

HUMANITARIAN ALTERNATIVES

“The priority for States must be to save lives”

Idil Atak • Docteur en droit, spécialiste des migrations

The latest report from the United Nations High Commissioner for Refugees (UNHCR) paints a damning picture of the situation of migrants around the world. It reinforces the observers' view that the migrant crisis in Europe is only the tip of the iceberg of a global phenomenon and almost systematic repressive policies. As a recognised specialist, Idil Atak answered the questions of Canadian researcher Yvan Conoir before the latter shed light on the UNHCR's doctrine and actions regarding the detention/retention of migrants, especially minors.

Humanitarian Alternatives – *The figures given in the latest UNHCR report¹ show a significant increase in forced migrations across the world. In your opinion, what are the key sustainable trends identified by this report?*

Idil Atak – I noted three important issues that should be raised on the basis of this report. Firstly, a significant increase in the number of people forced to leave their place of residence can indeed be observed. In 2005, there were 37.5 million forced migrants in the world. In 2014, the figure was 59.5 million and it reached over 65 million in 2015. In the space of 10 years, the change is substantial. This brings me to my second point: the main causes of forced migrations remain war and persecutions. This has been a strong trend for several decades. We can also see that these causes are increasingly interconnected. Conflicts exacerbate poverty, exclusion and lack of economic opportunities. The impact of climate change can also be observed. Today, the combination of several factors uproots a growing number of people. A third point I noted in this report, which deserves to be highlighted, is the vulnerability of these populations, which are increasingly exposed and destitute. The UNHCR focuses on the situation of children: more than half of forced migrants is now made up of children, a large portion of which is known to be unaccompanied minors². In addition to these children, there is an increasing number of lone women, but also elderly people. These are populations that often suffer from both physical and psychological diseases, with specific needs that must be taken into account.

H. A. – *The evolution of the number of migrants is at the same time contextual (Syria), recurrent (migration in the Mediterranean) and durable: as an observer of the issues of displacements, what lessons should be drawn for the present and the future?*

I.A. – This is a complex question and there are several lessons to be drawn. I will mention a few of them. Firstly, the current situation shows the failure of the international community to find sustainable solutions to the major causes of forced migrations. These causes are well known: wars, conflicts, socio-economic marginalisation, climate change and lack of democracy. So the first lesson to be drawn is the need to find answers to these causes of forced displacements. But few tangible, effective, sustainable initiatives have been taken in this regard.

¹ UNHCR, *Global Trends. Forced Displacement in 2015*, UNHCR, June 20, 2016, <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>

² See, in the Reporting section of this issue, Laurence Geai's work for UNICEF with the unaccompanied minors of Calais [Ed].

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Of the world's 65.3 million forced migrants in 2015, 21.3 million were refugees (16.1 million under the responsibility of the United Nations High Commissioner for Refugees [UNHCR] and 5.2 million of the UNRWA [United Nations Relief and Works Agency for Palestine Refugees in the Near East], as Palestine refugees). Almost double that number (40.8 million) is made up of people displaced within the borders of their own countries. Of this total of 65.3 million, 3.2 million were asylum seekers. If all these people formed a state, it would represent the 21st largest population in the world.

In 2015, over 12 million people were forced to migrate because of conflicts or persecutions: 8.6 million people were displaced within their own country and 1.8 million were new refugees. The UNHCR also estimates at about 10 million the number of stateless people in the world even if a little under 4 million (3.7) were officially registered in 78 countries in 2015

Source: UNHCR report, *Global Trends. Forced Displacements in 2015*

Secondly, the existing legal instruments, which are intended to protect these populations, are not effectively implemented. After World War II, a series of international and regional legal instruments was adopted and I notice a limited capacity of States or a lack of will to implement them. Since the 1980s, Western states have been adopting increasingly restrictive policies regarding the selection of migrant workers. They reacted to the increased number of asylum seekers and irregular migrants by militarising their borders. Laws related to immigration and asylum have become repressive. This is evidenced, for example, by the introduction of biometric measurements or the increased number of detentions³ and forced repatriations of migrants. Today, clandestine migrations, such as those observed in the Mediterranean, are mixed: they include economic migrants in search of a job opportunity in developed countries as well as asylum seekers who are fleeing persecution. Yet, States and even international organizations tend to categorise them as irregular migrants. As a result, a significant number of people in need of international protection do not have access to asylum because they are intercepted during their journey, placed in detention or forcibly sent back. The best illustration is constituted by the measures that were implemented in Europe during the summer of 2015. These practices contravene the obligations of States under the legal instruments in place, such as the 1951 Convention relating to the Status of Refugees. Similar developments have been observed in Canada, under the rule of the Conservative Party. In addition to a political discourse that criminalises asylum seekers - saying they are "abusing Canada's generosity" or calling them "criminals" for example - the 2012 "reform" of the asylum system included measures such as the expedited review of asylum applications, the adoption of the so-called "safe country of origin" clause and the systematic detention of certain categories³ of asylum seekers, who are denied any right of appeal. Canada has thus been influenced by other developed countries, including the United Kingdom, Australia and the United States, which have particularly repressive policies against asylum seekers.

A third lesson to be drawn is the lack of solidarity for these populations on the part of the international community. The vast majority of refugees live in developing countries or in the least developed countries. In 2015, five countries accepted 50% of the refugees: Turkey, Jordan, Pakistan, Lebanon, South Africa. One of the durable solutions to the problems is the resettlement of refugees. But in 2015, less than 1% of the world's refugees were resettled in only 26 countries. According to Oxfam, the six wealthiest countries host less than 9% of the world's

³ At the end of this interview, see the clarification regarding the use of the term "detention".

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refugees. Canada, which resettled more than 26,000 Syrian refugees in the space of less than a year, has shown the world that more solidarity is possible and more necessary than ever.

H. A. – *Is the increasing number of refugees, displaced persons and asylum seekers leading to a review - or a request for review - of the international normative texts that govern their protection? Are we to believe - following the example of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa adopted in 2009⁴ - in an improvement, or an increase, of normative conditions for new categories of migrants (climate refugees, residents from “flooded countries” or migrants fleeing violence)?*

I.A. – That is a good question! I would first say that the 1951 Geneva Convention relating to the Status of Refugees is not only a treaty that defines who is a refugee, but also a human rights instrument that must be preserved at all cost. It is also one of the most ratified treaties in the world. So there is no need to reinvent the wheel or to renegotiate the terms of the convention. States must simply comply with their obligations. I would say the same thing for every other instrument adopted after World War II, such as the two Covenants (civil and political, economic, social and cultural)⁵. If you read these two texts, every clause they contain also applies, with a few exceptions, to refugees and irregular migrants.

The latest tool is the United Nations Convention on Domestic Workers⁶, which I consider as a very positive step, especially in view of the conditions imposed on these individuals in many countries, like Canada. We must also salute the African Union’s so-called Kampala Convention that you mentioned, which demonstrates the ability of front-line players to give themselves the legal means to obtain respect for a population that now represents twice the number of refugees worldwide⁷.

Ideas are brewing among academics for the development of an instrument to protect the rights of irregular migrants, but given the current political and economic context - especially the emphasis on security and borders - I do not think this is a possibility in the short term. It must be said that the UN has adopted various provisions for the protection of all migrant workers and their families - the UNHCR speaks of “mixed flows” - but once again, no developed country has yet ratified the convention that protects the rights of migrants, including workers in irregular situations. So objectively, there is a lack of political will that slows down the process.

H. A. – *The recent interweaving of military and humanitarian action during the Mare Nostrum rescue operation (100,000 lives saved by Italian Navy ships in 2014) has led some to say that “migrants thus intercepted become potential shipwrecked individuals who must be rescued and are no longer considered as holders of internationally recognised rights”⁸. What do you think? Could this be the emergence of a new paradigm on the issue of migration?*

⁴ Entered into force in December 2012, it is the first continental instrument that legally binds governments to protect the well-being of people forced to flee their homes by violence, disasters or persecutions [ed.].

⁵ The International Covenant on Civil and Political Rights was adopted in New York on December 16, 1966 by the General Assembly of the United Nations. It concerns the right to life, the prohibition of torture, slavery and forced labour, the right to freedom, etc. The International Covenant on Economic, Social and Cultural Rights was adopted the same day and invites the signatory States to take action in order to progressively achieve the full realization of economic, social and cultural rights protected in the Covenant, including the right to work, to health, to education and to an adequate standard of living [ed.].

⁶ The Convention concerning decent work for domestic workers was adopted by the General Conference of the International Labour Organization in June 2011 and entered into force in 2013 [ed.].

⁷ The UNHCR only started collecting statistics on displaced persons in 1994 [ed.].

⁸ Alessandra Sciarba and Filippo Furri, “Au-delà de la frontière: la Charte de Lampedusa, un exemple de réécriture des droits contre la logique de l’enfermement” [Beyond the border: the Charter of Lampedusa, an example of rights being rewritten against the logic of confinement], *Éthique publique* [online], vol. 17, no. 1, Para. 25, 2015, posted on June 18, 2015, viewed on September 26, 2016. <https://ethiquepublique.revues.org/1746>

I. A. – I think that the priority for States must be to save lives, which is both a moral and a legal obligation, under the law of the sea in this instance. But I also admit that there is a very fine line between rescue operations organised by *Mare Nostrum* or by *Frontex* and interception operations. Anyone who is rescued at sea must have the opportunity to apply for asylum and be treated in accordance with human rights obligations. The European Court of Human Rights set a very important legal precedent in 2012 with the case of *Hirsi Jamaa versus Italy*. It concerned an operation in the Mediterranean that involved around twenty individuals from Somalia and Eritrea in 2009. These migrants were intercepted and transferred to ships from the Italian Navy. Some of them were intending to apply for asylum, but did not have the opportunity to do so: naturally, there were no interpreters, no legal advisors or any other means that would have allowed them to submit their application. And they were directly sent back to Libya, where they had come from. The European Court ruled that Italy violated the migrants' human rights, which are protected by the European Convention on Human Rights. So, when a Member State of the Council of Europe is involved in a rescue through its own officials, it must assume full jurisdiction even if the operation takes place in high seas.

Regarding the responsibility of *Frontex* vessels during the summer of 2016, no ruling has yet been made by the European Court of Human Rights. But the *Hirsi Jamaa* case clarifies the law in terms of jurisdiction and responsibility to protect human rights: if state officials are involved in operations led by *Frontex*, the Member States are responsible for the violations of rights. It will be interesting to see what the first ruling says on that matter.

H. A. – *And what about private humanitarian aid vessels - for example those of NGOs - which are used to save refugees at sea: what happens afterwards?*

I. A. – Theoretically, under the law of the sea, they have an obligation to transport these people to the nearest port and, in any case, shipwrecked individuals must be given the opportunity to apply for asylum. They also have the right not to be arbitrarily detained, not to be subjected to ill-treatment and not to be turned away. It is known that Doctors Without Borders (MSF), for example, are doing remarkable work in this field to provide assistance to shipwrecked individuals by informing them of their rights.

H. A. – *There are now different refugee status determination systems in place in Turkey. Syrian refugees - who are more than 2.5 million - are "guests". Other nationalities are determined by the UNHCR - not by the government - as is the case in other countries (Jordan, Lebanon, Malaysia). Can the multiplication of special statuses affect the preservation of the fundamental rights and interests of refugees and asylum seekers in dynamics of an increasingly national nature? Can one imagine having "à la carte" refugees and, after the migrant crisis of 2015, is this not what is somehow currently happening in Europe?*

I. A. – Yes, you are right regarding Turkey. The issue is extremely complicated and the existence of these different statuses also opens the way for the arbitrary. It must be said that Turkey ratified the 1951 Convention with a geographical limitation, whereby it does not recognise as refugees individuals coming from Syria, for example, but only individuals from Europe, which is obviously very rare, as evidenced by the case of the Bosnian refugees in the 1990s. Yet, it must be acknowledged that Turkish authorities have been very generous in their reception of nearly three million Syrian refugees on their territory (health, education, right to work). In fact, although the Turkish government did not sign the 1967 Protocol (which extends the coverage of the 1951 Convention both geographically - the whole world - and temporally, ed.), it implemented de facto legal provisions of the 1951 Convention. The right to work for Syrian refugees has been achieved thanks to pressure from humanitarian organizations and the action of civil society.

“The Turkish exception”: towards an “à la carte” refugee system?

The Law on foreigners and international protection, adopted by the Turkish Republic in June 2014, distinguishes different categories of persons under international protection, namely:

- Refugees: recognised as such “as a result of events occurring in European countries” (Art. 61), which was the case of Bosnian and Chechen refugees;
- Conditional refugees: recognised as such “as a result of events occurring outside European countries” (art. 62), which is the case of Afghans, Iraqis, etc.
- Beneficiaries of subsidiary protection: these are foreigners “not characterised as refugees or conditional refugees”, but who would “face the execution of a death penalty, [...], be imprisoned or face torture or “serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict” (art. 63). This situation is that of Syrian “guests”.
- Stateless persons (art. 50).

Yvan Conoir

H. A. – *But is the multiplication of special statuses not leading to a complete fragmentation of the rights of refugees and the right of asylum?*

I. A. – Yes! In Europe, we are observing a trend similar to what is happening in Turkey: since the turn of the millennium, the EU has adopted legal instruments as part of its common asylum policy, with a view to harmonising the policies and practices of EU Member States regarding the reception of asylum seekers, the refugee status determination procedure as well as the status granted to refugees and the rights that go with it (for ex-ample the length of detentions, procedural guarantees, etc.). These instruments have been gradually incorporated by States into their national law, and subsequently implemented. However, there are still loopholes⁹ in the protection systems: the standards applied differ significantly from one Member State to another. This has led the EU to further reform the instruments a few years ago. The process for implementing these revised instruments, with a view to having common standards, principles and practices, is proving long and complex. On the ground, we see the fragmentation of the refugee status and an application of principles and standards designed to be common that is however not at all harmonised.

H. A. – *You are currently doing research on the relationship between security, irregular migration and asylum. What are your main conclusions?*

I. A. – I am leading a five-year project on the securitisation of migration. It concerns the measures taken by States (Canada and some European countries like France and the United Kingdom) against “undesirable” migrants. The first conclusion is that the measures taken (detention, biometrics, border militarisation, changes in legislation on immigration and asylum) have the effect of criminalising populations that have nothing to do with “crime”. For example, crossing an international border without the necessary papers is not a crime. The second conclusion concerns the right of access to asylum, which is a fundamental right. Due to the increasing criminalisation of irregular migration and any associated assistance, persecuted

⁹ On that subject, see Idil Atak, “Mesures d’interception en Europe et au Canada: Le droit d’asile en péril” [Interception measures in Europe and Canada: the right of asylum in jeopardy] *Revue Droits et Libertés*, vol. 35, no. 1, Spring 2016, p.17-20, <http://liguedesdroits.ca/?p=3689> and Idil Atak and François Crépeau, “Managing migration at the external borders of the European Union: Meeting the human rights challenges” *European Journal of Human Rights*, n°. 5, 2014, p. 591-622.

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individuals have very limited access to this right, both in Europe and in Canada. When they manage to apply for asylum, it is more difficult for them to obtain the status of refugee because of new legislative techniques, such as expedited review procedures or the implementation of safe country clauses. So in addition to tighter border controls, people who are fleeing persecution have no access or increasingly limited access to asylum. Thirdly, the purpose of these measures is primarily deterrence through criminalisation, the message sent to asylum seekers being: “Do not come because you will be intercepted, detained and sent back”. However, our research shows that these measures have no deterrent effect. They have unintended - or unwanted - consequences, namely an increase in irregular immigration and in crime related to the smuggling of migrants and trafficking in human beings (both of which are becoming increasingly interconnected). Migrants therefore become even more vulnerable, and must pay ever larger amounts of money to their smugglers. It is also worth noting that these supposedly deterrent measures are very costly. But more generally, the violations of migrants’ human rights represent the highest cost, since they are obviously contrary to the obligations of States under their constitutions and international instruments.

H. A. – *In this constrained and increasingly restrictive, oppressive and arbitrary environment, what role can humanitarian NGOs play: are they capable of changing the stakeholders’ roles or attitudes?*

I. A. – I think that humanitarian NGOs play a very important role. They are at the forefront for the provision of essential emergency humanitarian aid in terms of rescue or food. I am currently involved in a research project entitled “Toronto, sanctuary city”, which concerns the protection that the City of Toronto is providing to irregular migrants. In this city, we now see not only undocumented workers but also a growing number of children - some of whom do not go to school for fear of being caught and deported from Canada. There are also elderly people without papers who have lived most of their lives in Canada, housed in shelters funded by the city. In all these cases, the support they receive comes from humanitarian organizations in Toronto, even if the city is involved, but only to a limited extent. This is similar to what the city of Paris did during the summer of 2016 in support of illegal migrants, based on the model organized by MSF in the “jungle” of Calais. NGOs also develop an experience that government officials do not have: they act as “guides” while gaining the trust of illegal migrants. As evidenced by our interviews, this is a highly marginalised population that does not trust the police. Some do not even want to go to the library because, for them, these institutions represent the state. Voluntary community organizations have been able to overcome this psychological barrier.

Interview by Yvan Conoir

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Translated from the French by Marc Duc

Detention of migrants: the view of the United Nations Commissioner for Refugees (UNHCR)

The UNHCR is evidently concerned by the detention¹ of people who are fleeing their countries because of persecution. It has developed a global strategy against detention² the three objectives of which are: ending the detention of children, ensuring that alternatives to detention are available in law and implemented in practice, and ensuring that conditions of detention where detention is necessary and unavoidable meet international standards by, inter alia, securing access to places of immigration detention for the UNHCR and/or its partners.

“Too many refugees and asylum seekers, including children, are forced to stay in detention centres; when they should be in an environment where they can get the information, support, privacy, and access to their legal rights”³, said UNHCR’s Assistant High Commissioner for Protection Volker Türk, adding that asylum seekers and refugees accounted for 17 per cent of all people detained for immigration-related purposes in 2015 in 12 countries, both northern and southern⁴, in which the strategy was implemented, up from 12% in 2013. However, based on the principle of the child’s best interests and on a constant dialogue with participating countries, there has been a significant drop of 14% in the number of children detained compared to 2014.

The “alternatives to detention” advocated by the UNHCR designate any law, practice or policy that allows asylum seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement. Alternatives to detention should not be imposed when there is no reason or ground for detention and should respect the principle of minimum intervention while paying close attention to the specific situation of particularly vulnerable groups. In accordance with international standards, freedom of movement for asylum seekers should always be the first option. For example, in Indonesia, the Ministry of Political, Legal and Security Affairs opened - with the support of the International Organization for Migration (IOM) - new accommodation to house 130 unaccompanied and separated male children. In 2015, the US Customs and Immigration Enforcement Department⁵ launched a program in support of vulnerable families, aimed at releasing from prison 800 families of asylum seekers who presented vulnerability criteria, under the direction of local NGOs in five major US cities, while hosting communities were in charge of helping to identify the resources necessary for health care or housing.

As part of the fight against the detention of migrant children, the most significant measures revolved around the adoption of legislative measures against the detention of children, the implementation of measures relating to the “child’s best interests”, the development of family search programs and reunification procedures, priority access to asylum procedures, as well as the appointment of qualified legal representatives and guardians.

Yvan Conoir

— 1. Editor’s note: The Guiding Principles of the UNHCR use the generic term “detention”, but it should be noted that under French law, the term “(administrative) retention” is used for both adult and child migrants who are retained pending the enforcement of a deportation ruling, when the person concerned does not qualify for asylum. Even so, many French NGOs condemn the administrative detention system which is, in fact, akin to detention. For more information, see the clarification provided by the UNHCR in the boxed text below.

— 2. UNHCR, Beyond Detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees. 2014-2019, UNHCR, June 2014, <http://www.unhcr.org/53aa929f6.pdf>

— 3. UN News Centre, “Drop in the total number of refugee children detained in 12 focus countries, according to the UNHCR”, 2016, http://www.un.org/apps/news/story.asp?NewsID=54705#.V_LHPZN96Rs

— 4. The 12 focus countries: Canada, United States of America, Hungary, Indonesia, Israel, Lithuania, Malaysia, Malta, Mexico, United Kingdom, Thailand, Zambia.

— 5. ICE

“Detention” or “Retention”: clarification from the United Nations High Commissioner for Refugees

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In its Guiding Principles on the criteria and standards applicable to detention of asylum seekers and alternatives to detention of 2012 (<http://www.unhcr.org/505b10ee9.pdf>), the UNHCR defined “detention” as the “deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or detention centres, closed reception or holding centres or specific facilities. The place of detention may be administered either by public authorities or private contractors; the confinement may be authorised by an administrative or judicial procedure, or the person may have been confined without “legal basis.”

Retention is therefore encompassed within the broader terminology of detention. It is important for it to be qualified as “detention” since this term refers to a state of deprivation of liberty. Individuals in retention in France are indeed deprived of their liberty. The nature of the ruling that led them to be deprived of their liberty (administrative ruling) does not change anything.

In the context of French-speaking countries, France is one of the only countries to use the term “retention”. In doing so, there is risk of diminishing the extent of this violation of liberty and for the procedural safeguards applicable to any deprivation of liberty to be overlooked: review of the detention ruling (ideally within 24-48 hours), periodic and regular review of the necessity to extend detention, right to challenge the legality of detention at any time before a court of law, etc.

Finally, it is interesting to note that François Crépeau, Special Rapporteur on the human rights of migrants, also chose to use the term “detention” when speaking about this issue (interview: <http://www.unmultimedia.org/radio/french/2016/05/migration-plaidoyer-pour-une-politique-douverture-controlee-en-europe/#.V8giEvl9671>).

The editor would like to sincerely thank the UNHCR for its legal clarifications

Biography • Idil Atak

After having received her Ph.D. from the Université de Montréal’s Faculty of Law, Idil Atak completed her post-doctorate at the Centre for Human Rights and Legal Pluralism, McGill University, and is currently a professor at Ryerson University’s Department of Criminal Justice and Criminology. She is a member of the Executive Committee of the Canadian Association for Refugee and Forced Migration Studies (CARFMS) and a research associate at Hans and Tamar Oppenheimer Chair in Public International Law (McGill University). Her research fields include irregular migration, refugee protection, and international and European human rights law. Her research currently focuses on the intersection of security, irregular migration and asylum. She also served as a legal expert for the Turkish Ministry of Foreign Affairs in Ankara, then as deputy to the Permanent Representative of Turkey to the Council of Europe in Strasbourg, France.

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