

Juridical Response to Mixed and Massive Population Flows

By

Christoph Tometten *

International movement of people is caused and influenced by a variety of factors. It can result from coercion or choice. It can be linked to a lack of civil and political rights, the typical case of persecution under the 1951 Convention relating to the Status of Refugees, or to a lack of economic and social rights. It can result from conflict and state failure, economic collapse and poverty or the simple wish to pursue personal happiness elsewhere. Typically – that is the challenge – several factors cause and influence international movement of people at the same time. A fleeing person might face religious discrimination and still hope for better employment opportunities; a migrating person might want to live with relatives and still be caught in trafficking networks.¹ Additionally, many people do not move alone but within broader movements.² This leads to this paper's subject: mixed and massive population flows, and how to handle them without infringing international law.

First, the notion must be clarified. While there is no internationally binding legal definition of mixed and massive flows, there has been much debate on the issue.

The International Organization for Migration (IOM) defines mixed flows as “complex population movements including refugees, asylum seekers, economic migrants and other migrants”³; they occur when population movements include migrants not placed under protection by international legal instruments, and people eligible for such protection, asylum seekers and refugees within the scope of the 1951 Convention or regional instruments⁴, victims of human trafficking⁵, or unaccompanied minors.⁶

The notion of massive flows, though a commonplace in political discourse, does not dispense with a definition either. As for mixed flows, no internationally binding definition is available; the phenomenon is not dealt

* LL.M. (Köln/Paris I) Berlin, Germany
Refugee Watch, 39 & 40, June and December 2012

with in the 1951 Convention. Massive influx is mentioned in the 2001 EU Temporary Protection Directive, though, as the “arrival (...) of a large number of displaced persons, who come from a specific country or geographical area” (Article 2d). The required number is not absolute but depends on whether the receiving state is able to ensure individual status determination as prescribed under the 1951 Convention, or not. Massive influx is ascertained, case by case, if the existing asylum procedures are unable to deal with the magnitude of the influx.⁷

In theory, massive flows are not identical with mixed flows, as not all massive flows necessarily include people eligible for international protection. In practice, however, challenges are similar: under international law, states are bound to grant protection to specific people, and their determination is made substantially more difficult if people move in mixed flows so massive that usual recognition procedures cannot be applied meaningfully.

That shows that mixed and massive flows indeed call for comprehensive juridical response. An easy response compliant with international law would be that states grant equal protection compliant with the highest standards to all foreigners indiscriminately. The problem is not that some standards cannot be meaningfully applied to all foreigners (for instance, some clauses of the 2000 Protocol only make sense if applied to trafficked persons) – they can be interpreted and applied accordingly. The problem is that states are unwilling to act in such a hospitable manner.⁸ We will therefore analyze the existing juridical framework for mixed and massive flows and examine critical voices regarding the status quo.

The Juridical Framework

International Requirements and Recommendations

We will limit our analysis to the approach to mixed and massive migration by the major international agency dealing with vulnerable people on the move, the United Nations High Commissioner for Refugees (UNHCR). To provide international protection to refugees (Article 1 UNHCR Statute) became increasingly difficult in the 1990s, when many states switched from a traditionally liberal approach to asylum to a more restrictive asylum and immigration regime. Therefore, UNHCR held Global Consultations on International Protection in 2000 to “explore how best to revitalize the existing international protection regime while ensuring its flexibility to address new problems”.⁹ This led to the states' endorsement of the 2001 Agenda for Protection, a guide for concrete action. It addresses, among others, the protection of refugees within broader migration movements:

UNHCR's clearly defined responsibilities for refugees and other persons of concern do not extend to migrants generally. It is, at the same time, a fact that refugees often move within broader mixed migratory flows. The insufficiency of viable, legal migration options is an added incentive for persons who are not refugees to seek to enter countries through the asylum channel, when it is the only possibility effectively open to them to enter and remain. It is important, given not least the effects on and risks to them, that refugees receive protection without having to resort to a criminal trade that will put them in danger. There is therefore a need to achieve a better understanding and management of the interface between asylum and migration, both of which UNHCR should promote, albeit consistent with its mandate, so that people in need of protection find it, people who wish to migrate have options other than through resort to the asylum channel, and unscrupulous smugglers cannot benefit through wrongful manipulation of available entry possibilities.¹⁰

UNHCR identifies seven objectives to improve this situation: better identification of and proper response to the needs of asylum seekers and refugees; strengthened international efforts to combat human smuggling and trafficking; data collection and research on the asylum-migration nexus; reduction of irregular and secondary movements; dialogue and cooperation with other actors; awareness campaigns on legal migration opportunities and the dangers of smuggling and trafficking; return of persons not in need of international protection.¹¹

These objectives were substantiated in the 2006 UNHCR 10-Point Plan of Action on Refugee Protection and Mixed Migration and the subsequent Dialogue on Protection Challenges, a "flexible, non-directive consultation between the High Commissioner and States (...) convened, at the High Commissioner's initiative, to permit discussion of special, novel or sensitive protection-related matters".¹² The Plan of Action identifies protection gaps and key areas where UNHCR might be involved. Affirming that "a more coherent and comprehensive"¹³ approach to mixed migration is necessary to ensure that vulnerable people be protected, UNHCR stresses that this might only be possible through cooperation of governments, international agencies and non-governmental organizations (Point 1). It is also reliant on the collection and analysis of data concerning humans flows and individual movement (Point 2). At the borders – whose controls are deemed necessary to combat international crime and avert security threats – so-called protection-sensitive entry systems guaranteeing respect of the principle of non-refoulement and maritime law, inter alia through the training of border security forces, should be installed (Point 3), reception arrangements including the provision with temporary documentation made (Point 4) and mechanisms for profiling, referral and differentiated procedures guaranteeing appropriate counseling implemented (Points 5 and 6). UNHCR calls for a comprehensive consideration of all options for refugee protection, reiterating its commitment to voluntary repatriation as a primary tool, followed by local integration and, in last resort, resettlement in

third countries (Point 7). It further asserts that asylum should primarily be sought and granted in countries of first refuge, readmission processes eased and flight as such wherever possible contained (Points 8 and 9). These aims should be facilitated by information campaigns in regions of origin, transit and arrival that highlight risks, danger and difficulties of international movement (Point 10).

If the Plan of Action is not really progressive, it is because of its nature: it does not aim to improve the situation of international migrants, as such an approach would require states' consent. Rather it gathers existing international law relating to mixed flows in one single document, in order to make states' obligations more apparent and provide states with a framework for action. It is thus understandable that it basically reiterates the obligations any informed person would deem to be self-understood. However, the Plan of Action emphasizes the principle of non-refoulement, which forbids states to send back people to a state where they would be at risk due to their race, religion, nationality, social group membership or political opinion.¹⁴ But: how to enforce this principle when individual status determination is impracticable?

A common means of protection in situations of mass influx advocated by UNHCR and in fact more widely used than individual status determination is *prima facie* recognition on group basis, i.e. the recognition not of the individual claim to asylum but of the apparent situation in the country of origin. *Prima facie* recognition ensures admission to safety and basic protection while allowing States to postpone the final status determination under the 1951 Convention.¹⁵

Another means of protection in such situations is to grant temporary protection to all asylum seekers regardless of the justification of their claims and to guarantee minimum standards of treatment.¹⁶ According to UNHCR, these standards should include non-discriminatory provision of adequate reception facilities, provision of assistance or access to employment, access to basic healthcare and education for children, access to justice, freedom of movement, the possibility of family reunion and tracing of missing family members.¹⁷ Temporary protection also allows to postpone the final status determination. Protection is temporary as it ends with the examination of an individual claim, regardless of its positive or negative outcome, but also with a fundamental change in circumstances, be it that the state becomes able to undertake the individual procedures envisioned under the 1951 Convention or that protection is not needed anymore.¹⁸

Neither *prima facie* recognition nor temporary protection are equal substitutes to asylum: the first is conceived as a provisional measure and experience shows that its beneficiaries are usually not granted the same rights as conventional refugees; the minimum standards of treatment advocated by UNHCR in case of the latter fall short of those refugees are entitled to under the 1951 Convention. Both are rather a pragmatic response

to emergencies and should remain exceptional.¹⁹ They are especially not an alternative to the protection of refugees in regions with low numbers of asylum seekers and high capacities to perform individual status determination and grant high protection levels.

To sum it up, UNHCR essentially aims at preserving the *acquis* of existing international refugee protection norms and justifies infringements on these same norms by upholding core principles such as non-refoulement. In its own words, it seeks a “balance between migration control priorities and refugee protection imperatives”.²⁰ UNHCR is bound by the decisions of the Member States and thus uneasy to be criticized for not pushing more liberal policies. It nevertheless remains objectionable that relatively weak means of protection should be adequate devices to handle mixed and massive flows.

National Implementation

Recommendations of international agencies require a national commitment to their implementation. As non-refoulement is the principle that UNHCR upholds as inviolable in the context of mixed and massive flows, State approach in this regard is of primary interest. The example of the European Union (EU) will be taken to analyze a trend towards containment observable in state action.

The principle of non-refoulement as such is widely accepted in national discourses; the problem is rather how states understand it, especially in situations of mass influx, when they tend to invoke national security to justify limitations to their international obligations.²¹ At the 1977 Conference on Territorial Asylum, Turkey declared that “non-refoulement might not be claimed in exceptional cases, by a great number of persons whose massive influx might constitute a serious problem to the security of the Contracting State”.²² Tanzania has repeatedly claimed that admission capacities authorize a state to limit its guarantee of non-refoulement; Pakistan, Ivory Coast and Tunisia have explained that an unlimited influx of people due to non-refoulement would strain their local economies and inhibit the efforts made to overcome low levels of human development.²³ Similarly, Australia warned that non-refoulement was used by economic migrants to illegitimately extend their stay.²⁴

Industrialized nations emphasize that the duty to respect non-refoulement is independent of any economic or social considerations: Responsibility-sharing, i.e. financial aid or resettlement, “must not be a prerequisite for respecting the fundamental principles of refugee and human rights law, including asylum, non-refoulement and family unity”.²⁵ Nevertheless, forms of responsibility-sharing have been implemented ad hoc on several occasions since 1979,²⁶ probably the only way to safeguard non-refoulement on an international level. The current debate on resettlement of

vulnerable refugees from the Middle East and North Africa in the EU²⁷ shows that such responsibility-sharing is not understood as a legal or at least moral obligation by industrialized nations, though. In the contrary, one witnesses a growing interest in border security issues, not only in Europe, but all over the world.

Border security policies increasingly intend to make the arrival of irregular migrants and asylum seekers more difficult.²⁸ Obvious signs for such policies are the border fences between the USA and Mexico, Greece and Turkey, India and Bangladesh.²⁹ Technical means, special agencies and military forces complement such installations. Artificial nomansland and deportation camps create *zones de non-droit* and deplace the border within the country.³⁰ But containment of population flows goes further: the attempt to outsource asylum procedures tries to legitimize the sealing of borders, arguing that obligations under international law are respected if vulnerable people can seek protection outside the national borders. Handling mixed and massive flows would then be simple, as its core challenge, international protection of vulnerable people, would have been dealt with before border-crossing takes place. The reflection on outsourcing of asylum procedures is accompanied by the development of the notion of protection in regions of origin, whose realization would make international protection unnecessary. The debate on both concepts has been particularly intense in the EU where “illegal immigration” has been subject of concern at least since the EU Commission issued its 1985 Guidelines for a Community Migration Policy, assuming that internal free movement requires tough immigration laws and external border controls.³¹ With increasing cooperation of EU member states in immigration issues, a High Level Working Group Asylum and Migration was set up in 1998 and mandated to “develop a strategic approach and a coherent and integrated policy of the European Union for the most important countries and regions of origin and transit of asylum seekers and migrants” and “to provide concrete suggestions for measures for managing and containing migration flows from these countries”.³² The 1999 Tampere Conference decided to strengthen its policies against illegal migration, integrating countries of origin and transit into a comprehensive migration control policy.³³ Outsourcing of asylum as such has been first brought up by the Austrian government in 1999 but UNHCR appropriated the idea and conceptualized it within a “three-pronged approach” to the “external dimension of European asylum policies”: the improvement of protection in countries of origin; the improvement of national asylum systems; and the setup of closed centers for the treatment of asylum claims.³⁴ In 2003, bypassing the second part of this approach, a British Paper on “New International Approaches to Asylum Processing and Protection” further elaborated the concept of protection in regions of origin. It proposed to create regional protection areas, where UNHCR would provide protection and humanitarian support to refugees. Spontaneous arrivals in destination

countries could be returned to such areas awaiting a decision on a possible controlled resettlement to other countries. Resettlement would be a device to suffice demands for burden-sharing.³⁵ The proposals did not obtain the support of a majority of EU member states, but some launched so-called pilot projects, including the setup of detention centers for irregular migrants in the vicinity of the EU.³⁶ In 2003, the EU Commission reformulated the British proposal and introduced the concept of Regional Protection Programmes. It thus operated some changes in vocabulary but abided by the concept of outsourcing. The 2004 Hague Programme listed priorities of the EU including increased cooperation with third countries in the governance of population flows, thus institutionalizing outsourcing.³⁷ It was supplemented by the 2009 Stockholm Programme, which envisions a European Pact for Immigration and Asylum, common deportations and refugee camps in third countries, some of them already established.³⁸ It has to be recalled that the concept is also present in the aforementioned points 8 and 9 of the UNHCR Plan of Action, which demand the settlement of refugees in countries of first refuge and the containment of flight.

Outsourcing of asylum procedures and protection in regions of origin thus remain powerful concepts in the discourse of the EU: Today, there are hardly any European development aid, reconstruction, trade or technical cooperation negotiations or agreements that do not include a paragraph on illegal migration and readmission policies. Immigration concerns, notably over irregular migration are embedded in many other policy fields and represent a driving force in the development of a common European Union migration policy and a potentially global regime.³⁹

This is the background for the implementation of international recommendations concerning mixed and massive flows. The EU endorses non-refoulement but seeks to limit it wherever possible. It fits in the picture that the concept of temporary asylum advocated by UNHCR has been developed in this world region, not because of real pressures due to population flows (with the possible exception of refugees from Bosnia-Herzegovina in the 1990s, to whom the concept was applied), but more so because of imaginary pressures alimeted by a xenophobic discourse.⁴⁰ The concept of temporary asylum was implemented unionwide with the 2001 Temporary Protection Directive that regulates the distribution of asylum seekers on the member states in case of massive influx (the normally applicable Dublin II Regulation gives competence to the state of entry for the procedure). This is conditioned to a qualified majority establishment of mass influx by the EU Council (Article 5). Temporary protection is first granted for a year and may be automatically prolonged twice for six months if the EU Council does not declare the end of the protection. It can be prolonged for another year if the EU Council decides so with a qualified majority (Article 4). The 2001 Directive authorizes member states to provide that temporary protection inhibits the refugee's individual asylum request to

be processed for the duration of the protection (Article 19). Temporary protection falls short of providing the refugee with the same rights as a refugee (Articles 9 to 16).⁴¹

The implementation of the international recommendations to address mixed and massive flows is not sufficient from a human rights perspective. We will therefore address the criticism of the governmental approach and the underlying assumptions of the concerned international agencies.

Critical Voices

Critics of the governmental and international approach to mixed and massive flows fear that progress in human rights be jeopardized by a securitarian approach and that UNHCR's involvement in the countries of origin is in fact a containment strategy that devalues the concept of asylum. This will be discussed before highlighting alternatives and solutions to the existing juridical response to mixed and massive flows.

A Securitarian Approach: Towards a System of Containment

Unlike the 1951 Convention in its original conception, which put the protection of the individual at its core, the asylum regime is increasingly entrenched with state interests related to national security which – it is asserted – is threatened by immigration and especially the uncontrolled immigration of asylum seekers. Governments have sought to escape from their obligations under international law, as described above. Especially industrialized nations lead a double discourse, well illustrated by the EU accession process of Turkey. The accession candidate is expected to reform its laws on refugee protection according to EU rules but at the same time asked to fight irregular migration. The emphasis on the latter jeopardizes the progress made by Turkey in questions of human rights over the past years. For instance, Turkey had to criminalize human smuggling, put up strict border controls and negotiate readmission agreements with countries of origin.⁴² That the EU expects its applicants for membership to implement its own policies is not surprising. But, although the EU pretends to give as much importance to its humanitarian obligations as to its own security, the Turkish accession process shows that the securitization of immigration issues plays the forefront role while concrete proposals on protection widely lack. Turkey, a state with borders to some of the world's most troubled areas, is a country where mixed and massive migration actually exists not only in the discourse of populist politicians. However, there is no mechanism for burden-sharing between the EU and Turkey and no talk about such an instrument; rather, the EU substantially funds the efforts of its member state Greece to tighten controls of its external borders.⁴³ Thus,

the EU (and other industrialized nations) resorts to burden shifting, not sharing.⁴⁴

That states refer to their security in order to infringe on rights is nothing new. That an international agency, which should be committed not to the policies of a minority of rich members but to the whole international community, becomes accomplice in this, is to be examined more in detail.

It has already been demonstrated that UNHCR participates in drafting a system where asylum procedures could be outsourced. Doing so, UNHCR transcends its humanitarian mission and becomes a political body which, unsurprisingly, tends to promote the political programs of its main contributors. Their pressure allows UNHCR to use the humanitarian frame to get involved with the situation in the countries of origin. When an agency responsible to protect people on the move gets involved with domestic policies of countries of origin, this inevitably aims at preventing the movement of the people it ought to protect. Nothing against preventive policies, but if people susceptible to move are prevented to do so, they are also taken away from the scope of UNHCR's protection. The agency thus withdraws people from its own protection. Several facts underpin this assumption: the growing interest of UNHCR with the protection of internally displaced people; the emphasis on repatriation and reintegration policies. All these activities are not evil per se; all of them might improve living conditions for their beneficiaries. The question is whether such activities should be undertaken by an agency created to protect people seeking international protection, not to improve the situation in their home countries. All this explains why UNHCR has been criticized for threatening refugee rights through its involvement in issues beyond the core of its mission, for its implication in the creation of an international system of containment persistent with the policy objectives of destination countries that does not prevent but rather hinders flight and cross-border movement. Humanitarianism, originally a tool limiting state sovereignty, is thus perverted into a tool strengthening the sovereignty of rich nations to the disadvantage of developing nations and, above all, people on the move. Humanitarianism finally becomes an enemy of refugee rights that it was to protect and promote.⁴⁵ This shift takes us back to the underlying reasons for the concept of asylum outsourcing. To legitimize restrictive asylum policies, governments resort to a simple switch in signification: instead of understanding asylum as a right, they define it as a state prerogative, thus allowing for its use against asylum seekers. Outsourcing of asylum procedures, as one example for the international system of containment, thus appropriately translates the "great reversal of asylum"⁴⁶ against the people on the move. The claim that "the Convention is a refugee protection instrument, not a migration instrument"⁴⁷ cannot deflect from the fact that UNHCR is accomplice of such policies and thus abandoning its mission to

protect refugees to transform it in a “vague humanitarian and moral intention”⁴⁸, dependent of security-driven policies.

Alternatives and Solutions

Still, it is not enough to criticize governments and international agencies for their security-driven approach of mixed and massive flows and their declared or implicit commitment to a system of containment. One must also find alternatives to such an approach, formulate proposals for a different solution, more compatible with the rights of vulnerable people.

We have seen that the security-driven approach tends to ignore the international guarantees for vulnerable people, with the dubious argument that this is the only way to guarantee the core principle of international protection, non-refoulement. The trade-off that leads to temporary asylum and prima facie recognition weakens the rights vulnerable people are entitled to. However, stressing the importance of national sovereignty and making security the supreme principle of state action does not allow for another discourse. The discourse will not change for better if its underlying assumptions are not questioned.

This is not a call for revolution. The existing system allows a different understanding⁴⁹ if it is centered around concepts so far ignored in governmental discourse. To do so, a democratic analysis of borders detached from sovereignty is necessary. That allows for the development of global freedom of movement and rights-centered asylum as a realistic alternative to the status quo. They are not anarchic fantasies but powerful concepts on which the debate has to concentrate.

In the dominant discourse, the border is a central symbol of sovereignty, its violation the archetype of aggression and its function restricted to the control of (human) movement.⁵⁰ Protection-sensitive entry systems as proposed in Point 3 of the UNHCR Plan of Action implicitly legitimize this view. But borders can also be understood differently. Rather than fences, borders are above all demarcations of spaces for democratic deliberation and the rule of democratic laws.⁵¹ The advantage of such an understanding of borders is that it does not demand their abolition, a rather utopian claim with complex implications. It rather links them to democracy instead of *raison d'état*, thus overcoming the state-centric security-driven approach to population flows.

If borders are understood as demarcations and not control mechanisms, the way is open to reconsider global freedom of movement and its necessary correlative, a right to long-term installation⁵². In times of massive state action hindering international movement of people, while international movement of goods and capitals is widely facilitated⁵³, one witnesses a bias in state discourse that neglects “counter-discourses of legitimacy” underlying population flows:

Many unauthorized labour aliens maintain that their actions are justified because of an unalienable right to migrate... Arguments to the effect that migration is a basic human right that transcends the principle of national sovereignty turn illegal migration into a morally justified act.⁵⁴

Even though global freedom of movement inserts itself quite well in the globalized world order, which it would make more humane, it has been belittled as an utopian, vaguely leftist fantasy for long. The French *Groupe d'Information et de Soutien aux Travailleurs Immigrés* (GISTI) has made a powerful demonstration that this is not the case.⁵⁵ It affirms:

In the context of a liberal globalization assumed to be self-regulatory but actually outsourcing its costs to grounded populations deprived of fundamental rights, freedom of movement with equality of rights appears as the only equitable manner to allow any person to escape from the determinism of his birth.⁵⁶

If global freedom of movement is obviously not guaranteed under international law, it is neither totally alien to international law. For instance, the *Institut de droit international*, in 1892, stated that admission of aliens is not an exclusive competence of the state but a topic of international law:

Free entry of aliens to the territory of a civilized state cannot be prohibited in a general and permanent manner unless for extremely serious motives compliant with public interest.⁵⁷

More recently, the United Nations Development Programme (UNDP) elaborated a positive approach of migration, which it considers as a normal process, a natural expression of general personal liberty. It therefore called upon governments to refrain from limiting movement. The main argument is a triple-win formula: industrialized destination countries would gain manpower and contributors to their welfare systems; countries of origin would gain remittances, knowledge and an appeasement of their saturated employment markets; migrants would obtain a better quality of life determined by their choice. UNDP, however, does not address freedom of movement explicitly: although it frequently alludes to notions of aperture and liberty, it never discusses the merits of their complete realization. If there are, of course, political reasons for this omission, it is still noteworthy that freedom of movement is not explicitly rejected neither.⁵⁸

Global freedom of movement would accomplish comprehensive globalization beyond mere globalization of markets linked only to the interests of the privileged few, a globalization of opportunities respecting people's rights and interests.⁵⁹ Critics, however, object that the discourse on global freedom of movement, is not only vowed to remain *lettre morte*, but also that it would also abolish asylum, a concept that might not be a solution for all people on the move but which has been able to protect some. It is therefore important to explain how global freedom of movement is not opposed to the protection of the oppressed.

Asylum can be understood in two ways. While a sovereignty-centered asylum allows a state to decide whether a person can enter or not

its territory, a rights-centered asylum links asylum to freedom of movement.⁶⁰ A sovereignty-centered vision understands asylum as derogatory to state sovereignty, a mere exception that should occur as rarely as possible. Asylum as a state prerogative is easily linked to security issues and assumed economic needs. Asylum thus becomes a migratory flow among others. The challenge of asylum, from this perspective, is that it does not fit with policy objectives of “chosen immigration”, a powerful paradigm of contemporary immigration policies.⁶¹ While sovereignty-centered asylum has become hegemonic in the state approach to asylum, a rights-centered asylum is compliant with the spirit of the 1948 Universal Declaration on Human Rights, whose Article 13 mentions freedom of movement, albeit in a reduced form: if it does not include the right to enter foreign countries, Article 14 provides it to asylum seekers. Global freedom of movement is rooted in the Declaration and participates in its function as a normative policy frame. If asylum is placed in the context of freedom of movement, the latter will not harm asylum, but rehabilitate and strengthen it.⁶²

What is the outcome of these reflections for a juridical response to mixed and massive flows? It has been demonstrated that, from a juridical perspective, mixed and massive flows challenge today's world order because they may include vulnerable people to whom states owe protection under international law. The juridical response to mixed and massive flows thus has to determine how this protection can be guaranteed. UNHCR affirms that it is enough to guarantee non-refoulement and proposes instruments to do so in an organized manner, temporary asylum and *prima facie* recognition. It accepts, however, that the beneficiaries of non-refoulement are not granted rights as provided to refugees under the 1951 Convention, as long as minimum standards are respected. States implementing these UNHCR recommendations seek to minimize their responsibility even further. Non-refoulement is not seriously questioned as a principle but strategies of containment are pursued zealously. Through the outsourcing of asylum procedures and the concept of protection in regions of origin, states do not only undermine asylum as such, which implies a minimal liberty to cross international borders, but it also weakens the minimum standards that UNHCR calls for to make a weaker international protection acceptable. Instead of opposing such developments, UNHCR appropriates this securitarian approach and thus becomes accomplice in the setup of a system of containment. This shows that the approach taken by UNHCR (and other international agencies) is not sufficient for a protection of vulnerable people within mixed and massive migration flows; a response that does not ensure respect of international protection cannot be an adequate juridical response. The alternative, global freedom of movement, is a concept compliant with international law and does neither require the abolition of borders nor the suppression of asylum. Beyond the protection of asylum seekers and refugees, it can be expected that it would crush smuggling and trafficking of

human beings to a large extent, as legal means to cross borders would be readily available. Global freedom of movement should thus no longer be ignored as a humane and just alternative to containment strategies.

Notes

1 On the factors causing and influencing international movement of people: Florina Benoît, “Economic Migration and Family Separation”, *Alliance News* n° 33, July 2010, p. 39; Kelly T. Brewer and Deniz Tükseker, “A Survey on African Migrants and Asylum Seekers in Istanbul”, 2006 (home.ku.edu.tr/~mirekoc/reports/2005_2006_kelly_brewer_deniz_yukseker.pdf, accessed 17 January 2012), p. 19; Elizabeth Colson, “Forced Migration and the Anthropological Response”, *Journal of Refugee Studies* vol. 16 n° 1, 2003, p. 2; Michael M. Hethmon, “Diversity, Mass Immigration, and National Security after 9/11 – an Immigration Reform Movement Perspective”, *Albany Law Review* vol. 66, 2003, p. 407; Jackie Pollock, “The Migrant Worker, The Refugee, and The Trafficked Person: What's in a Label?”, *Alliance News* n° 33, July 2010, p. 19.

2 Julien Brachet, “Migrations transsahariennes – Vers un désert cosmopolite et morcelé (Niger)” (Bellecombe-en-Bauges: Croquant 2009), pp. 8-9. It must be noted, though, that the discourse of massive migration can also serve populist purposes: “despite fears of massive migration from the countries in transition after 1990, the net migration rate into the EU, relative to population, has actually been about half of that into North America in the last decade”, see Robert E.B. Lucas, “International Migration Regimes and Economic Development”, May 2004 (www.un.org/esa/population/meetings/thirdcoord2004/P22_AnnexIII.pdf, accessed 17 January 2012), p. 148.

3 IOM, MC/INF/294, 7 November 2008, p. 2; IOM, MC/INF/297, 19 October 2009, p. 1.

4 The 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa; the 1984 Cartagena Declaration on Refugees, the Common European Asylum System.

5 The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

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- 8 Samaddar (2001); Samaddar, “The Cruelty of Inside/Outside” in: Pradip Kumar Bose, “Refugees in West Bengal” (Calcutta: MCRG 2001), pp. 200-204.
- 9 UNHCR, “Agenda for Protection”, October 2003, p. 5.
- 10 UNHCR (2003), p. 46.
- 11 UNHCR (2003), pp. 47-51.
- 12 Concept Paper on the “High Commissioner’s Dialogue on Protection Challenges”, 30 July 2007, p. 1.
- 13 UNHCR, Plan of Action on Refugee Protection and Mixed Migration, revision 1, January 2007, p. 1.
- 14 On non-refoulement: Goodwin-Gill/Jane McAdam (2007), pp. 201-284; UNHCR (2006), p. 33.
- 15 Global Consultations on International Protection (2001), pp. 1-3; Richard Stainsby, “UNHCR and individual status determination”, *Forced Migration Review* n° 32, p. 52; UNHCR/IPU (2001), pp. 53-54.
- 16 Executive Committee Conclusions Nos 5 (1977), 15 (1979), 19 (1980), 22 (1981), 74 (1994), 85 (1998); Global Consultations on International Protection (2001), pp. 3-4; Barutcisky (2004), pp. 231, 290-293; UNHCR/IPU (2001), p. 56.
- 17 UNHCR/IPU (2001), p. 56.
- 18 Global Consultations on International Protection (2001), p. 4.
- 19 Barutcisky (2004), p. 290-291.
- 20 UNHCR (2003), p. 47.
- 21 Goodwin-Gill/McAdam (2007), pp. 218, 336; Susan Kneebone, “The Trafficking-Refugee Nexus: When return and reintegration become refoulement”, *Alliance News* n° 33, July 2010, p. 24; Samaddar, “The Marginal Nation – Transborder Migration from Bangladesh to West Bengal” (New Delhi: Sage 1999), p. 19.
- 22 Quoted after Goodwin-Gill/McAdam (2007), p. 242.
- 23 Goodwin-Gill/McAdam (2007), pp.338-339.
- 24 Goodwin-Gill/McAdam (2007), p. 221.
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instance, France did barely ever request an asylum seeker to prove its individual persecution (Karen Akoka, “L’archétype rêvé du réfugié”, *Plein droit* n° 90, October 2011: www.gisti.org/spip.php?article2441, accessed 17 January 2012).

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