

Global Freedom of Movement as a Response to Mixed Mass Migration

By Christoph Tometten

Abstract

Mass population movements of a mixed nature are a recurrent topic in state discourse and migration policies. This article analyses the framework developed by the United Nations High Commissioner for Refugees (UNHCR) to address this phenomenon as well as its national implementation, with a special focus on the European Union (EU). It argues that the proposed solutions to the problems posed by mixed mass migration – refugee status determination on a *prima facie* basis and temporary protection – are not sufficient from a human rights perspective and explores whether global freedom of movement would be an alternative to this approach. In doing so, it calls for a reconceptualisation of borders as delimitations of democratic spaces and of asylum as centred on the rights of asylum seekers themselves rather than state sovereignty.

Introduction

Although people move between the same origin, transit and destination countries for various reasons – some by choice, some by coercion and many for mixed motivations – such ‘mixed’ movements of people lack an internationally binding definition, but they are described as ‘complex population movements including refugees, asylum seekers, economic migrants and other migrants’ (IOM 2008; IOM 2009) by the International Organization for Migration (IOM).¹ Accordingly, mixed migration occurs when population movements include migrants not placed under protection by international legal instruments, as well as people eligible for such protection.²

Similarly, although many people do not move alone but within broader movements, there is also no internationally binding definition of mass movement (Brachet 2009). Mass influx is defined in the 2001 European Union Temporary Protection Directive,³ however, as the ‘arrival... of a large number of displaced persons...from a specific country or geographical area’ (Article 2d). According to this definition, 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. Whether a situation of mass influx exists is ascertained on a case by case basis, depending on whether existing asylum procedures are unable to deal with the number of

¹ On mixed migration, see Benoit (2010), Brewer and Tükseker (2006), Colson (2003), van Hear (2011), Hethmon (2003), van der Klaauw (2007), Koser and Martin (2011), Pollock (2010), Samaddar (2001), UNHCR (2006) and UNHCR (2003).

² International protection duties include the *non-refoulement* provisions in Article 33 of the 1951 Convention relating to the Status of Refugees and Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), as well as the protection of victims of trafficking under the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the 2000 Convention against Transnational Organized Crime.

³ This Directive regulates the distribution of asylum seekers among member states in case of mass influx. Its application is conditional upon a qualified majority establishment of mass influx by the EU Council on a proposal from the Commission (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 its end. It can be prolonged for another year if the EU Council decides so with a qualified majority (Article 4). The 2001 Directive authorises 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).

arrivals (UNHCR 2001; Barutciski 2004: 295; Goodwin-Gill and McAdam 2007: 335-336; UNHCR/IPU 2001: 53) Situations in which individual status determination procedures cannot be conducted due to the high number of arrivals include the Somali and Ethiopian migration across the Gulf of Aden and the population movements in the African Great Lakes Region (Jureidini 2010; Long and Crisp 2011; Regional Conference on Refugee Protection and International Migration 2010). These examples show that it is meaningful to consider mixed mass migration as a joint phenomenon.

Of course, states could grant protection equivalent to the highest standards to all migrants indiscriminately, but states are usually unwilling to act in such a hospitable manner (Samaddar 2001; 2000: 200-204). I will therefore analyse how the phenomenon of mixed mass migration is addressed *de lege lata*, with a focus on the framework developed by UNHCR and its implementation on a national level. I will show that UNHCR proposes refugee status determination on a *prima facie* basis and temporary protection as adequate instruments to ensure the respect of international protection duties, which states tend to define narrowly. This will be illustrated with the EU's attempt to outsource asylum to regions of origin. In a second step, I will engage with the criticism of this framework and envision global freedom of movement as an alternative. Such an idea might appear to be idealistic. However, approaching the phenomenon of mixed mass migration from this angle highlights the weaknesses of the *status quo* and allows a quest for a remedy which is unflawed by the limitations of existing arrangements. Following Carens (1996), it remains relevant to assess reality in light of human rights ideals in order to develop new approaches to a situation even under non-ideal circumstances.

The UNHCR's Framework

To provide international protection to refugees in accordance with Article 1 of the 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 (Valluy 2009b). 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' (UNHCR 2003: 5). This led to 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...There is therefore a need to achieve a better understanding and management of the interface between asylum and migration (UNHCR 2003: 46).

UNHCR identifies objectives to improve this situation: better identification of and proper response to the needs of asylum seekers and refugees; strengthening 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 (UNHCR 2003).

These objectives were substantiated in the 2006 UNHCR 10-Point Plan of Action on Refugee Protection and Mixed Migration, which identifies protection gaps and key areas where UNHCR

might be involved. UNHCR stresses that ‘a more coherent and comprehensive’ (UNHCR 2007) approach to mixed migration, necessary to ensure that vulnerable people be protected, is only 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 human flows and individual movement (Point 2). At borders – the control of which is 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 training of border security forces, should be installed (Point 3) and reception arrangements, including provision with temporary documentation, as well as mechanisms for profiling, referral and counselling implemented (Points 4 to 6). UNHCR calls for comprehensive consideration of all options for refugee protection, reiterating its primary commitment to voluntary repatriation, 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 on the risks, dangers and difficulties of international migration (Point 10). The Plan of Action thus gathers existing international law and policy relating to mixed migration in one single document, in order to make states’ obligations more apparent and provide states with a framework for action to face situations of mixed migration. Two instruments supplement this framework for situations in which mixed migration is concomitantly mass migration.

Refugee Status Determination on a Prima Facie basis and Temporary Protection

To guarantee protection in such situations, UNHCR advocates refugee status determination on a *prima facie* basis, a procedure which is not mentioned in any international legal instrument but is more widely applied in practice than individual status determination, especially but not exclusively in Africa (Albert 2010; Stainsby 2009). *Prima facie* determination does not assess the individual claim to asylum but the situation in the country of origin. It extends the rights to which refugees are entitled under the 1951 Convention to its beneficiaries as long as an individual status is not determined (Stainsby 2009). *Prima facie* determination thus forces the refugee to await individual status determination which, in most cases, never occurs. Moreover, the provisional nature of *prima facie* determination prevents the refugee from being considered for resettlement (Albert 2010: 38, 46).

Alternatively, states may grant temporary protection to all asylum seekers regardless of the justification of their claims and to guarantee minimum standards of treatment (Executive Committee Conclusions Nos 5 (1977), 15 (1979), 19 (1980), 22 (1981), 74 (1994), 85 (1998); UNHCR 2001; Barutciski 2004: 231, 290-293; UNHCR/IPU 2001). 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 (UNHCR/IPU 2001).⁴ Temporary protection also allows the postponement of the final status determination. Protection is temporary as it ends with the examination of an individual claim, regardless of its 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 no longer needed (UNHCR 2001). It differs from *prima facie* determination insofar as it is, from the outset, limited in time and thus

⁴In the EU, Articles 9 to 16 of the 2001 Temporary Protection Directive do not provide the same quality of rights as the 1951 Convention (Heinhold 2007: 151-152; Duchrow and Spieß 2006: 179-180).

does not allow for local integration (Albert 2010: 48). This procedure was applied to refugees from Bosnia-Herzegovina to other European countries during the war years of 1991-1995.

Neither *prima facie* determination nor temporary protection is an equal substitute for asylum: the first is conceived as a provisional measure; the minimum standards of treatment advocated by UNHCR in case of the latter fall short of those to which refugees are entitled under the 1951 Convention. Both are rather pragmatic responses to emergencies and should remain exceptional (Barutciski 2004: 290-291). In particular, these measures should not be viewed as 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.

Thus, UNHCR accepts the validity of relatively weak means of protection in complex situations of mixed mass migration as long as core principles of international refugee law such as *non-refoulement* are respected. It is questionable whether this response is adequate to handle mixed and massive migration.

National Implementation

In order to be implemented, the recommendations of international agencies must enjoy the commitment of states. As UNHCR upholds *non-refoulement* as an inviolable principle in the context of mixed and massive migration, the approach of states in this regard is of primary interest. Of course, the principle does not apply to mixed mass migration as such but only to persons at risk of persecution or torture in territories to which they could be returned. However, its general validity in situations of mixed mass migration is widely accepted; the problem is rather that states tend to invoke security concerns to justify restrictions to the principle (Goodwin-Gill and McAdam 2007: 218, 336; Kneebone 2010; Samaddar 1999: 19). For instance, at the 1977 Conference on Territorial Asylum, Turkey voiced the view 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' (Goodwin-Gill and McAdam 2007: 242). Tanzania has repeatedly claimed that admission capacities authorise a state to limit *non-refoulement*; Pakistan, Ivory Coast and Tunisia have maintained 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 (Goodwin-Gill and McAdam 2007: 338-339).

An even greater threat to the respect of *non-refoulement* obligations arises from increasingly strict border security policies intended to make the arrival of migrants and asylum seekers more difficult for, as long as a migrant has not reached its territory, a state is neither in a position nor under the obligation to abstain from returning a migrant to the border (Rodier 2007a; UNHCR 2006). Obvious signs for such policies are the border fences between the United States and Mexico, Greece and Turkey, India and Bangladesh (Kabir 2005; Samaddar 1999: 28; van Schendel 2005: 212-218). Technical means, special agencies, military forces and deportation camps supplement such installations. On arrival at international airports, asylum seekers may be obliged to undergo accelerated asylum procedures which do not permit the same quality of legal assistance as a conventional procedure; in France, this procedure can even be applied in any given location determined by the competent authorities (Article L 221-1 of the French Code of Entry and Residence for Aliens; Duchrow and Spieß 2006: 263-268; GISTI 2008: 50-57; Heinhold 2007: 71-79). The border is thus moved from the periphery to the interior of the state territory (Agamben 1995; Le Cour Grandmaison *et al.* 2007; Goodwin-Gill and McAdam 2007: 253-257; Rodier 2007b; Valluy 2009). Containment of international migration goes even further: the outsourcing of asylum procedures is an attempt to legitimise the sealing of borders, following the argument that obligations under international law are respected if individuals can seek protection outside the national borders. If this were the case, handling mixed mass

migration would be simple, as its core challenge – the international protection of vulnerable people – would be dealt with before border-crossing has taken place. The attempt to outsource asylum procedures is accompanied by the development of the notion of protection in regions of origin, based on the simplistic assumption that international protection would be unnecessary if all its potential beneficiaries were protected *in situ* (Valluy 2009). The example of the European Union will serve to illustrate these developments.

Outsourcing Asylum in the European Union

In the European Union (EU), ‘illegal immigration’ has been a subject of concern at least since the EU Commission issued its 1985 Guidelines for a Community Migration Policy, assuming that internal freedom of movement requires tough immigration laws and external border controls (Düvell and Vollmer 2009). With increasing cooperation of EU member states on immigration issues, a High Level Working Group on 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’ (Düvell and Vollmer 2009: 6). At the 1999 Tampere Conference, it was decided to strengthen EU policies against illegal migration, integrating countries of origin and transit into a comprehensive migration control policy (Valluy 2009: 280; Rodier 2007b).

Outsourcing asylum was first proposed by the Austrian government in 1999, but UNHCR appropriated the idea and conceptualised 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 centres for the treatment of asylum claims (Valluy 2007b; 2009: 277, 286-287). In 2003, bypassing the second part of this approach, a British paper on ‘New International Approaches to Asylum Processing and Protection’⁵ 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 (Henry 2006; Valluy 2007b; 2009: 282-284; UNHCR 2006). 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 centres for irregular migrants in the vicinity of the EU (Rodier 2007a; Valluy 2007a: 139-152; 2009: 284-285, 290-291; Henry 2006: 21). In 2003, the EU Commission reformulated the British proposal and introduced the concept of Regional Protection Programmes. It thus made some changes in vocabulary, but retained the concept of outsourcing. The 2004 Hague Programme listed priorities of the EU, including increased cooperation with third countries in the governance of international movement, thus institutionalising outsourcing (Henry 2006: 20; Rodier 2007b: 153-155; Valluy 2009: 300). 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. It should be recalled that the concept is also inherent in 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. Indeed, Düvell and Vollmer (2009: 8) note that today

⁵This paper was sent by the British government to the Greek presidency of the European Union on 10 March 2003, in view of the European Summit scheduled for 20 June 2003. See <www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> (accessed 10 October 2012).

‘immigration concerns, notably over irregular migration are embedded in many...policy fields and represent a driving force in the development of a common European Union migration policy and a potentially global regime’.

Critical Voices

The outsourcing of asylum procedures is one example of the ‘great reversal of asylum’ (Valluy 2009) against people on the move. To legitimise their restrictive policies, governments define asylum as a state prerogative instead of a right, thus allowing for its use against people in need of protection. But we cannot limit ourselves to criticising governments and international agencies for their approach to mixed mass migration. We must also find alternatives to such an approach and formulate proposals for a different solution, more compatible with the rights of migrants and refugees.

Temporary asylum and *prima facie* refugee status determination tend to weaken guarantees for people entitled to international protection, with the dubious argument that this is the only way to guarantee the core principle of international protection, that of *non-refoulement*. This is the logical consequence of a discourse that makes sovereignty and national security supreme principles of state action. Therefore, another discourse can only be developed if the superior value of these principles is questioned. This is not as difficult as it may sound. In fact, the existing system allows for a different understanding⁶ if it is centred around concepts so far ignored in governmental discourse. To do so, the concept of borders must first be detached from the principle of sovereignty and analysed from the perspective of democratic theory. Global freedom of movement could then be envisioned as an ideal alternative to the *status quo*. However, in the context of mixed mass migration, this is only relevant if existing protection mechanisms are not jeopardised should global freedom of movement ever be realised. It will therefore be shown that global freedom of movement does not stand in contradiction to asylum, the most important existing instrument of protection.

Global Freedom of Movement

In the dominant discourse, the border is seen as a central symbol of sovereignty, its violation the archetype of aggression, and its function restricted to the control of (human) movement (Crosby 2007: 31; Mau 2010: 339, 340; Wong 2005: 89). Protection-sensitive entry systems as proposed in the UNHCR Plan of Action implicitly legitimise this view.

However, borders can also be understood differently. Borders are above all a means to ensure effective jurisdiction over a given territory.⁷ Hence, in democracies, the primary legitimation of borders is that they demarcate spaces for democratic deliberation and the rule of democratic laws (GISTI 2005). The advantage of such an understanding of borders is that it does not demand their abolition. Instead, it links them to democracy instead of *raison d'état*, thus overcoming the state-centric and security-driven approach to migration.

If borders are understood as demarcations and not primarily as control mechanisms, the way is open to reconsidering global freedom of movement and its necessary correlative, a right to residence (Moulier-Boutang 2011). From this angle, ‘open borders’ are not a contradiction *per se*

⁶Although critics maintain that the 1951 Refugee Convention is not adequate to deal with today’s population flows (Samaddar 2000: 202-204), in the first twenty years of its existence it was interpreted in a favourable way for asylum seekers by most states. For instance, France hardly ever requested a proof of individual persecution (Akoka 2011).

⁷Borders...support the “partitioning of populations” in governable units’ (Mau 2010: 343); ‘even fully open borders still demarcate autonomous jurisdictions’ (Bauböck 2009: 1, 5).

as they remain demarcations of specific jurisdictions. Bauböck (2009: 8) rightly points out:

Internal borders in liberal democracies are all open in this way. In federal states the powers of jurisdictions demarcated by provincial borders may be very strong but they generally do not include the right to control migration. The same applies now to internal borders in the Schengen area of the European Union.

To begin with, several authors (Bauböck 2009: 1-31; Carens 1987: 251-273; Mau 2010: 339-361) have shown that global freedom of movement is a logical consequence of the equality in rights set forth in Article 1 of the 1948 Universal Declaration of Human Rights, enshrined in numerous human rights instruments and constitutive of liberal democracies. It has been argued that the self-determination of peoples (Articles 1 and 55 of the 1945 Charter of the United Nations) as such justifies restrictions to this principle insofar as it encompasses global freedom of movement. This view assumes that members of a specific group collectively own the territory which they inhabit and therefore that access to this territory is to be governed in accordance with the same rules as access to private property. However, this line of argument neglects the fact that, in most states, the state territory belongs to private owners to a large extent. If the private owner's view differs from the community's view on the question of access, it remains unclear under which circumstances one view should prevail over the other (Bauböck 2009: 13; Carens 1987: 252-254). Therefore, it is preferable to justify restrictions to global freedom of movement in accordance with the general rules that apply to the justification of restrictions to rights. Equality in rights implies that any restriction must contribute to the protection of public order, i.e. the set of norms which guarantee the respect of fundamental rights and principles (Mau 2010: 344). As these rights and principles prohibit distinctions on the grounds of birth (Article 2 of the 1948 Declaration) unless they are justified, in turn, by public order, public order should not be conceived as including the right of a specific population defined by birth to exclude others from access to the territory which they inhabit, as it would then itself operate a distinction that it ought to prevent (Bauböck 2009: 8; Carens 1987: 251-252; Mau 2010: 341-342).

Global freedom of movement of people would also be consistent with an increasingly free movement of goods and capital across international borders (Wong 2005: 70). The *Groupe d'Information et de Soutien aux Travailleurs Immigrés* (GISTI) holds:

In the context of a liberal globalisation 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.⁸

From a human rights perspective, global freedom of movement is therefore the logical consequence of the economic globalisation process, which it would make more comprehensive and more humane.⁹

Granted, nothing in international law obliges states to accept freedom of movement. There is a right to leave any country (Article 13 of the 1948 Declaration, Article 12 (2) of the 1966 International Covenant on Civil and Political Rights), but no corresponding right to enter another country of one's own choice (Goodwin-Gill and McAdam 2007: 380-384). However, international organisations such as the United Nations Development Programme (UNDP) have elaborated a positive approach to migration, seen as a normal process; as a natural expression of

⁸Translation by the author.

⁹Of course, this implies a specific understanding of globalisation, detached from a purely capitalist perspective. On this, see Klein 2002: 76-84; Hardt and Negri 2000: 396-400.

general personal liberty. UNDP therefore called upon governments to refrain from limiting movement. The main argument is a triple-win formula: destination countries would gain manpower and contributors to their welfare systems; countries of origin would gain remittances and an appeasement of saturated employment markets; migrants could live in the location of their choice. UNDP, however, does not address freedom of movement explicitly: although it frequently alludes to aperture and liberty, it never discusses the merits of their complete realisation. If there are political reasons for this omission, it is still noteworthy that freedom of movement is not explicitly rejected either (Pécoud 2011: 33-35).

Global freedom of movement would accomplish comprehensive globalisation beyond mere globalisation of markets linked only to the interests of the privileged few, a globalisation of opportunities respecting people's rights and interests. It might challenge the liberal welfare state's capacity to enforce a system of social solidarity.¹⁰ Even under ideal circumstances, global freedom of movement should therefore not be realised without thorough preparation. But global freedom of movement 'does not imply...the suppression of all state regulation on economic and social questions' (GISTI 2005),¹¹ and there are reasonable grounds for believing that social achievements can be successfully upheld through effective internal legislation despite the opening of borders, at least in the medium term. One might be cautious about generalising experience drawn from the European unification process, but it is worth recalling that the Swedish welfare system, for instance, has not been relevantly strained although Sweden was the only EU member state to fully open its labour market to citizens from Bulgaria and Romania with their accession to the EU in 2007 (Bauböck 2009: 8).

Rights-centred Asylum

It might be objected that global freedom of movement is not only vowed to remain *lettre morte*, but 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. Then global freedom of movement would not be an adequate answer to mixed mass migration because it would not efficiently address the issue of protection. It is therefore important to explain how global freedom of movement does not jeopardise the acquired standards of protection for refugees.

In classical theory, the principle of sovereignty allows a state to decide freely whom it allows to access its territory. Therefore, an asylum claim requires the presence of the person who seeks international protection on the state territory, which in turn presupposes that any asylum seeker must already have crossed an international border. This view – which may be termed as sovereignty-centred asylum – does not allow, in principle, that an asylum claim be filed in the country where the applicant is at risk of persecution as such a procedure would require the collaboration of the authorities that are responsible for the persecution, at least insofar they would need to allow the asylum seeker to leave the country once asylum is granted (Valluy 2009: 150-159). This might not be completely unthinkable but highly improbable in practice. Also, the requirement to cross an international border before filing an asylum application generally adds the risks of irregular border-crossing to the already existing persecution and thus conditions international protection to a temporarily increased level of vulnerability. This is hardly reconcilable with the spirit of international human rights law (GISTI 2004).

However, another view would provide asylum seekers and refugees with a more comprehensive protection. If asylum were linked to freedom of movement, the main obstacle to international protection, i.e. the possibility for states to prevent asylum seekers from reaching their borders,

¹⁰However, subjected to empirical scrutiny, this claim might lack sufficient evidence (Holtug 2010: 435).

¹¹Translation by the author.

would be removed. The rights of persons seeking international protection could then be enforced more effectively so that a concept of asylum linked to global freedom of movement may be termed as rights-centred asylum. It could be objected that asylum would lose its *raison d'être* if global freedom of movement is realised, given that crossing an international border generally satisfies the need of protection, at least if it leads to possibility to stay in another country. This would, however, unduly restrict the concept of asylum to a sole right to residence among others. Such an understanding might be coherent if asylum is understood as merely derogatory to the principle of sovereignty in its exclusionary sense, but it does not take into account that asylum also fulfils other functions. It may, depending on internal legislation, entitle the refugee to specific social benefits not granted to other migrants; it may be used by states to officially acknowledge acts of persecution or to demonstrate their political support for specific persecuted groups or persons. These functions of asylum will even be rehabilitated and strengthened if asylum is placed in the context of freedom of movement (Valluy 2009: 150-159; GISTI 2004).

Conclusion

What is the outcome of these reflections for an adequate response to mixed mass migration? It has been demonstrated that, from a legal perspective, mixed mass movements challenge the current world order because they may include people to whom states owe protection under international law. An adequate response must thus determine how this protection can be guaranteed. UNHCR affirms that it is sufficient to guarantee *non-refoulement* for those who are entitled to it, and proposes instruments to do so in an organised manner: temporary asylum and *prima facie* refugee status determination. UNHCR accepts, however, that these instruments do not provide the same quality of rights to their beneficiaries as stipulated, for instance, in the 1951 Convention. International protection is further jeopardised by attempts to outsource asylum procedures and delegate protection to the regions of origin. This approach undermines asylum as such, implying minimal liberty to cross international borders, and is therefore not an adequate response to mixed mass migration. The alternative, global freedom of movement, neither requires the abolition of borders nor the suppression of asylum. Global freedom of movement should thus no longer be ignored as a humane and just alternative to restrictive policies and a solution for the challenges of mixed mass migration, one which would be respectful of the human rights of both migrants and refugees.

Christoph Tometten holds a Master's in German and French Law from the Universities of Cologne and Paris 1. He currently lives in Berlin where he works as a Legal Trainee with the Senate of Berlin's Representative for Integration and Migration. He also volunteers as a counsellor in immigration and asylum law with the local Contact and Consultation Center for Refugees and Migrants.

References Cited

- AGAMBEN, G.** (1995) *Homo Sacer – Il Potere Sovrano e la Nuda Vita*, Turin, Giulio Einaudi.
- AKOKA, K.** (2011) 'L'archétype Rêvé du Réfugié'. *Plein Droit* **90**.
- ALBERT, M.** (2010) 'Prima facie Determination of Refugee Status – An Overview and its Legal Foundations', *Working Paper Series* **55**.
- BARUTCISKI, M.** (2004) *Les Dilemmes de Protection Internationale des Réfugiés*. Paris.
- BAUBÖCK, R.** (2009) 'Global Justice, Freedom of Movement and Democratic Citizenship'. *European Journal of Sociology* **50** (1): 1-31.
- BENOIT, F.** (2010) 'Economic Migration and Family Separation'. *Alliance News* **33**: 39-42.
- BRACHET, J.** (2009) *Migrations Transsahariennes – Vers un Désert Cosmopolite et Morcelé (Niger)*, Bellecombe-en-Bauges, Croquant.
- BREWER, K.** and **TÜKSEKER, D.** (2006) *A Survey on African Migrants and Asylum Seekers in Istanbul*, Istanbul, MireKoc.
- CARENS, J.** (1987) 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics* **49** (2): 251-273.
- _____ (1996) 'Realistic and Idealistic Approaches to the Ethics of Migration'. *International Migration Review* **30** (1): 156-170.
- COLSON, E.** (2003) 'Forced Migration and the Anthropological Response', *Journal of Refugee Studies* **16**: 1-18.
- CROSBY, A.** (2007) 'The Boundaries of Belonging: Reflections on Migration Policies into The Twenty-First Century', *Refugee Watch* **29**.
- DUCHROW, J.** and **SPIESS, K.** (2006) *Flüchtlings- und Asylrecht*, München, dtv.
- DÜVELL, F.** and **VOLLMER, B.** (2009) *Irregular Migration in and from the Neighborhood of the EU. A Comparison of Morocco, Turkey and the Ukraine*, Clandestino.
- GOODWIN-GILL, G.** and **McADAM, J.** (2007) *The Refugee in International Law*, New York, Oxford University Press.
- GISTI** (2004) 'Réhabiliter le Droit d'asile par la Liberté de Circulation'. *Proteste* **101**.
- _____ (2005) *La Liberté de Circulation: Un Impératif Éthique et Social*. Available from: <www.gisti.org/spip.php?article721> (accessed 10 October 2012).
- _____ (2008) *Le Guide de l'entrée et du Séjour des Étrangers en France*, Paris, La Découverte.
- HARDT, M.** and **NEGRI, A.** (2000) *Empire*, London, Cambridge; Harvard University Press.
- HEINHOLD, H.** (2007) *Recht für Flüchtlinge*, Karlsruhe, Loeper.
- HENRY, P.** (2006) 'La Politique d'Externalisation de l'Union Européenne'. *Accueillir* **239**.
- HETHMON, M.** (2003) 'Diversity, Mass Immigration, and National Security after 9/11 – an Immigration Reform Movement Perspective', *Albany Law Review* **66**: 387-411.
- HOLTUG, N.** (2010) 'Immigration and the Politics of Social Cohesion', *Ethnicities* **10**: 435-451.

- INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM)** (2008) *Challenges of Irregular Migration: Addressing Mixed Migration Flows*. Available from: <www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/Policy_documents/MC-INF-294-Discussion-Note-Mixed-Migration-Flows.pdf> (accessed 3 November 2012).
- _____ (2009) *Irregular Migration and Mixed Flows: IOM's Approach*. Available from: <www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/98/MC_INF_297.pdf> (accessed 19 October 2012).
- JUREIDINI, R.** (2010) *Mixed Migration Flows: Somali and Ethiopian Migration to Yemen and Turkey – Final Report*, Cairo.
- KABIR, E.** (2005) *Border Fencing – A Major Irritant in Indo-Bangla Relations*, Dhaka, NewsNetwork.
- KLEIN, N.** (2002) *Fences and Windows – Dispatches from the Front Lines of the Globalization Debate*, New Delhi, LeftWord Books.
- KNEEBONE, S.** (2010) 'The Trafficking-Refugee Nexus: When Return and Reintegration Become Refoulement', *Alliance News* **33**, 24-26.
- KOSER, K.** and **MARTIN, S.** (2011) *The Migration-Displacement Nexus*, New York, Oxford; Berghahn Books.
- LE COUR GRANDMAISON et al.** (2007) *Le Retour des Camps? Sangatte, Lampedusa, Guantanamo...*, Paris, Autrement.
- LONG, K.** and **CRISP, J.** (2011) 'In Harms Way: The Irregular Movement of Migrants to Southern Africa from the Horn And Great Lakes Regions', *New Issues in Refugee Research* **200**.
- MAU, S.** (2010) 'Mobility Citizenship, Inequality, and the Liberal State – The Case of Visa Policies', *International Political Sociology* **4**: 339-361.
- MOULIER-BOUTANG, Y.** (2011) 'Pour un Droit À Immigrer Vers l'Union Européenne', in GISTI (ed.) *Liberté de Circulation: Un Droit, Quelles Politiques?*, Paris, GISTI.
- PÉCOUD, A.** (2011) 'Le Scénario "Migrations Sans Frontières"', in GISTI (ed.) *Liberté de Circulation: Un Droit, Quelles Politiques?*, Paris, GISTI.
- POLLOCK, J.** (2010) 'The Migrant Worker, The Refugee, and The Trafficked Person: What's in a Label?', *Alliance News* **33**: 19-22.
- REGIONAL CONFERENCE ON REFUGEE PROTECTION AND INTERNATIONAL MIGRATION** (2010) 'Mixed Movements and Irregular Migration from the East and Horn of Africa and Great Lakes Region to Southern Africa – Concept Note'. Available from: <www.unhcr.org/4d7f7ef711.pdf> (accessed 10 October 2012).
- RODIER, C.** (2007a) 'Aux Marches de l'Europe: La Construction de L'inacceptable', 130-138 in Le Cour Grandmaison, O. et al. (ed.) *Le Retour des Camps? Sangatte, Lampedusa, Guantanamo...*, Paris, Autrement.
- _____ (2007b) 'Ceuta et Melilla, Macabre Laboratoire de l'Externalisation de la Politique Européenne d'immigration et d'asile', 164-171 in Blanchard, E. Wender, A.-S. (ed.) *Guerre aux Migrants – Le Livre Noir de Ceuta et Melilla*, Paris, Syllepse.
- SAMADDAR, R.** (1999) *The Marginal Nation – Transborder Migration from Bangladesh to West Bengal*, New Delhi, Sage.
- _____ (2000) 'The Cruelty of Inside/Outside', 200-214 in Bose, P.K. (ed.) *Refugees in West Bengal*, Calcutta, Mahanirban Calcutta Research Group.

- _____ (2001) 'Power, Fear, Ethics', *Refugee Watch* 14.
- STAINSBY, R.** (2009) 'UNHCR and Individual Status Determination', *Forced Migration Review* 32: 52-53.
- UNHCR** (2001) '*Protection of Refugees in Mass Influx Situations: Overall Protection Framework*'. Available from: <www.unhcr.org/refworld/docid/3bfa83504.html> (accessed 19 October 2012).
- UNHCR** (2003) *Agenda for Protection*, Geneva, UNHCR.
- _____ (2006) *The State of the World's Refugees – Human Displacement in the New Millennium*, New York, Oxford University Press.
- _____ (2007) *Plan of Action on Refugee Protection and Mixed Migration, Revision 1*, Geneva, UNHCR.
- _____/IPU (2001) *Refugee Protection – A Guide to International Refugee Law*, Geneva, UNHCR/IPU.
- VALLUY, J.** (2007a) 'Algérie, Libye, Maroc: Des Camps Européens au Maghreb', 139-152 in Le Cour Grandmaison, O. et al. (ed.) *Le Retour des Camps? Sangatte, Lampedusa, Guantanamo...*, Paris, Autrement.
- _____ (2007b) 'Contribution à une Sociologie Politique du HCR: Le Cas des Politiques Européennes et du HCR au Maroc', *Recueil Alexandries*. Available from: <www.reseau-terra.eu/article571.html> (accessed 10 October 2012).
- _____ (2009) '*Rejet des Exilés – Le Grand Retournement du Droit de L'asile*', Bellecombe-en-Bauges, Croquant.
- VAN DER KLAUW, J.** (2007) 'Multi-dimensional Migration Challenges in North Africa', *Forced Migration Review* 28: 13-15.
- VAN HEAR, N.** (2011) *Mixed Migration: Policy Challenges*, Oxford, The Migration Observatory.
- VAN SCHENDEL, W.** (2005) *The Bengal Borderland – Beyond State and Nation in South Asia*, London, Anthem Press.
- WONG, D.** (2005) 'The Rumour of Trafficking', 69-100 in van Schendel, W. and Abraham, I. (ed.) *Illicit Flows and Criminal Things*, Bloomington, Indiana University Press.