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MIXED FLOWS AND THE PROTECTION OF MIGRANTS WITH SPECIAL REFERENCE TO SUB-SAHARAN MIGRANTS

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Sintesi

Il cambiamento nei movimenti migratori internazionali ha posto nuove sfide alla protezione degli immigrati in generale e dei rifugiati in particolare.

Il Mediterraneo rimane una delle zone in cui il fenomeno migratorio è più intenso e complesso.

Il paper affronta il problema di movimenti collettivi in cui risulta difficile individuare i motivi che spingono a emigrare e di conseguenza tutelare i diritti dei rifugiati.

L'autrice evidenzia delle norme a cui i rifugiati sono soggetti nell'area mediterranea e suggerisce un approccio più ampio per un regime di protezione dei migranti.

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Introduction

One of the dramatic changes and challenges in the world today is the new face of migration, which is becoming more and more illegal and causing great suffering, exploitation and thousands of deaths among migrants moving from the poor South to the rich North.

Another specific feature of population movement now is that the migrants are more and more mixed: all types of migrants, with different rights, are travelling together and using the same channels, which are largely clandestine ones.

The spread of violence and increase in human rights violation all over the world, and notably in some regions where there is armed conflict, have driven many people to flee from their homes looking for a safe haven elsewhere. This is the case with many sub-Saharan migrants transiting via Morocco to get to Europe.

In our global world migration has also become global, as have its causes and consequences. This started back in the 1990s, when it became difficult for people from the South to use the normal legal channels for migrating, owing to severely restrictive migration policies in the North.

Because of the new face of migration, some countries from the South that used to be associated mainly with emigration (like Morocco) are also becoming transit and immigration countries and are experiencing mixed flows of migrants. Different types (refugees, asylum seekers, students, migrant workers etc.) are entering Morocco illegally, with the primary aim of migrating to Europe, but they are staying for long periods in Morocco itself waiting for the occasion to move north.

Because of these mixed flows of migrants, the management of migration is often characterized by confusion between all the different types of migrants and their rights. This confusion is amplified when different branches of migration laws would apply for the same migrant because s/he is moving for mixed causes and motivations. For example, a person is moving from a country ruled by a dictator, where there is civil war and discrimination, and where it has become impossible for him/her to work or live. S/he is then moving at the same time as an asylum seeker and a migrant in search of work and safety. In this case, both refugee law and migrant workers law would normally apply. However, as the person is moving "illegally", s/he is very often considered as an "irregular migrant" and is not protected by any law.

The changing face of international migratory movements has posed new challenges to migrants' protection in general and to refugees' protection in particular. Because some migrants now move for mixed reasons, migration specialists and lawyers who used to differentiate between migrants and draw lines between the laws applied to them on the basis of the reasons for their migration, now find it difficult to distinguish between them and their rights.

What can be done then?

Should we continue to use the present migration law with all its divisions, limits and shortcomings or should we think of a new migration law that is more adapted to the new face of international migration. If the answer is yes, what would be the future of refugee law within this new global migration law?

United Nations High Commissioner Representatives often assert that Migration and Asylum are distinct phenomena. Population movements are now interlinked: refugees are travelling alongside migrants to reach a safe place because they often have no other way to flee than to use the same clandestine channels as the other migrants. But the UNHCR insists on keeping the distinction between migrants when it comes to rights and laws applicable to refugees and asylum seekers.

Would it be possible to go on distinguishing refugee law from the rest of migration law? What about the limits and imperfections in the present refugee law (due mainly to its western origin)? What about the difference between the refugee law applied in the North and that applied in the South?

Mixed migration flows seem extremely complicated, but the need for protection is not. For a better protection of all migrants (in rich western countries as well as in poor southern ones), it would be necessary to review all migration law and to rethink the roles of the various institutions taking care of migrants, including UNHCR. Otherwise, we will continue using the present migration law, which is out of date and **out of content?** and migrants would continue moving illegally and facing exploitation and denial of rights.

The situation of migrants in Morocco, a country at the crossroads between rich, fortress Europe and poor, violent Africa, could provide an example of the limitations of migration law and of the protection problems migrants are having to face.

1. Mixed flows but different migrants' rights

In theory, migrants are of different types because of the causes and types of their displacement and of the specific laws in application according to each type of migration. But, in practice, most migrants now move for almost the same cause and in the same manner. This has resulted in some confusion between all migrants and their rights.

A. Different migrations and different branches of migration law

Migration law applicable to migrants differs according to their type of migration.

Different types of migration and migrants

Migration means any population movement from one country to another or from one region to another, with the intention of settling permanently or temporarily. Migration could then be internal (within the national borders) or international (crossing the borders); voluntary (the migrant is not forced to move and could go on living in his/her country or region without any risk to his/her life) or forced (the migrant is obliged to flee in order to safeguard his life or rights); legal (using the legal migration procedures) or illegal (using illegal means). Migrants could then be citizens or foreigners; they could be asylum seekers, refugees, students, migrant workers etc. Migrants' rights differ

according to their type of migration but at present many migrants are moving in a clandestine way, with few laws to protect irregular ones.

To each type of migration a specific kind of migration law applies. Lawyers distinguish normally between two branches of migration law: the first branch regulates migration and sanctions illegal movements and the second branch protects migrants and safeguards their rights. The first branch of migration law is mainly domestic and is embodied in states' national legislations. It is also discretionary as states are generally free to open or close their borders to foreigners. The second branch of migration law is, on the whole, international and is included in universal and regional legal instruments to which states can choose to adhere and agree to introduce their stipulations in their own domestic laws.

Different laws protecting migrants

The second branch of migration law includes two main sub-branches: refugee law and migrant workers law.

Refugee law

Refugee law is the law that applies to forced migrants crossing international borders in search of asylum¹. **Universal refugee law** is embodied in the 28 July 1951 Geneva Convention relating to the status of refugees². This convention gives a precise and restrictive definition of a refugee. The definition is based on the notion of persecution and defines a refugee as a 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, unable or, owing to such fear, is unwilling to return to it»

The most important refugees' rights introduced by the Geneva Convention are, without doubt, their right to move undocumented and not to be sent back to a country where they fear persecution.

Thus, article 31 of this convention stipulates that:

«The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence».

¹ For more information on refugees and refugee law, see the various UNHCR publications, notably the periodic publication on refugees in the world and the collection of texts on refugee law and different guides on determining refugee status published by this international organisation.

² For more information on all the instruments of refugee law (universal, regional as well as domestic legislations), see the UNHCR web site : <http://www.unhcr.org>;

Article 33 prohibits expulsion or return (refoulement) of refugees and asylum seekers and asserts that:

«No contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion».

But, the Geneva refugee convention was enacted in 1951, mainly by Europe and for Europe and aimed especially at solving the refugee influxes coming from ex socialist Europe. That is why article 1 included an option to apply the Convention to either:

- “events occurring in Europe before 1 January 1951” or
- “events occurring in Europe or elsewhere before 1 January 1951”

These geographical and temporal limitations were removed later on by the New York additional Protocol of 31 January 1967, but many western states continued to apply for some time the definition of a refugee only to asylum seekers and refugees originating from Europe.

At the regional level, some southern refugee instruments enlarged the refugee definition to include other categories of forced migrants while some northern ones were enacted with the objective of restricting it even more.

Therefore, the African definition, introduced by the Organisation of African Unity (OAU) Convention of 10 September 1969 Governing the Specific Aspects of Refugee Problems in Africa, has enlarged the Geneva refugee definition and added four causes for applying for refugee status. It stipulates in article 1 that the term “refugee” shall also apply to every person:

«... who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality».

Another regional instrument, the Latin American Cartagena Declaration on Refugees of 22 November 1984, goes even further in enlarging the refugee definition and considers that any person fleeing because of any human rights violation could be granted refugee status. The Declaration stipulates in article 3:

«...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 OAU Convention (article 1, paragraph 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 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».

In Europe, the refugee definition has, on the contrary, been restricted both in theory and practice. The aim of the Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities of 15 June 1990 was to limit the opportunity for asylum seekers to present their claims to refugee status³. The Convention sets out to determine which Member State is responsible for assessing an asylum claim. The underpinning of the «Dublin system» is the principle of authorization, under which the State which has «authorized» the entry of an asylum seeker on the territory of the Member State is responsible for examining his or her application. The Convention sets out objective criteria to determine the responsible State in accordance with that principle. Complex procedural rules have also been adopted to implement the Convention, such as those concerning a centralized database of asylum seekers fingerprints. Asylum seekers are then treated as suspected persons or criminals. The Convention was widely criticised. For example, A Hurwitz asserts that «*the scope of the Convention does not include applications for humanitarian protection, the conditions for family reunification are too strictly defined, and most importantly the difficulty of providing strong evidence of illegal entry into one of the Member States renders the Convention useless in many cases*»⁴.

In 2001, the European Commission proposed a regulation to replace the Dublin Convention, which has become known as «Dublin II». The proposal was not very different but introduced a new aim of preventing 'secondary movements' of asylum seekers from one Member State to another. This proposal was approved by the European Council in December 2003⁵. But the final text resembles the original Dublin one. A common European policy on asylum policy has been started also since 2003 and different European legal documents include common procedures for granting refugee status⁶.

At the national level, few domestic legislations guarantee migrants rights. Many national laws relating to migrants are more restrictive than International Law. In Morocco, a domestic legislation on refugees was enacted in 1957⁷. It is not a very detailed or informative legislation⁸. At present, the UNHCR Office in Rabat is urging the Moroccan authorities to carry out a global revision of this domestic refugee law.

³ See for more information on this convention: [http://www.refugeelawreader.org/c/91/i..Responsibility The Dublin System](http://www.refugeelawreader.org/c/91/i..Responsibility%20The%20Dublin%20System).

⁴ See A. HURWITZ, *The 1990 Dublin Convention: A Comprehensive Assessment*, in «International Journal of Refugee Law», Vol. 11, 20 October 1999, n. 4, pp. 646-677; See also: <http://www.jingentaconnect.com/content/oup/reflaw/1999/00000011/00000004/art00646>.

⁵ Dublin II Council Regulation; Council Regulation (EC) n. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 050 (25 February 2003).

⁶ See: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0182+0+DOC+XML+V0//FR>.

⁷ Decret n. 2-57-1256 du 29 août 1957 fixant les modalités d'application de la Convention relative au statut des réfugiés du 28 Juillet 1951.

⁸ See K. ELMADMAD, *Asile et réfugiés dans les pays afro-arabes*, Editions Eddif, Casablanca 2002, pp. 177-79; see also on refugees and refugee law in Morocco, K. ELMADMAD, *Les réfugiés et les apatrides au Maroc, des étrangers pas comme les autres*, in «Regards croisés sur l'étranger», a special issue of the Review of Meknes University (Morocco) , Minbar al Jamiaa, n. 3, 2001, pp. 35-72; see also, the *Journal of*

In general, refugees and asylum seekers benefit from specific rights, notably, they should not be expelled even when they are undocumented and should be given an opportunity to present their claim for refugee status.

Migrant workers' law

This law is generally embodied in universal, regional, bilateral as well as domestic legal documents.

Universal migrant workers' Law is included mainly in two kinds of legal instruments: the various instruments enacted by the International Labour Organisation (ILO) and in the United Nations Convention on the Protection of the Rights of All Migrants and Members of Their Families of 18 December 1990, which is called for the moment the Charter of all migrants⁹. These instruments guarantee different rights for migrant workers and the members of their families, such as the right to equality of treatment and wages, the right to family reunification, the right to education and freedom of movement and the right to transfer money to their countries of origin.

The UN 1990 migrants' Convention protects also undocumented migrants. While it does not encourage their presence, it ensures that they have access to basic human rights. But this convention has been ratified only by states "exporting migrants" that is, developing states. Northern states and notably European states are reluctant to ratify it or accept its stipulations. They are afraid that granting more rights to migrants would make their countries more attractive to them. Not accepting the convention can be considered therefore as a European strategy to discourage potential migrants¹⁰.

Morocco was the second country (after Egypt) to have ratified the 1990 Migrants' Convention in June 1993¹¹. Morocco is a member of the Committee on the rights of migration created in conformity with the Convention. Morocco has also ratified some ILO instruments but not the most significant instruments relating to migrants¹².

Regional migrants' instruments vary according to the regions: Africa, America, Asia, Europe, the Arab and Islamic Worlds etc. Morocco is part of some migrant workers' instruments enacted in Africa and in the Arab and Islamic worlds. The Arab Labour Organisation was created in 1965 and has enacted an Arab Charter on migrant workers as well as a few other instruments relating to them. But most of these

the French NGO Forum Réfugiés, n. 33, janvier 2006, p. 3 <http://www.forumrefugies.org/pdf/soutien/journal/33.pdf>

⁹ For the texts and studies on migrant workers instruments, see the web site of ILO: <http://www.ilo.org>; see also the web site of the NGO 18 December: <http://www.18decembre.org>.

¹⁰ For a detailed analysis of the UN 1990 Convention, see UNESCO, United Nations Convention on Migrants' Rights, UNESCO publications, Paris 2003.

¹¹ Cfr. K. ELMADAMD (ed), *Les migrants et leurs droits au Maghreb avec une référence spéciale à la Convention du 18 décembre 1990*, Casablanca 2005.

¹² For the list of the ILO instruments ratified by Morocco, see the ILO web site <http://www.ilo.org>; see also K. ELMADAMD, *Les migrants et leurs droits au Maghreb*, cit., pp.166-167.

instruments are not implemented as few Arab states (including Morocco) **have ratified** them¹³.

At the regional European level Morocco concluded an agreement with the European Union in 1996. Parts of this agreement relate to the protection of Moroccan migrants in Europe¹⁴.

Since 1990 and because of the restrictive European policies towards migrants from Africa, Morocco has become a transit country for many sub-Saharan migrants migrating illegally to Europe. Many among them would stay for long periods in the country waiting for the occasion to move north. Morocco and Europe have taken a few measures to find solutions or to limit the sub-Saharan migrants' illegal migration, including security measures. For example, Morocco initiated a Euro-African Conference on Migration and Development from 10 to 11 July 2006, with assistance from France and Spain. The Conference brought together some 60 European and African countries. Mixed flows of migrants were discussed and a plan of action was issued during this international meeting, suggesting solutions for migration from Africa to Europe¹⁵.

Migrant workers are also protected by **bilateral agreements and conventions**. These instruments aim at regulating migration for work and guaranteeing migrants rights. Morocco has signed many of these agreements with many European countries, notably with Germany on 21 May 1963, with France on 1st June 1963, with Belgium on 17 February 1964, with Holland on 14 May 1969 and with Spain on 6 February 1996 and on 25 July 2001¹⁶. However, these instruments are sometimes less protective for migrants than the universal instruments. Countries of origin often accept some clauses imposed by destination countries which limit or deny some fundamental migrants' rights, such as their rights to freedom of movement, to family reunification or to training.

Since the 1980s, the migrant workers bilateral agreements have hardly been referred to or used, and recently Europe has invented a new formula for migration for work: "circular migration". Thus, new kinds of bilateral agreements called "circular migration agreements" are being signed with a few countries of origin. These agreements concern temporary migration and are less protective for migrants than the previous bilateral migrant workers' agreements. In these new bilateral agreements, a strict selection of migrants is very often made, taking into consideration the economic interest of the receiving country only and rarely the interest and rights of the migrants. For example, in Morocco, some "circular migration agreements" with Spain concern only married women with children who would go to work in Spain for limited periods, leaving behind their families. The recruiting country is then assured that these women will return to Morocco at the end of their contract, as they are not allowed family

¹³ K. ELMADMAD, *Les migrants et leurs droits au Maghreb*, cit., pp.170-171.

¹⁴ For details on this agreement, see: http://ec.europa.eu/external_relations/morocco/index_en.htm.

¹⁵ For information on this Euro-African conference, see the web site of the Moroccan Ministry of Foreign Affairs: <http://www.maec.gov.ma/migration/fr/programme.htm>.

¹⁶ Source: Moroccan Ministry of Foreign Affairs and Cooperation, Direction of Consular and Social Affairs.

reunification¹⁷. The right to live with one's family seems no longer a human right in these new bilateral agreements on circular migration.

Domestic legislations could concern also migration and migrants and could distinguish between the different laws applied to them. In November 2003, Morocco introduced a new migration law (Loi 02/03) which distinguishes between legal and illegal migrants and between migrant workers, refugees and asylum seekers. Despite some shortcomings in this new law (such as its harsh sanctions for illegal migration), it refers, in some of its articles, to the international instruments signed or ratified by Morocco for protecting migrants and guaranteeing their rights¹⁸.

These are, in sum, the main laws regulating migration and protecting the different kinds of migrants. Normally these laws should be kept separated and should apply specifically to each kind of migration and migrants, but because of mixed flows of migrants, who are moving sometimes for mixed causes, it has become quite difficult to draw such a distinction and there is now confusion between migrants and their rights.

B. Mixed movements and the confusion between migrants, laws and rights

Because most migrants are moving side by side and irregularly, they enjoy almost no rights. No legal instruments protecting all irregular migrants exist for the moment, except for the general human rights instruments that states are usually reluctant to apply to illegal migrants

Mixed movements and the confusion between the different kinds of migrants

Despite their differences, migrants in general and African migrants in particular now move together, and with the same aim: to find a "safe haven" in a northern country.

A fieldwork conducted in November and December 2007 with sub-Saharan migrants living either legally or illegally in Morocco showed that most of them had come to Morocco via Algeria and had moved together with the main objective of migrating to Europe. Many of them had fled general violence and poverty. They were all undocumented asylum seekers and migrant workers¹⁹.

Many of the migrants interviewed asserted that because of the mixed causes of their migration but especially because of their "illegality", the reaction towards them was generally the same: no right to entry and expulsion from the country, even when they had claimed refugee status. The fieldwork showed also that most asylum seekers who succeeded in presenting their claims for refugee status to the UNHCR office in Rabat had entered Morocco illegally as it was not possible for them to present their claims at

¹⁷ See K. ELMADMAD, *Migration circulaire et protection des migrants: le cas du Maroc*, in the web site of the Florence Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM): <http://www.carim.org>.

¹⁸ For an analysis of the 2003 Moroccan migration law, see K. ELMADMAD, *La nouvelle loi marocaine du 11 novembre 2003 relative à l'entrée et au séjour des étrangers au Maroc et à l'émigration et l'immigration irrégulières*, published in the web site of CARIM, cit.

¹⁹ Fieldwork conducted with Sub-Saharan migrants in Rabat and Tangier in November and December 2007 as well as with some NGOs and religious institutions assisting them materially.

the borders. Some of them had been expelled several times from Morocco, but had come back.

We could conclude from the different interviews with sub-Saharan migrants (from Ivory Coast, Mali, Cameroon, Nigeria, Congo Kinshasa Senegal and Gambia) as well as with some Moroccan authorities in charge of managing migration flows and some NGOs working with migrants that there is lack of knowledge of migration law and of the different categories of migrants.

Sub-Saharan migrants go through inhumane experiences during their journey to Morocco and live in quite dramatic situations when they reach the country. Many of them live on begging in the streets of some Moroccan town, in constant fear of being caught by the police and expelled from the country. Most of them have paid large amounts of money to reach Morocco (some 1000 to 2000 US dollars). Many of them confessed that they would not go back home whatever happened to them in Morocco. Some migrants also gave information on Spain's selective behaviour towards irregular migrants. A migrant who made the trip to the Canary Islands with a friend and was sent back to Morocco, informed us how his friend was authorised to stay there because he was a bigger built man and how he was expelled back to Morocco because he was smaller and thinner. Some other sub-Saharans gave information on the human trafficking, the culture of corruption and business climate present during all the stages of migration, from the time they left their home country until their attempt to enter Europe.

A survey conducted by Amnesty International in October 2006 with sub-Saharan migrants, after the tragic events of Ceuta and Mellilla in September and October 2005 (when some of them were killed while attempting to scale the fences separating these Spanish enclaves from Morocco), showed the non respect of migrants' rights and the confusion between refugees and illegal migrants by both the Moroccan and Spanish authorities²⁰. In this survey, a migrant from Ivory Coast declared that he had left his country of origin in 2003 after his father and brother were killed by armed forces. He travelled by foot until Morocco and went through much suffering and exploitation. He entered illegally Morocco and presented his claim for refugee status to the UNHCR and obtained it²¹. Despite his refugee status, this migrant was expelled from Morocco to Algeria but came back. In September 2005, because he could not work in Morocco, he managed to scale the Mellilla borders fence and reach Spain where he was trying to present his claim for refugee status. But he might not get this status either on the basis that he has already got this status in Morocco or because the reason for his flight (general violence) is not one of the reasons included in the definition of refugee in the 1951 Geneva Convention regulating asylum in Spain.

In the same Amnesty International survey, one migrant from Mali affirmed that a Spanish migration agent had answered him when he tried to explain his reasons for migrating: *"you're just a Negro and you don't have any right to speak"*. According to this survey, the Spanish authorities apply neither the domestic Spanish legislation nor

²⁰ Cfr. Amnesty International, Spain/Morocco, EUR 41/016/2005 EFAI, 26 October 2005.

²¹ In Morocco, the UNHCR bureau in Rabat is in charge of determining refugee status, but this status is sometimes not recognized by the Moroccan authorities. In June 2007, an agreement was signed between UNHCR and Morocco for a better cooperation in future.

the European or the international principles protecting migrants: all migrants are treated as illegal migrants. The survey also showed that the behaviour of the Moroccan authorities with sub-Saharan migrants is no different or better than that of the Spanish authorities. The Moroccan authorities react in the same way towards migrants and consider all of them as illegal migrants who should be sanctioned, without distinguishing between their different statuses and categories.

In theory, asylum seekers and refugees are protected against expulsion or “refoulement” to any country where they fear persecution. But in fact many of them are sent back to their persecution countries. In Morocco, some NGOs working with sub-Saharan migrants as well as the UNHCR have, at several times, contested the expulsion of some refugees with status or asylum seekers. For example, the NGO “*Réfugiés sans Frontières*”, based in Rabat, has on many occasions denounced the expulsions of refugees and asylum seekers by the Moroccan authorities²².

In Europe, because the European states do not accept the enlarged African refugee definition, most of those migrants who do not answer the conditions set in the Geneva refugee definition, to claim refugee status, are considered as illegal migrants. They do not enjoy any protection and are expelled when this is possible.

Mixed flows and the confusion between laws and rights

As explained above, to each kind of migration a specific kind of migration law applies. Generally, migrants are either workers or refugees and asylum seekers to whom we could apply either migrant workers’ law or refugee law. While the first type of migrants should normally move with proper documents (generally travel documents and work contracts), the second type could be undocumented as they are supposed to have fled in a hurry and in search of safety and did not have the time or the possibility to take their travel documents with them.

Because many migrants in search of work now move illegally, all migrants are treated equally by migration authorities. They are all considered as irregular migrants who should be sanctioned for illegal entrance or stay. In addition, because the only legal way for migrating is asylum now, some migrants try to use this channel in order to gain legality in destination countries. This often results in an increase in the number of claims for refugee status and inflates refugee protection. “*Genuine*” refugees and asylum seekers are then confused with false ones and few claimants are granted refugee status.

The UNHCR often insists on keeping the distinction between refugees and other migrants, even in mixed flows. In his statement at the Rabat Euro-African Conference of 10 and 11 July 2006, the United Nations High Commissioner for Refugees, António Guterres, declared that:

«... in the current context, we must focus special attention on the phenomenon known as 'mixed movements', whereby migrants and refugees move alongside

²² See, for example the press communiqué of this association of 10 November 2007 entitled *Raffles de migrants*: COMMUNIQUE DE R.S.F.MAROC n. 0123/11/R.S.F./LDNGK/007.

each other, usually in an irregular manner, making use of similar routes and modes of transport.

Such movements are termed "irregular" because they often take place without the requisite documentation and frequently involve human smugglers. The people who move in this manner often place their lives at risk, are obliged to travel in inhumane conditions and may be exposed to exploitation and abuse. States regard such movements as a threat to their sovereignty and security.

While recognizing the difficulties that such movements can pose for states in terms of national and local security, we must ensure that the measures taken to curb irregular migration do not prevent refugees from gaining the international protection which they need and to which they are entitled».

With a view to distinguishing refugees and asylum seekers from other migrants, the United Nations High Commissioner for Refugees has enacted a document entitled: *Refugee Protection and Mixed Migration: a 10 point Plan of Action*. This document includes 10 important points relating to: Cooperation among key partners, Data collection and analysis, Protection-sensitive-entry system, Reception arrangements, Mechanisms for profiling and referral, Differentiated processes and procedures, Solutions for refugees, Addressing secondary movements, Return arrangements for non refugees and alternative migration options and finally Information strategy²³.

During the Rabat Euro-African migration Conference, the High Commissioner unveiled this 10 plan action and explained that the 10-point plan sets out key areas in which comprehensive action is required to address the issues of mixed and irregular migratory movements in a coherent and practical way – in countries of origin, transit and destination.

Mr. Guterres insisted especially on keeping the distinction between refugees, asylum seekers and other migrants and declared at the Conference:

«While we must maintain this fundamental distinction between refugees and migrants, we must also recognize that both forms of mobility are often rooted in the broader problem of under-development. I hope that this conference will enable the states of Africa and Europe to formulate cooperative approaches to the challenge of development – approaches which can help us to create the conditions that enable people to migrate out of choice, rather than necessity».

This declaration could lead us to ask: do we really need to keep distinct laws, institutions and procedures for each type of migrants if we know that most migrants now move because of necessity and not out of choice and that the global reason for all migration is underdevelopment? Don't we need to reconsider all the concepts and laws relating to migrants as they are migrating more and more for the same reason? Don't we need a new migration law which is more protective for all the uprooted who are outside the law now?

²³ See the text of this UNHCR Plan of Action in its web site: <http://www.unhcr.ch>.

2. *For a more protective and global migration law*

Part of the confusion between migrants and their rights is due to the limitations and shortcomings of migration law in general and to refugee law in particular. In order to redress the situation a revision of these laws seems badly needed now.

A. *“Outside the law” migrants” and the limits of migration law*

Most migrants are not protected today because they are considered as “illegal” or “irregular”. In addition, migration law and refugee law include many shortcomings and divisions and largely contribute to the legal lacuna concerning migrants’ protection.

Mixed flows of migrants in Morocco

The present migration law is unable to protect all migrants. Migration is becoming more and more irregular and dramatic but no law exists to protect all irregular migrants. Most irregular migrants have been forced to move. If they are not all refugees and asylum seekers according to present refugee law, they are people who have been driven from their homes by general violence, poverty and human rights violations. They all move together in search of protection. Most undocumented migrants are treated as illegal aliens and few among them are able to prove that they deserve international protection as refugees and asylum seekers. Mixed flows of sub-Saharan migrants in Morocco could be a very good example of this lacuna in migrants’ protection.

A colloquium organized in Rabat from 10 to 11 December 2007 by a Moroccan NGO “*La Fondation Orient/Occident*” in collaboration with the UNHCR office in Rabat addressed the problem of migrants’ protection in mixed flows. The meeting brought together many academics and institutions working on migration and refugees and aimed to provide information on the situation of migrants and refugees in Morocco and to develop cooperation between the various institutions working with migrants in the country²⁴.

The report of this meeting stressed the fact that because of its strategic geographical position, the present socio-economic situation of the African continent (the sub-Saharan countries notably) and the closure of the European borders for southern migrants, Morocco has become since 1990 a country of all types of migration. It has become particularly “an imposed” destination country for sub-Saharan irregular migrants transiting via Morocco to get to Europe. Some **10,000** illegal migrants live in Morocco now. Most of them come from Africa south of the Sahara. The UNHCR Representative stated at the meeting that some 6000 asylum seekers have presented their claims for refugee status and that some 725 among them obtained this status. Morocco finds it difficult to manage these mixed flows of migrants: few of them have

²⁴ The UNESCO Chair “Migration and Human Rights”, the Moroccan NGO “Migrations and the Law” and the Network of Moroccan Experts on Refugee Law were represented at this meeting by Professor K. Elmadmad who gave a presentation in French on “*Mixed Flows and the Protection of Refugees in Morocco*”.

pure economic motivations and most of them are fleeing general violence and persecution. All enter Morocco illegally and it is quite difficult to distinguish between asylum seekers in search of international protection and economic migrants considered as “irregular migrants. The UNHCR office in Rabat is facing many problems and difficulties because of these mixed flows”.

Many sub-Saharan migrants live unprotected and unassisted in Morocco. Some of them have set up “waiting migration camps” in northern and southern Morocco where they try to shelter waiting for the opportunity to cross illegally to Europe. Some of them live on begging in the streets of Moroccan towns.

The silence on irregular migrants and on their rights

The reality is that most irregular migrants do not intend to stay permanently in Morocco or enjoy refugee status in the country. Most of them want to migrate to Europe²⁵. But the European definition of a refugee is stricter than the African one and most of them cannot claim refugee status when they succeed in reaching Europe. Most of them are either expelled or live unprotected in Europe.

Silence about irregular migrants and their rights is one of their main characteristics. Irregular migrants face exploitation, lack of protection and injustice during all the stages of their migration: when leaving their countries of origin, when crossing illegally to Europe and even when they succeed in reaching Europe. **Shocking** actions are taken even on the high seas to deter refugees and migrants from entering their destination countries.

The sub-Saharan “boat people” and deaths in the sea have become common phenomena in both Morocco and Spain. But silence about them and their rights is prevailing in both countries and continents. Silence of the authorities managing migration (ignoring them sometimes and expelling them periodically), silence on the part of NGOs (limited in their action by the legal silence on irregular migrants) and silence of the migrants themselves who often refuse to talk about their experiences and who live with a constant fear of imprisonment or deportation.

During the Rabat colloquium on mixed migration flows, the UNHCR Representative called for a better knowledge of refugee and migration law by both the migrants and the persons managing migration in order to protect “genuine” refugees and asylum seekers. The issue of irregular sub-Saharan migration could partially be solved, in theory, by applying some international legal instruments ratified by Morocco, such as the African 1969 refugee Convention or the 18 December one protecting all migrant workers. But, in fact, none of these instruments are used to protect “outside the law” migrants. A few arguments are sometimes used to justify this lack of protection such as the fact that Morocco is no longer a member of the African regional Organisation and can no longer use African legal instruments or that most illegal migrants living in

²⁵ This was quite obvious from the November/December fieldwork and from a few studies conducted on illegal migration in Morocco. More than 80% of the sub-Saharan migrants state that they are only transiting via Morocco to go to Europe.

Morocco are not migrant workers and the 1990 Convention could not be applied to them²⁶.

The reality is that neither migration nor refugee law are able to protect the majority of migrants, who stay outside the law. There is an urgent need now to rethink both laws and adapt them to the present situation. The legal silence on irregular migration should definitely be addressed with the objective of protecting “unprotected migrants”.

B. *The need for a more humane and homogenous migration law*

There is an urgent need now to reformulate migration law and all its branches and to restructure the institutions in charge of migrants.

Rethinking migration law and its branches

Migration law and migrants' rights are now out of date, selective and not homogenous. In some cases, universal refugee law is less protective than the regional, and migrant workers' law is applied only in few situations and for few workers. That is why a revision of laws, concepts, definitions and actions seems necessary.

From refugee law to forced migration law

As it exists today, refugee law is guaranteeing protection for very few “privileged forced migrants”. A bureaucratic and quite expensive UNHCR is taking care of very few forced migrants.

As incorporated in the 1951 refugee Convention, universal refugee law includes a few shortcomings and limitations. Many forced migrants are excluded from protection, such as the Palestinians living the Middle East, or internally displaced persons who have not crossed international boundaries. Thus, according to article 1 paragraph D of the Geneva 1951 Convention, refugee law “*shall not apply to persons receiving from organs or agencies of the United Nations other than the United High Commissioner for Refugees protection or assistance*”. That is why the Palestinians receiving assistance from the United Nations Relief and Work Agency for Palestinians in the Near East (UNRWA) are not entitled to refugee protection. But UNRWA is a relief and not a protection agency and Palestinians have been suffering difficulties in getting official documents such as travel documents. Furthermore, according to the 1951 Convention, persons who have been displaced forcibly inside a country or who were stopped from crossing these boundaries cannot present their claims for international protection, even when no state is protecting them. No binding legal instruments protect internally displaced migrants except for the general guidelines on Internally Displaced Persons, enacted in 1998 by the UN special Representative Francis Deng for the UN Human

²⁶ It is true that Morocco left the OAU in 1983 and that most irregular migrants living in Morocco are not migrant workers, but Morocco has never yet renounced any ratified African legal instruments and some sub-Saharan migrants are working informally in the country.

Rights Commission. These guidelines lay stress more on assistance than on protection²⁷.

In addition, some stipulations of the Geneva Convention are in contradiction with some fundamental human rights such as the right to non discrimination or to equality between men and women. For example, article 12 of the Geneva Convention relating to personal status stipulates that:» *The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence*”. These stipulations do not favour refugee women living in asylum states where there is no equality between sexes. For example, a fieldwork conducted in Sudan in 1992 showed that a Moslem Ethiopian refugee woman was sanctioned for marrying a Christian man because the Sudanese personal status law does not allow such a marriage, while the law of her country of origin permits it. In Morocco, a Russian refugee woman could not enjoy the inheritance will left by her husband leaving her the totality of his inheritance. She was granted only 1/8 of this inheritance in conformity with the Moroccan personal status²⁸. Furthermore, some solutions for refugee problems included in the Geneva Convention seem difficult to implement now such as Voluntary repatriation which has become in some cases mere “*involuntary repatriation*”²⁹.

The protection granted by universal refugee law seems then quite exclusive of many forced migrants and notably of the most vulnerable among them.

The universal definition of refugees is stricter than the African or the Latin American ones and limits the protection granted to forced migrants. Persons considered as refugees and asylum seekers in Africa or Latin American are not entitled to protection in other continents and are considered as simple illegal migrants who should be expelled.

All these shortcomings and limitations call for a revision of universal refugee law, making it more global and really universal. Refugee law also needs to be updated, taking into consideration the present reasons forcing migrants to seek protection elsewhere. It could take the name of forced migration law, in order to include all forced migrants.

Refugee law cannot be applied to all asylum seekers today. Few of them are now seeking protection because they face persecution because of race, religion, nationality, membership of a particular social group or political opinion. Most migrants are forced to flee their home now because of other reasons.

For a more humane and protective migration law

Most migrants are moving today because of one main reason: underdevelopment. We speak now of a global development for all: “*human development*”. The right to

²⁷ See K. ELMADMAD, *Asile et Réfugiés dans les pays arabes*, pp. 146-147.

²⁸ In a judgment rendered on 16 December 1980, the Rabat Appeal Court has assimilated refugees living in Morocco with Moroccan citizens in the field of Personal Status and has refused the will of a refugee permitting his wife to inherit the totality of his inheritance; See the above reference, pp. 361- 362.

²⁹ Cfr. *Ibidem*, pp. 363-367; see on repatriation, M. ZIECK, *UNHCR and Voluntary Repatriation of Refugees*, The Hague, Boston and London 1997.

development is a human right; it could be economic, political, social, or even cultural development as was asserted rightly by the UN High Commissioner for Refugees during the Rabat migration conference in July 2006:

«..., I believe that the notion of development should be interpreted in a broad and inclusive sense, and not as a simple synonym for economic growth. In this context, allow me to remind you of the definition that is to be found in the UN Declaration on the Right to Development, which states that the right to development is an inalienable right, by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized».

He added:

«..., it is precisely because they are unable to exercise their right to development that so many people – including migrants who are looking for a better standard of living, and refugees who are looking for safety and security – feel obliged to leave their own country and move elsewhere».

Because most migrants move now to guarantee their right to development, we wonder if we should keep on differentiating between them. A global answer to their global cause of migration could be a global migration law.

As most migrants are moving now because of human rights violations, migrant law should then become more humane, taking into consideration the present causes of their migration.

The two main branches of migration law: the branch organising migration and the protection of migrants branch could be kept apart. But the second branch should become protective of all migrants and not only a few of them. The legal silence on irregular migration could be replaced by a dialogue between those managing migration, those sending migrants, those hosting them and the migrants themselves. A global and comprehensive instrument on migration could break the legal silence on irregular migrants and could include stipulations protecting all forced migrants and not only some few “privileged refugees”.

Because of all the changes that took place in migration movements, it has become necessary to homogenize the laws but also the procedures and the management of migration. New solutions could be found for stopping illegality and promoting legality. For example, circular migration is one of the means found by Europe to stop irregular migration. Circular or temporary migration agreements could be signed by the countries of origin and of destination and could reduce irregular migration. But, these agreements should definitely take into consideration migrants' rights. As mentioned above, some circular migration agreements signed recently between Morocco and Spain are quite selective and exclusive of some fundamental rights of migrants (such as the right to family reunification or to freedom of movement).

Restructuring the institutions in charge of migrants and unifying their actions

Various international institutions aim to protect or assist migrants. Some work at the universal level and others at the regional one. Among these institutions, we could mention: the United Nations High Commissioner for Refugees (UNHCR), which is in charge of the international protection of refugees, the International Labour Organisation (ILO), which protects migrant workers, the United Nations Relief and Work Agency for Palestinians in the Near East, which assist the Palestinians and the International Organisation for Migration (OIM), which operates for all types of international migration. In addition, some other United Nations agencies also deal with migrants, particularly the human rights agencies³⁰. Some international non-governmental organizations also work on migration and with migrants such as Amnesty International or the International Federation of Human Rights.

At the national level, there are also some specialized and non-specialized institutions working with migrants. In Morocco for instance, various governmental bodies are in charge of them: the Ministry of the Moroccans Residing abroad, the Hassan II Foundation, the Mohamed V Foundation, the Consultative Council for Human Rights, the Ministry of Human Rights first and the Council for the Moroccan Community Residing abroad very recently. In addition, some Moroccan and foreign NGOs also work on migration issues in the country.

Very often these different institutions are duplicating work. Some of them spend more money on their bureaucratic administration than on assisting or protecting migrants. For example, UNHCR statistics show that in some cases less than 1% of claimants would get refugee status. This leads us to ask the following question: do we need such an expensive and bureaucratic international organisation for the protection of such a very small number of migrants?

It has become necessary to unify action and to save effort and money. This might be achieved by creating national and international “supra migration institutions” which will replace the various existing ones. The new global institutions could be in charge of all kinds of migration and migrants. This would facilitate action and favour the protection of migrants.

An umbrella migration institution could break the silence relating to irregular migrants, voice their claims and find solutions to their problems.

3. Conclusion

The informal and irregular international movements of migrants seem to exceed and, thus, undermine the universalism of the UN vision of human rights and freedom. Not all migrants are entitled to Human rights protection now. Many of them are considered as a threat to security and should be excluded from protection. Some states are resorting to highly sophisticated and computerised methods to fight illegal migration such as fingerprinting or DNA tests. The UNHCR is also resorting to the same

³⁰ For more details on these institutions and their work with migrants see the following web sites: <http://www.unhcr.org>; <http://www.ilo.org>; <http://www.iom.int>; <http://www.unhchr.ch>; <http://www.unesco.org>.

methods for selecting refugees and determining the status of these “privileged forced migrants”. But selection would not stop those forced to move from moving in order to look for safety. Despite all the controls, migrants will go one moving side by side and heading north.

The problem of mixed and irregular movements is not the sole responsibility of states located south of the Mediterranean Sea. Refugees, asylum seekers and migrants will continue to enter Europe. Indeed, the logic of globalization and demographic change is such that their numbers seem certain to increase in the years to come. It is essential to take this reality into consideration in all efforts to address this issue.

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