall that some aspects of smuggling and trafficking of persons are dealt with in International Criminal Law. 'The main applicable instruments of *international criminal law* pertaining to migration are the two 'Palermo Protocols' to the UN Convention against Transnational Organized Crime, adopted in 2000, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air' (Inter-Parliamentary Union, *supra* nt 7, 42).

Consular Law,[24] International Environmental Law,[25] and International Maritime Law,[26] all branches of International Law that can also be seen as complementing the international protection of human beings as well as containing provisions applicable to the regulation of the migratory process.[27]

However, Law is not the single force in trying to assess and influence the migratory process and the creation of standards for the protection of international migrants. In times of nationalistic waves and anti-terrorism concerns, border closures and manifestations with racist and xenophobic contents the issues surrounding the migratory phenomenon have been addressed much more under political assumptions than under legal presuppositions.[28] Migratory issues have direct and indirect effects on economic power discourses and security discourses that relegate legal issues to the background.

> Because States value their ability to modify their migration policies to reflect changing needs and circumstances relating to matters such as labour market conditions, local demographic profiles, local skill levels, and popular sentiment about migration and migrants, they have been generally reluctant to undertake binding commitments limiting their discretion over migration.[29]

Regardless, it is relevant that International Law tackles migration and even more so the protection of migrants given that International Law does effect States' behaviour.[30] This is true given that, on the one hand, International Law is ultimately the result of commitments in which reciprocity of treatment, stability of expectations, and predictability of actions are sought,[31] and, on the other, '*[m]igration policies and practices can only be viable and effective when they are based on a firm foundation of legal norms, and thus operate under the rule of law*'.[32] Moreover, if migration issues are seen from the standpoint of the centrality of migrants, IHRL assumes a position of paramount importance and its logic, rhetoric, architecture, and grammar need to be in play in dealing with migration.

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[24] *Ibid*, '*International consular law* is enshrined in the Vienna Convention on Consular Relations 1963, its Optional Protocol concerning Acquisition of Nationality, and the Optional Protocol concerning the Compulsory Settlement of Disputes, which also include several provisions for the protection of a country's nationals abroad'.

[25] Although there is no legal instrument of International Environmental Law related to migration, there is a Draft Convention on the Protection of Persons in the Event of Disasters being developed by the UN International Law Commission and a Project for a Convention on the International Status of Environmentally Displaced Persons, drafted by research groups at the University of Limoges and other contributors (Jubilut, LL and Ramos, EP, "Regionalism: a strategy for dealing with crisis migration" 45 FMR (2014) 66, 66).

[26] '*International maritime law* is an umbrella term that refers to the UN Convention on the Law of the Sea, 1982, as well as the many instruments adopted under the auspices of the International Maritime Organization (IMO), which include a number that are of particular relevance to the rights of migrants, such as the International Convention for the Safety of Life at Sea, 1974, and the International Convention on Maritime Search and Rescue, 1979 (Inter-Parliamentary Union, *supra* nt 7, 42).

[27] *Ibid*, 40-46.

[28] Betts, *supra* nt 22, 217.

[29] Solomon, MK, "Focus on Regional Consultative Processes on Migration, IOM's International Dialogue on Migration and the Berne Initiative" (2005) United Nations Expert Group Meeting on International Migration and Development International Migration Management through Inter-State Consultation Mechanisms *at* <http://www.iom.int/sites/default/files/our_work/ICP/RCP/expert _paper_rcp.pdf> (accessed 20 June 2017).

[30] Guzman, AT, *How International Law Works: a rational choice theory* (Oxford University Press, 2008).

[31] do Amaral Junior, A, *Curso de Direito Internacional Público* (Atlas, 4th Edition, 2013), 9-10.

[32] Inter-Parliamentary Union, *supra* nt 7, 40.

International Law should not be the only strategy in dealing with migration but it is a relevant one, especially in guaranteeing the protection of migrants.

International Law is an appropriate place for regulation and governance of migration issues by virtue of their transnational nature,[33] and by the possibility of adding layers to internal protection.

It should not be forgotten, however, that the scope of International Law is conditioned by the political relationships among States that, although being sovereigns and legally equal,[34] have different levels of power,[35] and have the most diverse interests. Although the interdependence related to the protection of common values and interests cannot be denied, issues related to the protection of sovereignty may (and have) conditioned the effectiveness of International Law, which certainly affects the migratory phenomenon.

As in other areas, in relation to migration, International Law may be limited due to the dichotomies between sovereignty and human rights as well as Law and politics. This may lead to difficulties in developing a general legal architecture on the topic and, therefore, alternatives for developing norms need to be sought.

International Law exists in the international scenario and, therefore, needs to coexist and be in sync with international relations so as to benefit from the exchange of analytical structures and to not exist in a vacuum, jeopardizing its applicability.[36] The theory of international regimes is a good example of a relevant dialogue in this sense: if the concepts of international regimes arise from International Relations, it is International Law that, in practice, houses (at least the most complex ones of) them. In terms of the topic at hand it seems that the concept of international regimes can be of use in assessing International Law and migration and the protection of migrants.

International regimes such as those found within IHRL,[37] IRL,[38] and IHL[39] go beyond norms and are also composed of rules, principles, and decision-making procedures.[40] The duties of which are assumed by bodies set up to promote them.[41] The IHRL system, for example, intended for the broad protection of all human beings has its foundation and main guideline in the Universal Declaration of Human Rights (UDHR),[42] strengthened by two subsequent Covenants[43] and by various specific thematic

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[33] Even when it comes to internally displaced persons, the international community's interest in the external effects of internal instability is still identified, whether related to the protection of persons or to border security.

[34] UN Charter, Article 2 (1).

[35] Jubilut, LL "Direito Internacional, Política e Relações Internacionais" in Jubilut, LL, (ed), *Direito Internacional Atual* (Elsevier, 1st Edition, 2014).

[36] For an assessment of the relationship between International Law and International Relations, see *Ibid*.

[37] Nowak, M, *Introduction to the Human Rights Regime* (Brill, 1st Edition, 2003).

[38] Nicholson, F and Twomey, P, *Refugee Rights and Realities: evolving International Concepts and Regimes* (Cambridge University Press, 1st Edition, 1999).

[39] Hammerstad, A "The International Humanitarian Regime and its Discontents: India's Challenge" 4 The Round Table (2014) 457.

[40] Krasner, S, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" 36 International Organization (1982) 185.

[41] '[T]he human rights movement is not simply a matter of fundamental postulates, ideologies and norms [...]. To the contrary, these basic elements are imbibed in institutions [...]', (Steiner, HJ and Alston, P *International Human Rights in context – Law, Politics and Morals* (Oxford University Press, 2nd Edition), 137.

[42] UNGA at <http://undocs.org/A/RES/217(III)> (accessed 20 June 2017).

[43] UN General Assembly, *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (ICCPR) and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (ICESCR).

conventions and documents.[44] It has gained, over time, feasibility from bodies such as the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Human Rights Committee (HRC), and the Committee on Economic, Social and Cultural Rights (CESCR). IHRL, thus, currently combines norms, principles, rules, and decision-making procedures, therefore, allowing one to see the existence of an international regime of protection of human rights.

The core of IRL, in turn, is composed by the 1951 Convention Relating to the Status of Refugees,[45] and by the 1967 Protocol Relating to the Status of Refugees, whose implementation supervision is delegated to the United Nations High Commissioner for Refugees (UNHCR). IRL aims for the protection of persons who migrate to another State as a result of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In the case of Africa, IRL also allows for the protection of persons fleeing acts of aggression and violations to the public order,[46] and in some Latin America and Caribbean countries,[47]

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[44] For example: International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention on the Rights of Persons with Disabilities, Optional Protocol to the Convention on the Rights of Persons with Disabilities, International Convention for the Protection of All Persons from Enforced Disappearance, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, Durban Declaration and Programme of Action (from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance).

[45] '[T]he term 'refugee' shall apply to any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. (Convention Relating to the Status of Refugee – Article 1(A)).

[46] Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 1(A). 1. For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[47] Cartagena Declaration on Refugees, Conclusion 3. To reiterate, that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (Article 1(2)) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

extends to persons fleeing gross and generalised violations of human rights.[48] The UNHCR is the organ with the mandate to conduct and coordinate international action to protect refugees and the search for durable solutions to their problems.[49] In light of this, a regime of protection of refugees can be identified.

In relation to IHL, there are regimes for the protection of human beings exposed to armed conflict depending on their peculiarities (such as civilians and wounded persons). They are composed of some international instruments including the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925, and the Geneva Conventions as well as the coordinated activities of UN organs and agencies (such as: the World Food Program (WFP), UNHCR, United Nations International Children's Emergency Fund (UNICEF), United Nations Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Relief and Works Agency for Palestine Refugees (UNRWA), and Food and Agriculture Organization of the United Nations (FAO)),[50] and by organisations such as the Red Cross and Red Crescent Societies.

As classically designed, the legal purpose of all international regimes is clearly coloured with political content.[51] If, on the one hand, the basic aspects of defining such regimes (principles and norms, i.e. legal content) may not require reformulation especially when it comes to human dignity, on the other hand, rules and decision-making procedures (political content) may be responsible for their modification and may give sufficient flexibility to the changes that might be necessary.

International regimes are relevant in the current international scenario and for International Law. The flexibility and possibility of changes in regimes reinforce the stability of Law while making enforcement practices more flexible and, thus, feasible; and does not remove or diminish the importance of hard law, which is true in questions of migration and, even more so, of the protection of migrants. In terms of migration, international regimes, and specially IHRL and IRL, provide alternative avenues for the protection of migrants while general hard international norms are lacking but also highlighting specific needs and developing norms when consensus has been possible to be achieved in the international scenario.

The notion that international regimes establish reliable and lower-cost information channels essential for consensus-building is not new and emphasizes the importance of these institutions for the promotion of cooperation.[52] This perspective, however, does not rule out the need for the specialisation of each regime to be built on common bases of International Law.

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[48] Countries that have incorporated the Cartagena Declaration: Argentina, Belize, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay, see *at* <http://www.acnur.org/que-hace/proteccion/declaracion-de-cartagena-sobre-los-refugiados/paises-que-incorporan-la-definicion-de-refugiado-establecida-en-la-declaracion-de-cartagena-en-su-legislacion-nacional/> (accessed 20 June 2017).

[49] Article 1 of the Statute of UNHCR *at* <http://www.unhcr.org/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html> (accessed 20 June 2017).

[50] Andrade, CSM and Madureira, AL, "A ONU e a Assistência Humanitária" in Jubilut, LL, Silva, JCJ and Ramina, L (eds), *A ONU aos 70: contribuições, desafios e perspectivas* (Editora da UFRR 2016) 902 - 925.

[51] 'Principles and norms provide the basic defining characteristics of a regime. There may be many rules and decision-making procedures that are consistent with the same principles and norms. [...] Fundamental political arguments are more concerned with norms and principles than with rules and procedures', (Krasner, *supra* nt 40, 188).

[52] Nye Junior, JS, *Cooperação e Conflito nas Relações Internacionais tradução Henrique Amat Rêgo Monteiro* (Editora Gente, São Paulo, 2009).

On the other hand, the specialised handling of issues has as a setback the fact '*that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law*'.[53] At the same time, in complex fields such as migration specialization can leave situations unaddressed for which the existing regimes were not designed. In light of this, one can argue that the diversity or fragmentation[54] of International Law needs to coexist with the search for its cohesiveness and dialogue with all relevant norms.

In this sense, despite the existence of international regimes that touch on migratory issues and the protection of migrants and despite the background of International Law, i.e. despite the relevance of both International Law and International Regimes for the topic, it is paramount that strategies that permeate all these specific regimes and promote a certain unity in International Law dealings with migration and migrants' protection are established so that the coherence and legitimacy of International Law is preserved.[55]

In so far that advancing hard norms in International Law in the topic of migration and migrants' protection have been challenging and the limitations arising from international regimes in terms of a general architecture on the topic are clear, it seems appropriate to deal with the question of the relationship between International Law and migration rather than only through the establishment of a closed normative system but through the delimitation of protection strategies. Protection strategies that could: (i) unify the language of cooperation in the field of migrations, (ii) enlarge the protective umbrella of migrants, and (iii) solve common problems for the adequate governance of migration. After all, comprehensive and adequate protection will only be in place when the strengthen and bases of International Law are combined with the specificity of international regimes and when there is an alignment of them both with common strategies underlining all of the international architecture created to deal with migration and migrants' protection.

For coherence, the first strategy proposed by this paper is to establish guidelines for the creation of new norms that consider: (i) the protagonist character of migrants in the understanding and the governance of migration (and as human beings whose dignity must be preserved), and (ii) a human rights-based approach to the migration phenomenon as a whole. In fact, there is no other tool better suited than human rights (and, consequently, human dignity) in tackling common ground in migration insofar as their observance is an *erga omnes* obligation as broadly recognised by the International Community.[56] From this first strategy the second one should derived: improving the dialogue of IHRL and IRL with International Law through cooperation, which, in turn, can also be favoured by the third and fourth proposed strategies. These last two strategies encompass regional approaches to migration and less formal actions that include the

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[53] United Nations, International Law Commission, "Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law", A/CN.4/L.682, 13 April 2006 *at* <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> (accessed 20 June 2017).

[54] On International Law's fragmentation, see the works of M. Koskeniemmi.

[55] As stated by Franck, T citing Dworkin: 'Coherence demonstrates that states relate through more than random interactions; that they consciously accept responsibilities derived 'from a more general responsibility' that is based on a membership in a community', Franck, T, "Legitimacy in the international system" 82 American Journal of International Law (1988) 748.

[56] Meron, T, *International Law in the Age of Human Rights: general course of Public International Law* (Hague Academy of International 2003), 21.

development of soft law and the participation of non-state actors in a responsibility-sharing-based migration's governance. The proposal of these four strategies will be developed in the following sections.

III. Proposed Strategies For How International Law Can Deal Better with Migration
A. Migrants: Protagonist in Movement

It is not uncommon to approach the migratory phenomenon from the perspective of States' interest rather than from the perspective of the migrant as the main actor of and in the process. Although 'it was the real or assumed intention, decision and action of people to migrate that put migration on the political agenda of the affected countries'[57], the realistic bias of security, wealth and power[58] continues to impose a link between territory and nationality that precedes any considerations about individuals or groups.[59] In this sense, migration policies are even used as instruments of political bargaining from which borders are opened or closed according to the interests at stake.[60]

The contemporary international order, however, is founded on the centrality of human rights,[61] which has even led to claims of a humanisation of International Law[62] or the birth of a universal legal conscience.[63] This presupposes that it is 'necessary for state or non-state actors to be concerned about the treatment of the inhabitants of other states' [64] and that States are responsible for all persons within their jurisdiction[65] - expressions of the universality of human rights by which individuals are viewed without any classification of origin. It also presupposes that the study of processes and social relations – such as migration - must be carried out from the standpoint of the protection of human being and not from the protection of States' power.

States have contributed to the creation of contemporary International Law (still being the main creators of its norms, directly or through international organisations) and, thus, to the inclusion of human rights as a guiding factor in the construction of the international regimes it houses. In this sense most governments and institutions recognise that at least some human rights are obligations *erga omnes.*[66]

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[57] Duvell, *supra* nt 6.

[58] Stein, AA, *Why Nations Cooperate: Circumstance and Choice in International Relations* (Cornell University Press 1990), 4.

[59] The so-called *methodological nationalism*, of Ulrich Beck; Beck, U, "Toward a New Critical Theory with a Cosmopolitan Intent" 10(4) *Constellations* (2003) 453.

[60] Duvell, *supra* nt 6.

[61] The centrality of human rights stems from the Kantian idea that the human being is an end in itself, and not a means to other ends; Kant, I, *Fundamentação da Metafísica dos Costumes* (Edições 70, 2007), 68. It is expressed, for instance, in '[...] *direitos humanos como paradigma e referencial ético a orientar a ordem internacional contemporânea. Se a 2ª Guerra significou a ruptura com os direitos humanos, o Pós-Guerra deveria significar a sua reconstrução*' ('[...] human rights as paradigms and ethical guidelines to lead the current international order. If the 2nd World War has signified the rupture with human rights, the post-war period should signify its reconstruction'); Piovesan, F, "A Universalidade e a Indivisibilidade dos Direitos Humanos desafios e perspectivas", *in* Baldi, CA, ed, *Direitos Humanos na Sociedade Cosmopolita* (Renovar, São Paulo, 2004), 47.

[62] Meron, *supra* nt 56, 50.

[63] See the Works of Judge Cançado Trindade, AA, who brings the idea of a "*consciência jurídica universal*".

[64] Sikkink, K, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America" 47(3) *International Organization* (1993) 411, 413.

[65] UNHRC 'General Comment 31' The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) CCPR/C/21/Rev.1/Add. 1326; see paragraph 10.

[66] Meron, *supra* nt 56, 21.

Assuming that all migrants are human beings and that the first quality precedes the quality of being a migrant, human dignity and the guarantee of human rights provided by the International Order must be respected regardless of migratory status. In this sense, when it comes to migration, the misconception in assuming the realistic bias - through which persons' mobility is seen from the standpoint of the flow of capital and of labour force, but not from the point of view of human rights and vulnerabilities - seems clear. It distances non-migrant actors from the migrants' humanity.[67]

A human rights-based approach highlights the better adequacy of a constructivist bias to migration, which assumes political relations as social relations that have direct effects on people and which are constructed from meanings and beliefs that determine the identities and values shared by the world community[68] among which are international obligations assumed by the States of protecting the juridical reflections of human dignity, i.e. human rights.

From the adoption of a human rights-based approach also derives the fact that it is not possible to ignore that the migratory phenomenon necessarily leads to vulnerability albeit at different levels.[69] Any migrant, whatever the cause of his/her movement, will be exposed right from the start at least to the socio-cultural[70] vulnerability of non-original membership of the host society in a clear pattern of inequality in comparison to native inhabitants. This social-cultural vulnerability may also be associated with others of temporal, spatial or socio-political purport[71] that can affect human rights, in its contents of freedom (civil and political rights) and/or equality (economic, social and cultural rights), i.e. that can become juridical vulnerabilities.

The way to face and correct any of these social-cultural or juridical vulnerabilities is to adopt a human rights-based approach in dealing with the protection of migrants and with any and all treatment of migration, which only becomes effective if one considers the protagonism of the persons (i.e. the migrants), not of the State, in the migratory process.

Once the approach to migration turns its focus to the human being specific needs are taken into consideration while the purpose of justice and generalised protection is sought.[72] The process of human rights specification allows diversity to be considered as a

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[67] Kakenmaster, B, "A Liberal Overview of Causes, Types, Pros and Cons" *The Oxford Council on Good Governance* (2017) *at* <http://ocgg.org/fileadmin/Publications/P002.pdf> (accessed 20 June 2017).

[68] Hurd, I, "Constructivism" *in* Smith, CR and Snidal, D, eds, *The Oxford handbook of international relations* (Oxford University Press, 2008), 299.

[69] Inter-Parliamentary Union, *supra* nt 7, 144.

[70] 'Socio -cultural determinants of vulnerability for migrants reflect differences in the norms, values and customs which constitute local constructions of the 'migrant''; Sabates-Wheeler, R and Wait, M, "Migration and Social Protection: a concept paper" (2003) Development Research Centre on Migration, Globalisation and Poverty Working Paper T2/2003, 13 *at* <http://www.migrationdrc.org/publications/working_papers/WP-T2.pdf> (accessed 20 June 2017).

[71] 'Temporal determinants of vulnerability factor largely in migrants' lives. In a static sense, the migrant faces different vulnerabilities associated with different points in the migration process (migrants in transit, migrants at destination, and the migrant's family at source). In a dynamic sense, the temporal vulnerabilities of a migrant and the family of the migrant at the source are nuanced by the length of migration (temporary, seasonal, long-term, daily, temporary, lifetime). […] In transit, migrants may be 'remote' in terms of geography and in terms of access to basic services such as health and education. A large number of undocumented migrants are vulnerable to health problems because of inhospitable terrain on transit and isolation. They are also vulnerable to exploitation and poverty due to their spatial dis-location from economic and social opportunities. […] Socio -political determinants of vulnerability refer to the institutional constraints facing migrants and typically reflect the lack of political commitment from the destination government/society to the migrant'; *Ibid*, 13-15.

[72] Jubilut and Apolinário, *supra* nt 10, 276.

strategy for achieving equality,[73] which does not occur when one considers the phenomenon of migration as such and not the people creating and involved in it. In the latter the tendency is to value causes rather than effects, which results in attempts to prevent migration and not in protection policies for those who need to migrate or who exercise the right of movement.[74]

The whole migratory process needs to be contemplated from the point of view of the main actor. Therefore, there is no more appropriate means to deal with the relationship between International Law and migration than through the protection of the human beings, which involves assuming the protagonism of migrants and the need for a human rights-based approach to migration.

B. Improving the Dialogue of IHRL and IRL with International Law
A direct result of adopting a human rights-based approach to migration is the need to improve the dialogue of IHRL and IRL with International Law.

Even though some regimes of protection of human beings and of governance of migration have been generated within International Law there is, as seen, no normative coverage for all international migrants.[75] Environmentally displaced persons, smuggled and trafficked persons, and humanitarian migrants are some of these persons that might need international protection and depend on *ad hoc* creations as they are not contemplated by specific hard international law or regimes focused on human rights. Despite this relevant lack of specific protection from a human rights standpoint, one can see that the existing regimes were built on a common background for the respect of human rights.

Both IHRL and IRL were built on the basis of the protection of human dignity[76] and consist of branches of International Law aimed at the protection of human beings.[77] Hence, in the absence of a common system convergence between these regimes and between instruments contained in them may mean greater support for persons in vulnerable conditions due to migration.

Using a traditional model of classifying migration so as to better assess one of its aspects, one sees that from the perspective of its main actor migration can be classified by the possibility of choice: a) forced migration and b) voluntary migration. The first classification covers 1) refugees; 2) stateless persons that are migrating; 3) internally displaced persons due to conflicts, disasters or human rights violations; 4) environmentally displaced persons; 4) displaced persons as a result of situations related to economic, social and cultural rights, whether due to a lack of implementation or by

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[73] Duarte, CS, "Fundamentos Filosóficos da Proteção às Minorias" *in* Jubilut, LL, *et al*, eds, *Direito à Diferença* (1edn Saraiva 2013), 34.

[74] It is important to recall that freedom of movement – which includes the right to leave one's country – is consecrated as a human right; see for instance Article 13 of the Universal Declaration of Human Rights. More recently, there have been campaigns advocating the right to migrate as a human right in itself.

[75] Alexander Betts points out that '[t]hree broad categories of people stand out as having unfulfilled protection needs as a result of conditions in the country of origin: a) people who may be considered as 'neither/nor' groups, who flee desperate economic and social distress, for example, resulting from state collapse, who are in need of some form of subsidiary protection, but who are not 1951 Convention refugees; b) people who flee natural disasters, such as tsunamis, earthquakes and flooding, to whom UNHCR is increasingly providing protection but who have no clear legal status and for whom operational responses are *ad hoc ;*c) people who are displaced by causes related to environmental degradation or the consequences of climate change. See Betts, *supra* nt 22, 211.

[76] See for instance the 1st paragraph of the preamble of the 1951 Convention on the Status of Refugees and the 1st paragraph of the preamble of the Universal Declaration of Humans Rights.

[77] Jubilut, *supra* nt 20.

development actions that induce migration; and 5) people seeking political asylum.[78] All those persecuted on the basis of race, religion, nationality, political opinion and membership of a social group who are unable or unwilling to return to their State of origin or residence qualify as refugees and are protected by IRL, which is the most structured scheme. In the absence of persecution, however, there is no specific (nor comprehensive) international protection for forced migrants, which, in light of the previous list, shows a huge gap in International Law.

Voluntary migration for its part finds basic protection within IHRL, albeit by separate instruments (such as the UHRD, the International Covenant on Civil and Politics Rights, the International Covenant on Social, Economic and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families) as well as diplomatic protection provided by the State to its nationals who are abroad.[79]

Separating migrants into the forced and voluntary migration categories and distinguishing on basis of different triggers of migration can be a recourse to assist in highlighting the gaps in specific protection. This recourse does not, however, fix all the blurred lines in international migration. For instance, there are difficulties in sometimes assigning one 'label' to a specific migrant[80] or in separating specific regimes to be applied as they might overlap as there is no guarantee that people who move voluntarily on economic issues will not be subjected to vulnerabilities such as those attributed to forced migrants, whose condition, in turn, may also admit protection techniques similar to those available to migrant workers, for example.

> While falling in principle in distinct legal categories, in practice, refugees, stateless persons, asylum seekers and migrants (including migrants in an irregular situation) often move and live in similar physical spaces and have similar human rights needs – in relation to their right to health or to freedom from arbitrary or prolonged detention, for example. Moreover, the principle of non-refoulement protects both refugees, who fear persecution in their countries of origin, and migrants, who fear torture or ill treatment upon their return, including at the hands of smugglers from whom the state will not protect them, or because of lack of access to lifesaving medical treatment.[81]

From the beginning of the displacement any migrant might be exposed to risk whether arising from gender or age or health issues, from contacts with coyotes, middlemen or with corrupt law enforcement agencies and traffickers[82] or even from dangerous crossings in geographical terms. Regardless of the classification, even in the absence of restrictive policies, there is always a possible vulnerability related to cultural barriers (language, uses and customs, access to information) from which might derive social exclusion: difficulty or lack of formal access to existing institutions in the host country, such as health,

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[78] Jubilut and Apolinário, *supra* nt 10.
[79] *Ibid*.
[80] This is even truer in light of mixed migration flows that are one of the characteristics of current international migration.
[81] Inter-Parliamentary Union, *supra* nt 7, 144.
[82] Sabates-Wheeler and Wait, *supra* nt 70.

education, labour market, social services and adequate housing,[83] which, in turn, may prevent participation in political life[84].

Additionally, when it comes to undocumented migrants, both forced and voluntary, it seems that there is still a greater willingness to allow oneself to be exploited due to fear of expulsion or deportation associated with the need for survival.[85] In some cases '[t]he rhetoric and practice in some countries of designating migrant's human beings as 'illegal' serves to justify non-recognition of fundamental rights and even denial that these rights apply'.[86] As a consequence, the universality of human rights may remain unapplied. And in light of this, the ideal of integral protection (meaning 'the combination of their rights as refugees [or migrants] and their rights under human rights law'[87]) is also jeopardised.

On the other hand, the difficulties of each migrant can be diverse even when one considers migrants with the same motives for migrating (forced or voluntary) or the same legal status. Cultural barriers, for example, can be heightened for women, children, the elderly and people with disabilities, who are also likely to be more exploited[88] and are the most unprotected in the case of disasters that require immediate removal and care.[89] Differences also appear in other groups of migrants, as while '[u]nskilled or semi-skilled migrants, for instance, may be made more vulnerable in terms of health and security',[90] '[p]eople who face trafficking, trauma and violence, or who become stranded migrants'[91] have specific protection needs.

In light of this, it is worthwhile to recall the perspective of international regimes to note that, although the specialisation characteristic is assumed as an advantage (in a given issue-area),[92] such specialisation has as its background the idea that complete convergence may be impossible so that cooperation is sought in what is possible. This idea, however, does not prevent any relationship between regimes (which should not remain embedded in their own spheres, but be stretched to reach situations similar to those to which they were built to tackle and which, in many cases, did not exist when they originated)[93] or between regimes and International Law in general. One should then strive for general protection when common bases are in place and for specific protection when peculiarities exist and need to be addressed.

The existing regimes (in IRL or IHRL) or even the norms in International Law dealing with migration are/or should be of the same value standard (protection of human dignity), which, in constructivist terms, justifies convergence between existing systems in

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83 Albuquerque, J, *et al,* "O Papel do Entorno no Acolhimento e na Integração de Populações Migrantes para o Exercício da Plena Cidadania" *in* Gediel, JAP and Godoy, GG *Refúgio e Hospitalidade*, eds, (Kairós Edições, 2016), 361-380.

84 Beetham, D, "What Future for Economic and Social Rights?" 43(1) *Political Studies* (1995) 41.

85 'Perhaps the most significant source of vulnerability for international migrants in destination countries is illegality'; Sabates-Wheeler and Wait, *supra* nt 70, 27.

86 Inter-Parliamentary Union, *supra* nt 7.

87 See Jubilut, LL and Madureira, AL, "Thinking Long–term: A Foundational Framework for Durable Solutions for Refugees", 7 October 2016, *at* <http://ohrh.law.ox.ac.uk/thinking-long-term-afoundational-framework-for-durable-solutions-for-refugees> (accessed 20 June 2017).

88 Inter-Parliamentary Union, *supra* nt 7.

89 Cavedon, FS and Vieira, RS, "Conexões entre Desastres Ecológicos, Vulnerabilidade Ambiental e Direitos Humanos: novas perspectivas" 2(1) *Revista de Direito Econômico e Socioambiental* (2011) 179.

90 Sabates-Wheeler and Wait, *supra* nt 70, 26.

91 Betts, *supra* nt 22, 220.

92 Krasner, *supra* nt 40, 34.

93 Betts, *supra* nt 22, 12.

a coordinated manner.[94] In addition, in practical and realistic terms the intentions are the same: reducing the costs of drafting, monitoring and applying rules - transaction costs -, which also justifies the formation of already existing regimes.[95] In these relations the same 'shadow of the future'[96] present in the migratory phenomenon - historically permanent[97] - was already identified and justifies the extension of the cooperative pattern to hypotheses reached by the same values and protective intentions.[98]

Applying this to the topic of this paper, one can defend that, although IRL is designed to protect human beings in situations of existing or perceived persecution due to race, religion, nationality, social group membership or political opinion (special situations), it is informed by principles and has mechanisms that are perfectly suitable to other situations for which they were not originally designed. In this sense, some of its protective structure should be respected in other migration situations: 1) *non refoulement* – which has acquired the status of *jus cogens*[99] - should always be applied where States of origin or residence do not provide protection for dignified survival; [100] 2) family reunification should be applied to facilitate the granting of visas for the families of any migrant; and 3) the principle of non-discrimination -laid down in Article 3 of the Convention Relating to the Status of Refugee and also a core value of IHRL, as an expression of the principle of equality – should be respected at all times for all migrants.

It should also be noted that the treaty bodies constituted by IHRL for the feasibility of the human rights protection regimes[101] 'have shared and complementary objectives and areas of work, both at operational and policy levels'[102] and are 'able to highlight different aspects of, and contribute different perspectives on migration-related issues',[103] so that even decision-making procedures can be established in a convergent way. The idea of the universality of human rights, which makes it imperative to respect the human rights of migrants as human beings, and the seeking of integral protection for

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[94] Hurd, *supra* nt 68, 62.

[95] Keohane, RO, *Power and Governance in a Partially Globalized World* (Routledge 2002).

[96] The shadow of the future presupposes long-term relationships, regularity of cooperative demands, reliability of information about the actions of the other stakeholders, and a fast feedback on changes in these actions. See Axelrod, R and Keohane, RO, "Achieving Cooperation Under Anarchy" *in* Oye, KA, ed, *Cooperation Under Anarchy* (Princeton University Press, 1986), 232.

[97] 'Migration is frequently labelled as a recent phenomenon. There are, however, few people in the world who need to go back further than three generations in their family tree to stumble upon a migrating ancestor'; BBC News, Schover, M, *Migration: A Historical Perspective*, 23 March 2004 *at* <http://news.bbc.co.uk/2/hi/in_depth/3557163.stm> (accessed 20 June 2017).

[98] It is worth resorting to the idea of issue-linkage (element of the international regimes theory) as an additional gain for parallel matters that determines the behaviour of the actors for other cooperation actions; Axelrod and Keohane *supra* nt 95, 88.

[99] Alain, J, "The *Jus Cogens* Nature of *Non – Refoulement*" 13(4) *International Journal of Refugee Law* (2001) 533.

[100] '[I]nsofar as the situation of irregular migrants means that their own states are unwilling or unable to provide fundamental human rights (such as the right to life), returning those migrants to a country in which there is good reason to believe that these rights would not be met would amount to a violation of those rights by the returning state. [...]In situations in which return may lead to torture, inhuman or degrading treatment or punishment, this obligation may require the state to allow an individual to remain on its territory so long as there is a risk of him or her being exposed to such treatment in his or her country of origin'; Betts, *supra* nt 22, 218.

[101] Among these the United Nations High Commissioner for Refugees (UNHCR), the Committee on Economic, Social and Cultural Rights (CESCR), The Human Rights Committee (CCPR), the Committee Against Torture (CAT), and the Committee on the Elimination of Racial Discrimination (CERD).

[102] Solomon, *supra* nt 29, 4.

[103] *Ibid*.

migrants, make the performance of these bodies perfectly adequate to the migratory situation - especially in a context where the migrant is assumed as the protagonist.

That said, two of the mechanisms that can be used for aligning the IRL and IHRL complementary application and the norms of International Law dealing with migration in general are (i) adopting less formalistic processes in the governance of migration (through the use of soft law and the participation of other stakeholders – such as civil society and migrants themselves- in a responsibility-sharing approach) and (ii) regional approaches, as will be seen below.

C. Less Formalistic Approaches to Regulating Migration
i. Developing Soft Law
Migratory issues are one of those topics directly related to the exercise of State power. At the same time that the external face of sovereignty gives States the possibility of regulating their frontiers and of electing which nationals from which States are allowed entry into their territory, the internal dimension guarantees them the election of safety, demographic and labour market regulation policies.[104] From a State-centric standpoint, there is room to argue for the reluctance to formal international commitments on migration issues.

Nevertheless, migration is also one of those themes that affects all countries in the world, whether as a State of origin, a host State or a transit State,[105] which is sufficient reason for an interest in cooperating. To which one can add the human rights commitments that need to be respected, even in a topic that is often presented as a 'sovereignty' matter, as the responsibility to protect both a State's nationals who are abroad and foreigners who are in its territory remain. Furthermore, another important addition to this equation is the duty to preserve the human dignity of anyone who is a migrant from any country, as an outcome of the flexibilisation of domestic jurisdiction, brought about by the internationalization of human rights.[106] It seems, thus, that the regulation of migration is one topic in which the dichotomy between sovereignty and human rights is highlighted[107].

'As a continuum, or spectrum, running between fully binding treaties and fully political positions',[108] soft law is an appropriate mechanism for solving the dilemma between the responsibility to protect and the exercise of sovereignty[109] in the current international scenario that makes the adoption of hard international norms on migration difficult.

Soft law are 'those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct'.[110] Even if it cannot be regarded as a classic source of International

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[104] Progressive external absolutization x Progressive internal constraint (Ferrajoli, L, *A Soberania no Mundo Moderno: nascimento e crise do Estado Nacional* (Carlo Coccioli and Mauro Lauria Filho trs Martins Fontes, 2002).

[105] Solomon, *supra* nt 29.

[106] Shaw, MN, *International Law* (Cambridge University Press, 2008), 272.

[107] Other topics that show this dichotomy can be found within the field of humanitarian interventions.

[108] Guzman, AT, and Mayer, TL, "International Soft Law" 2(1) *Journal of Legal Analysis* (2010) 171.

[109] Gruchalla-Wesierski, T, "A Framework for Understanding "Soft Law"" 30 *McGill Law Journal* (1984) 38.

[110] Soft law is those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct; *Ibid*.

Law under Article 38 of the Statute of the International Court of Justice,[111] soft law cannot be denied as a mechanism of current International Law, and one that can gain importance depending on the topic it is regulating and its current context.

Despite the existence of the regimes of IHRL and IRL, which can and should be applied to the migratory context, the difficulties in creating hard international law on the matter as well as the 'lack of clear guidance on [the] application [of said regimes]'[112] and the 'lack of clear division of responsibility among international organisations for the protection of vulnerable migrants, especially on an operational level'[113] may have the power of rendering ineffective the provisions of the regimes. This is so especially in view of the possibility of each State to assign the interpretation it deems appropriate to existing rules, which is contrary to the convergence of wills that guides the formation of any international regime.[114]

At the same time, the possibility of adhering to rules with less formal requirements [115] that approach cultural similarities, rather than highlighting their differences, makes soft law more attractive to States. It constitutes a method that allows for the creation of international norms, especially in contested areas, as is the case with migration or any area in which the 'sovereignty-human rights' dichotomy exists.

Among the effects attributed to soft law, there are legal, political, interpretive and qualifying ones. [116] Soft law has the direct legal effect of binding international organisations in which it was formulated,[117] the legal effect of transforming its provisions into *opinio juris,*[118] and the legal effect of delegitimizing an earlier rule, which is contrary to its provisions.[119] It has the political effects of promoting its incorporation into domestic norms and of being transformed into international hard law, the political effect of encouraging non-parties to act in accordance with its provisions, the political effect of legitimising conducts not foreseen in hard law, and the political effect of serving as a guide for negotiations and disputes settlement.[120] It also has the effect of guiding the interpretation of hard law, as well as of acting as an interpretative guide to contracts and domestic rules.[121] Soft law has even the effect of qualifying relationships by giving them value and, as a consequence, broadens the discussion on certain issues to the international level at the same time that it changes States' practice.[122]

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[111] Statute of the International Court of Justice, Article 38(1): The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[112] Betts, *supra* nt 22, 212.

[113] *Ibid*.

[114] *Ibid*.

[115] Guzman and Mayer, *supra* nt 108, 214.

[116] Gruchalla-Wesierski, *supra* nt 109.

[117] *Ibid*.

[118] 'The *opinio juris*, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certain way because they are convinced it is binding upon them to do so'; Shaw, *supra* nt 106, 84).

[119] Gruchalla-Wesierski, *supra* nt 109.

[120] *Ibid*.

[121] *Ibid*.

[122] *Ibid*.

In this sense, 'soft law can play an important role in consolidating existing norms into a clear and transparent understanding of the application of existing human rights norms to the situation of migrants.'[123] At the same time, it can broaden the interpretation of existing protective norms to achieve situations not addressed by them and, in practice, enhance protection. Examples of this are 1) the 1984 Cartagena Declaration - which enlarges the concept of refugee to achieve persecution resulting from grave and generalized human rights violations – such as conflicts, dictatorships and war-, as 2) the Guiding Principles on Internal Displacement[124], that established the main guidelines for these forced migrants, and 3) the International Migrants' Bill of Rights (IMBR) initiative, [125] developed by 'a transnational network of scholars, practitioners, other experts and students', whose purpose is to associate norms and governance in a process of enlightenment, recognition and protection of the human rights of all migrants.[126]

It is also noted that soft law development allow communication and exchange of expertise between specialised institutions, or by the possibility to align individual experiences in the field of human rights and in the field of migration.[127]

It seems clear, therefore, that the development of soft law is an appropriate way of improving the dialogue among IHRL and IRL to International Law and of enhancing International Law dealings with migration. One is not proposing that the international community gives up on finding commitment to establish hard international laws on migration with a human rights-based approach but rather that soft law can coexist with hard law and correct – at least in parts – the negative effects that normative voids arising from the lack of hard law on the topic can have on the protection of migrants.

ii. Developing a Non-State Centric Approach to Migration Governance: Responsibility Sharing and New Actors

In parallel to soft law, another form of adopting a less formalistic approach to migration governance is to adopt approaches that, at the same time, allow for the expansion of actors involved in it and set up a logic of responsibility-sharing to replace the sense of burden-sharing in migration.

The notion of burden-sharing informs IRL since its origin,[128] in a sense that refugees 'may place unduly heavy burdens on certain countries'.[129] This understanding

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[123] Betts, *supra* nt 22, 215.

[124] 'These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection and assistance during displacements as well as during return or resettlement and reintegration'; United Nations Office for the Coordination of Human Affairs, "Guiding Principles on Internal Displacement" *at* <http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html> (accessed 20 June 2017).

[125] 'The *Purpose* of the IMBR Initiative is to advocate for the protection of migrants' human rights by promoting the understanding and implementation of the International Migrants Bill of Rights. The *Goal* of IMBR Initiative is to pursue this vision and purpose through work at the international, regional and country levels'; Georgetown Law, "IMBR Initiative" *at* <http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/> (accessed 20 June 2017).

[126] Kysel, IM, "Promoting the Recognition and Protection of the Rights of All Migrants Using a Soft-Law International Migrants Bill of Rights" 4(2) *Journal on Migration and Human Security* (2016) 29.

[127] 'The development of a common understanding of the application of human rights law to irregular migrants would require the input of those actors - such as UNHCR – who have experience of operationalising a rights-based framework for a particular group of people on the move, as well as actors with complementary operational experience in the area of migration'; Betts, *supra* nt 22, 226.

can be extended to all migrants and is consistent with the mentioned tendency to analyse the migratory issue under the assumption of States' interest rather than through a basis of human rights and human dignity. It is not consistent, however, with the consideration of the migrant as the main actor of the process whose vulnerabilities and needs must be taken into account. It is also not consistent with the fact that, in most cases, the migrant positively transforms societies of origin and destination:

> On the whole, migration benefits receiving countries by increasing the available supply of labor, leading to a higher wage equilibrium in the long run, and not draining public expenditures. Migrant-sending countries benefit from increased access to financial capital in the form of remittances, higher wage equilibriums in the short run, and increased employment opportunities in emigrant-dominated sectors.[130]

Not only the State but civil society as a whole benefits from migrants' presence both in terms of prosperity and development[131] and in terms of cultural diversity.[132]

In this sense, whether for the obligation to protect or for the social benefit, it seems that the notion of responsibility sharing - as an 'idea that the countries and communities that host large numbers of [migrants] should be supported in doing so by the international community'[133] - is better suited to the migration context insofar as it goes beyond the isolated action of the State to reach society as a whole. This notion allows for the inclusion of non-state actors as agents of the governance of migration in a 'whole-of-society'[134] approach that, in addition to States' authorities and organisations, involves financial institutions, civil society and academia, the private sector, and the media.[135] Furthermore, and significantly, it includes migrants themselves, holders of rights, interested in the transformation of their own history and capable of acting as agents in governing the phenomenon that not only they created and carried on but that affects their protection.

Similar to soft law, actions aimed at involving non-State actors can be qualified as less formal strategies within International Law for the governance of migration. They are important to make reception procedures less bureaucratic and faster (non-state institutions can, for example, take care of reception, accommodation, documentation, and integration) as well as make the predictions of international regimes more feasible and sustainable,[136] given the broadening of the range of actors that can contribute to them. They can also empower migrants in the protection of their own rights and in the

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[128] Preamble, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[129] Jubilut, LL and Madureira, AL, "Os Desafios de Proteção aos Refugiados e Migrantes Forçados no Marco de Cartagena + 30" 22(43) *Revista Interdisciplinar da Mobilidade Humana* (2014) 11, 25.

[130] Kakenmaster, *supra* nt 67.

[131] Open Democracy, Crepeau, F, *A New Agenda for Facilitating Human Mobility After the UM Summits on Refugees and Migrants* 24 March 2017 *at* <https://www.opendemocracy.net/beyondslavery/safepassages/fran-ois-cr-peau/new-agenda-for-facilitating-human-mobility-after-un-summits-on-refuge> (accessed 20 June 2017).

[132] Kakenmaster, *supra* nt 67.

[133] United Nations High Commissioner for Refugees, *Towards a Global Compact on Refugees: a proposed roadmap* 4 April 2017 *at* <http://www.unhcr.org/58e625aa7.pdf> (accessed 20 June 2017).

[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*

creation of norms governing migration. In all these dimensions, a scenario of responsibility-sharing in migration would be created.

It is, therefore, not surprising that responsibility sharing is '[o]ne of the most important issues addressed by the New York Declaration [for Refugees and Migrants]',[137] in which 'the private sector and civil society, including refugee and migrant organisations, [are invited] to participate in multi-stakeholder alliances to support efforts to implement the commitments' there assumed.[138]

D. Regional Approaches to Protecting Migrants

Although the migration phenomenon has currently been addressed - or at least there are attempts to do so - in global terms,[139] the effects of migration are felt more immediately at local and regional levels.[140] Even if the choice of destination is guided by a variety of factors (economic, cultural and political), aspects such as the cost of travel (including security) and linguistic proximity may determine the movement within the same region.[141]

In these spheres one can see a zone of interests whose convergence is more easily identified, highlighted either by cultural and value features, or by economic and security aspects that the proximity of borders usually emphasizes.[142] In this sense, when it comes to cooperation 'regional solutions that are tailored to the specific scenarios may be politically more acceptable, and therefore more effective and easy to apply, than universally established formulae.'[143]

A recourse to Game Theory - which presents us with mutual interests, shadows of the future and the number of actors as the three situational dimensions that affect the tendency to cooperate [144] - underscores the importance of regional perspectives in migration. The mutual interest in managing migratory flows in the region and in protecting people whose tendency is to migrate to nearby places, coupled with the expectation of closer contacts between States' authorities and with the reduction of the number of actors involved in decision-making - and therefore of (political) wills -, make it clear that migration issues can be effectively addressed under regional assumptions. In practice it seems that States have in fact preferred to establish international cooperation on migration issues in regional contexts,[145] as the above mentioned African and Latin American development of regional norms on refugees.

Although tailored to a specific region, regional approaches can favour the exchange of experiences between different regions, which despite intrinsic differences

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[137] *Ibid.*

[138] Paragraph 16, UN General Assembly, New York Declaration for Refugees and Migrants, 3 October 2016, (Seventy-first session) A/RES/71/1.

[139] 'The regional dimension has been strangely muted or taken for granted in these high level debates'; Munck, R and Hyland, M, "Migration, Regional Integration and Social Transformation: a north-south comparative approach" 14(1) *Global Social Policy* (2013) 3.

[140] It is, for instance, estimated that 95% of refugees live in neighbouring countries and that 86% are in developing regions.

[141] Kakenmaster, *supra* nt 67, 3-4; In the case of the Syrian conflict, for instance, the author points out that while 4.1 million Syrians fled to neighbouring Turkey, Lebanon, Iraq, and Jordan in light of a brutal civil war that left many destitute, impoverished, and facing Persecution, Europe as a whole received only 348,540 asylum applications from Syrian immigrants by the same month.

[142] Anderson, R, "The Global Front Against Migration" 15 *Anthropology of This Century* (2016) *at* <http://aotcpress.com/articles/global-front-migration/> (accessed 20 June 2017).

[143] Jubilut and Ramos, *supra* nt 25.

[144] Axelrod and Keohane, *supra* nt 96.

[145] Betts, *supra* nt 22.

may present adaptive answers to similar issues,[146] thus, inspiring change outside of the original region. Hence, a regional point of view refines the protective look according to the needs of each region but does not mean a geographically limited solution.

As in the case of the only apparent dichotomy between soft law and hard law, regional solutions do not exclude the use of global mechanisms and should co-exist. The discussion about the antagonism between the multilateral approach and the regional one has already been overcome in order to establish a complementarity framework focusing on ascertaining the most protection possible to migrants.[147]

In terms of protection, and contrary to what occurs at the universal level, regulatory frameworks and institutions dedicated to broad aspects of migration are already identified in regional scenarios. There is, for example, the Committee on Migration, Refugees and Displaced Persons of the Council of Europe, which has among others as one of its priorities 'strengthening the protection of rights of migrants, refugees, asylum seekers, and displaced persons',[148] Additionally, with the Migration Policy Framework for Africa a regional framework exists that 'urges a comprehensive approach to regulatory and administrative measures to ensure safe, orderly and productive migration'.[149]At the same time, there are also regional documents[150] and organisations[151] dedicated to the realisation of human rights, as well as to the handling of specific aspects of migration, to which the notions of alignment, dialogue and integration apply.

In this sense, considering that common problems are more easily identified in the regional context and that dialogue is favoured by identities, the regional approach may be a effective mechanism for cooperation and, therefore, for the protection of migrants. However, and in the same sense of what has been said about soft law, the strategy being proposed is the coexistence of regional and international initiatives, organisations, and norms so as to guarantee the most protective scenario for migrants.

IV. Conclusion

Migration sets up a context of interdependence between States, which justifies the intention of establishing international regimes for the governance of common issues. Nevertheless, the complexity of the phenomenon, coupled with arguments of power and wealth, has hindered the elaboration of a general comprehensive regulation for all

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[146] *Ibid*.

[147] Jubilut and Ramos, *supra* nt 25.

[148] Inter-Parliamentary Union, *supra* nt 7, 64.

[149] *Ibid*.

[150] The American Convention on Human Rights (ACHR),1969, the African Charter on Human and Peoples' Rights, 1981, the League of Arab States Charter on Human Rights, 2004, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, as well as their related Protocols. Among the soft law documents, Cartagena Declaration, which expanded the definition of refugee, should always be mentioned, as well as 'the MERCOSUR Declaration of Principles on International Protection of Refugees highlighted the need for strengthening the regional humanitarian space, encouraging all states to adopt the wider definition of refugees from the 1984 Cartagena Declaration'; Jubilut and Ramos, *supra* nt 25, 66.

[151] The rights of migrants are also the concern of regional economic integration communities, such as ASEAN, the Andean Community, the Caribbean Community (CARICOM), the Central African Economic and Monetary Community (CEMAC), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC) and the South American Common Market (MERCOSUR), which all have regional agreements on the movement of people that include provisions to enhance the legal recognition and protection of Member State nationals in other member countries; Inter-Parliamentary Union, *supra* nt 7, 63.

matters present in the field of migration or even the creation of specific regimes to all migrants in need of protection.

The multiplicity of issues associated with migration has promoted fragmented regulation, which does not always present the most protective solutions for migrants, the main actors in the process. While there are standards, rules, principles and decision-making procedures that already protect certain specific migrants' situations, there are no specific predictions for all kinds of vulnerabilities arising from migration.

International Law is the normative space for regulating the protection of human beings. It is also the setting to address the protection gaps of migration regimes. Currently there are specific regimes that, albeit fulfilling an important role in migrants' protection, due to the systematic unity of International Law and its axiological choice for the protection of human dignity, must converge to reach this common goal.

Neither International Law as it is nowadays, nor the existing international regimes are capable of dealing alone with migration in a manner that secures the ideal standard of protection. It is relevant to improve existing structures and to create new ones so as to have an adequate international architecture to deal with migration and the protection of migrants. In all of these there is a need to rethink the better way for International Law to deal with migration. In doing so four strategies arise: First, assuming the protagonism of migrants in migration and, thus, shifting the focus from the regulation of the phenomenon to the protection of its subjects as a strategy consistent with the contemporary background of International Law based on human rights and providing a common basis for normative regulation; Second, enhancing the dialogue between existing regimes – mainly with IHRL and IRL -, which extend the protective base for migrants in that a dialogue allows for the exchange of tools provided by one regime to situations encountered by other ones as well as combining International Law and international regimes in the governance of migration; Third, using less formalistic approaches such as soft law and the participation of stakeholders for the governance of migration with a responsibility-sharing approach; Fourth, using regional approaches to facilitate the development of stronger cooperation and regional norms.

Considering the current political scenario, such strategies, combined with a continuous effort to develop International Law and International regimes' tools for dealing with migration, can give coherence to the system through a common language of protection. These strategies are needed to both, foster cooperation and broaden the range of protection of migrants and as ways for International Law to better deal with migration.

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