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The Immigration-Related Detention and Human Rights Nexus: The case study of Morocco.

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(the opinions expressed in this working paper are the author's own)

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Abstract

The immigration-related detention of migrants and asylum seekers by the authorities of transit and destination countries has been recently employed as a common practice towards migration management. Based on the right of the states to guarantee their sovereignty and territorial security, detaining migrants in an irregular status creates a pessimistic orientation of how migration is approached by national authorities, while the lack of specific efficient national migration policies and the criminalization of irregular migration causes more problems to migrants' regularization, it also leads to the justification of detention as a good practice. This paper describes the implementation of international human rights law in immigration-related detention, considering the problematic aspect of territorial and border control logistics of sovereign states, and how in practice treaties and conventions guarantee the protection of migrants from being detained and which rights of migrants legally have while in detention. The case study of Morocco comes as an attempt to briefly present a meaningful picture of how the irregular migration phenomenon is approached in a country which is currently facing a change in its migration profile, namely from a country of emigration of Moroccan nationals to a country of destination and transit for migrants. While highlighting the detention practices that the country is following, attention is also given to the role of the National Human Rights Council of Morocco and the challenges it faces in the protection and promotion of human rights, mainly through the prevention of inhumane practices against detained migrants.

Keywords: irregular, migration, detention, human rights, protection, violation

1. Introduction

Detention of migrants based on their irregular status is one of the most common practices currently on the rise and increasingly used by state authorities. Detention of irregular migrants in many cases is even – paradoxically- promoted as an effective solution to address irregular migration and to guarantee migrants’ protection from any further action or omission that could be considered as a risk to themselves. However, the practice of detaining migrants merely due to their irregular status -while considering the irregular act of migration as a common crime- could be seen as a threat against migrants. The detention processes and the inhuman conditions in which migrants are placed, with deprivation of liberty and all the disturbing effects on physical and mental health that this implies, could be judged as an action against migrants’ dignity and a violation of their rights, which countries are legally and also morally obligated to uphold under international human rights law. They are responsible not only to strive for promoting the full access and exercise of these rights without discrimination but also to further their policies for preventing violations against migrants under detention.

2.0 Human rights implementation on migrants’ detention

Detaining migrants and asylum seekers constitutes a repressive approach by which a country and its authorities, from prosecution services, police, and border guards to administrative and judicial authorities, deal with the phenomenon of irregular migration and in particular with the unlawful way migrants infringe a country's sovereignty, by crossing its borders and trying to enter in order to stay and/or to transit to another destination. The degrading conditions of the detention process and facilities only increase the suffering of

migrants who already come from painful backgrounds and poor quality of life conditions. Furthermore, all this could have a strong impact on the daily management of their lives and their treatment while being detained by state authorities, contrary to the standards of international obligations towards the protection of human rights. Thus, considering that migrants' detention leads to a restriction on the exercise of their fundamental rights by the detaining states, including the right to personal liberty and freedom of movement, this should be avoided when the cause of detention seems to be related only to irregular migration due to the unlawful entry and stay in a country.

Detention in the migration context is neither prohibited under international law *per se*, nor is the right to liberty of a person an absolute¹ one. Each country may impose specific detention practices in order to settle matters of migrants' identification and to control their stay, provided however that the proper detention criteria and requirements are laid down and applied after alternative options are exhausted. These alternative measures may concern the identification and registration of irregular migrants and their temporary control and oversight without detention. In the case of asylum-seekers, this may occur until the final decision of their application and -in the positive cases- until their regularization in the country of residence.

In each case, detention of migrants must be justified and should be followed by a legal presumption. The authorities of each country must implement detention only if it is necessary and only as an efficient measure within the framework of

¹ UN High Commissioner for Refugees (UNHCR). "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention." (2012), p. 15 Available at <http://www.unhcr.org/refugees/pdf/guidelines-on-the-applicable-criteria-and-standards-relating-to-the-detention-of-asylum-seekers-and-alternatives-to-detention-2012.pdf> ; (accessed 28 May 2017)

their legal system, following the rule of law, practices of good governance, and upholding the implementation of all the relevant international treaties for the protection of human rights and the prevention of migrants' rights violations. However, detention is used in an instrumental manner which appears disjointed from normative underpinning (Provera, 2015:26). Cause for detention should be proven and justified according to legal rights and arrangements, as the only plausible solution once all other alternative measures are shown not to yield the desired outcome.

The application of the principle of proportionality should apply in the policy of migrants' detention given that it is necessary to assess each case individually while considering the specific conditions that might characterize it. The measure of detention should be imposed if it seems the proper and necessary instrument to be applied and the only solution that can ensure the interests of the migrant himself, in any case, only after the interest of the State authorities. The need to detain the individual is to be assessed in light of the purpose of detention, as well as the overall reasonableness of that detention in all the circumstances, the latter requiring an assessment of any special needs or considerations in the individual case (Provera, 2015:21). Moreover, while the principle of proportionality is relevant for the adjudication of cases by an individual point of view, according to the special needs and interests of the detained migrant, it can also be used more broadly as a measure to assess the practices and policies that the state itself applies on migration detention (Flynn, 2011:11).

3.0 The sovereignty and territorial logic

However, since many countries are resorting to migration detention as the only way to control irregular migration flows and paradoxically as an excuse to safeguard migrants from other dangers (e.g. human trafficking networks), by placing them into closed and controlled environments, this common policy should then be applied under certain limitations along with the high observance of all obligations for the protection of human rights providing. Protecting the human rights of detained migrants should be a high priority for the state's authorities.

Although, the international human rights law provides the ground for limitation on detaining practices, these protections are often weak or even absent (Costello, 2012:258). This happens even if most of countries implicated in the phenomenon of international migration have even ratified the relevant treaties for the protection of human rights and are obliged to follow practices and adopt policies in line with the principles for the protection of these rights. Human rights recognize that certain principles and norms are universal, indivisible and inalienable and are to be conceived as true and valid rights for all people. In practice there is a distinctive conception regarding the issue of sovereignty that dominates the migration discourses and laws, and therefore leads the states to practices which do not fulfil their obligations in respect to the international human rights law, tending to equate their sovereignty with the unfettered state discretion on how to use and implement the law provisions (Costello, 2012:261).

The contemporary problems following the poor management of irregular migration, due to the sovereignty and territorial concerns of states which are negatively effecting the implementation of the international human rights law, are diverse in their kind but similar regarding the impact on migrants' lives and

detention conditions. Under these circumstances, migration and in particular irregular migration is seen as a problem for the global system which refers to the territorial protection of each country and the relevant social system as a nation-state, leading to the perception that in order to guarantee the security of that nation-state space the use of measures and in particular violent dissuasive one, including detention, appears necessary and imperative (Cornelisse, 2010:3). Therefore, the detention of migrants comes as a measure which is applied by countries as an application of the right of exercising the principle of sovereignty and in order to ensure the perpetuity of that sovereignty.

The international human rights law appear unable to be impose on state practices in regards to the violations of migrants' rights. This has been proved to be an essential issue for both the reputation and value of human rights, with regards to their universality and effectiveness, in acting as a constructive legal framework for safeguarding human dignity and guaranteeing protection for irregular migrants during the implementation of each country's different migration policy structure. Especially in regards to human rights' universality and therefore the desired ability to apply everywhere, without exceptions of places and states, there are concerns based on two relevant perceptions. First, since human rights and their realisation are linked to and depend on a state system, they cannot be out of this state structure which is based on a territorial logic of sovereignty. Second, even if human rights have resulted in a limitation of a state's jurisdiction within its own territory, they have not yet reached the level of constraining the exercise of state power when this is based on the concept of territorial sovereignty (Cornelisse, 2010:9).

This complexity regarding the supremacy and dysfunctionality between the state sovereignty and the international human rights law gives the opportunity

for the adoption of national policies and practices by the involved countries, which have resulted in many *de facto* cases of migrants' detention, even without being subject to specified acceptable conditions and derogations that are not withheld during detention to protect national security and to prevent related circumstances. Attempts to examine from a legal point of view states' justification leading to limitations of rights, usually brings to the conclusion that this kind of derogations are not valid neither under the domestic nor under the international law (De Zayas, 2005:16). Under these circumstances, given that the moral objective is to protect the human rights of migrants, especially during their detention, the implementation of the international human rights law, in particular those provisions related to the detention of migrants, should be a priority of the states when considering their obligations to follow the common norms and principles concerning when and how migrants should be detained and how they should be treated while in migration detention. These obligations, arising in a variety of forms in international human rights law, can be distinguished between the form of «hard law» including treaties, conventions and statutes and in the form of «soft law», which refers to General Assembly resolutions, declarations, and Special Rapporteurs' reports or opinions. It is also important to be noticed that the provisions of the «hard law» are justiciable before the national and the international tribunals, whereas the «soft law» is covered by the concept of promotional nature and often expanded on the rules of «hard law» (De Zayas, 2005:17).

4.0 Guarantees on International Human Rights Law

The Universal Declaration of Human Rights (UDHR) stipulates in its Article 9 that “No one shall be subjected to arbitrary arrest, detention or exile”². However, the detention of people is currently used as a common practice and the correspondence to the article provisions of the International Human Rights Law comes as a confirmation of the necessity to guarantee the protection of human rights of migrants who are in a situation related to or under detention and therefore have their rights to liberty and security restricted. The International Covenant on Civil and Political Rights (ICCPR) provides strong guarantees in relation to the detention of people and in particular in its Article 9 paragraph 1, which specifies that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”³.

In the same point of view, paragraph 4 of Article 9 of the ICCPR, states that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”⁴. Concerning the provisions of Article 9 of the ICCPR, the General Comment No. 8 of the United Nations Human Rights Committee determines in paragraph 1 that the protection of the detainees and the legality of preventive detention refers to a general exercise of the relevant rights in terms that could

² UN General Assembly. “Universal Declaration of Human Rights.” 10 December 1948, 217 A (III), Article 9 Available at: <http://www.refworld.org/docid/3ae6b3712c.html>; (accessed 24 June 2017)

³ UN General Assembly. “International Covenant on Civil and Political Rights.” 16 December 1966, United Nations, Treaty Series, vol. 999, Article 9.1 Available at <http://www.refworld.org/docid/3ae6b3aa0.html>; (accessed 2 June 2017)

⁴ Ibid, Article 9.4

not be seen to apply just to persons accused of criminal activities and therefore are to be applicable to all types of deprivations of liberty either by arrest or by detention, including migration-related detention⁵.

Taking into consideration that migration-related detention application is strongly connected with the deprivation of liberty and consequently brings about insult to human dignity, this enforces the need to deal with detention cases with high sensitivity. Article 10, paragraph 1, of the ICCPR, stipulates that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”⁶, while the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) also establishes in its Article 17, paragraph 1, that migrant workers and the members of their families who are under conditions of deprivation of their liberty “shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity”⁷.

However, as a term, migration detention refers to the deprivation of liberty of non-citizens under aliens’ legislation because of their status (Grant, 2011:69). Migration detention should be applied as a last resort tool to address irregular migration considering that the status of migrants is by no means a sufficient

⁵ UN Human Rights Committee (HRC). “CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)” 30 June 1982, No. 8, par.1 Available at <http://www.refworld.org/docid/4538840110.html>; (accessed 24 June 2017)

⁶ Ibid. 13, Article 10.1

⁷ UN General Assembly. “International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.” 18 December 1990, A/RES/45/158, Article 17.1 Available at <http://www.refworld.org/docid/3ae6b3980.html>; (accessed 2 June 2017)

reason to limit or violate their basic rights. The Convention Relating to the Status of Refugees (CRSR) states in its Article 31, paragraph 1, that “the contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened (...), enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”⁸. Furthermore, the ICRMW states in its Article 16, paragraph 4, that “migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law”⁹.

The irregular status of migrants makes them always vulnerable with a risk of being abused when they are apprehended by government authorities, especially when the responsible staff for the related procedures is inadequately trained and supervised¹⁰. State policies on migration detention and the protection of migrants’ rights under these conditions are usually non-effective in fulfilling the obligations regarding the upholding of international human rights standards, as well as the difficulties accompanied with staff responsible for arresting, detaining and the management of irregular migrants under imprisonment situations. This staff is, in many cases, unfamiliar with the protection of

⁸ UN General Assembly. “Convention Relating to the Status of Refugees.” 28 July 1951, United Nations, Treaty Series, vol. 189, Article 31.1 Available at <http://www.refworld.org/docid/3be01b964.html>; (accessed 2 June 2017)

⁹ Ibid. 17, Article 16.4

¹⁰ Inter-Agency. “International Migration, Racism, Discrimination and Xenophobia.” (2001), p. 5 Available at <http://www.refworld.org/docid/49353b4d2.html>; (accessed 14 May 2017)

migrants' rights and the prevention of their violations while in their custody. The UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) stipulates in Article 10, paragraph 1, the importance that "each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment"¹¹. Similarly according to Article 11 of the CAT, states should prove their will to good practices and "shall keep under systematic review interrogation rules, instructions, methods, and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture"¹².

Deprivation of a person's liberty usually takes place in the form of detention under administrative justification, however, there have been reports of dramatic increases in the number of detained irregular migrants under the common criminal law who are therefore placed within the national criminal justice system. When the responsible authorities and the detention facilities are not qualified to deal with the irregular cases of detaining migrants and asylum seekers, this not only has the potential to create unnecessary risks in their living conditions but also interferes with the evaluation and the further administrative management of their cases. Article 32 of the CRSR states in its paragraph 2

¹¹ UN General Assembly. "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." 10 December 1984, United Nations, Treaty Series, vol. 1465, Article 10.1 Available at <http://www.refworld.org/docid/3ae6b3a94.html>; (accessed 2 June 2017)

¹² Ibid, Article 11

regarding the restrictions on the movement of refugees that these should be applied with limitations and in particular only when this seems necessary¹³. The detained migrants and asylum seekers should be able to have access to the administrative and justice systems via the direct detention authorities who should have the means and capacities to provide any relevant assistance and legal support to the detainees pertaining to their situation.

Moreover, since the detainees are foreigners, they are in most cases also faced with practical problems such as the need for interpretation and consular services provided by the representative authorities of their country of origin. In these terms the Vienna Convention on Consular Relations (VCCR) states in its Article 36, paragraph 1b, that the arresting authorities have an obligation to provide to persons arrested or in detention all the necessary advices regarding their rights for accessing their consular representatives and when it is specifically requested by the detainee, even to make the arrangements for such access¹⁴.

In addition, the same Article 36 in paragraph 1c, provides to the consular officers “the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation”¹⁵. The ICRMW states in Article 16 paragraph 7, that migrant workers and the members of their families who might be under any form of detention should be able to have access and communicate with the

¹³ Ibid. 19, Article 32.2

¹⁴ United Nations. “Vienna Convention on Consular Relations.” 24 April 1963, Article 36.1b Available at <http://www.refworld.org/docid/3ae6b3648.html>; (accessed 24 June 2017)

¹⁵ Ibid, Article 36.1c

consular authorities of their country of origin¹⁶ and stipulates in paragraph 8 that “migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, that may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used”¹⁷.

There is no difference between the administrative and justice authorities’ jurisdiction on detainees when the detention of migrants leads to the deprivation of liberties as a result of poor detention conditions. Therefore, the need to guarantee the protection of migrants’ rights under these conditions must be accounted for, regardless of which authority is tasked with their arrest and detention. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) obliges the states to prohibit and eliminate any kind of discrimination regarding the enjoyment of civil, political, economic, social and cultural rights. Similarly, according to the Committee on the Elimination of Racial Discrimination in its 2002 General Recommendation on discrimination against non-citizens, paragraph 19, the states should “ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards”¹⁸.

¹⁶ Ibid. 17, Article 16.7

¹⁷ Ibid, Article 16.8

¹⁸ UN Committee on the Elimination of Racial Discrimination (CERD). “CERD General Recommendation XXX on Discrimination against Non-Citizens.” (2002), par. 19 Available at: <http://www.refworld.org/docid/45139e084.html>; (accessed 2 June 2017)

Furthermore, a special attention should be given to the detention of vulnerable groups of migrants like women and children. Following the guarantees of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Committee on the Elimination of Discrimination against Women has stated in its 2006 recommendations to Malaysia, paragraph 24, that “trafficked women and girls should not be punished for violations of migration laws and should have adequate support to be in a position to provide testimony against their traffickers”¹⁹. These findings and recommendations are particularly important in regard to incidences where detention practices are causing further suffering upon detainees irregular migrants who are where victims of traffickers.

Along the same lines, the Convention on the Rights of the Child (CRC) covers many issues regarding the detention of minors primarily pointing out in its Article 3 as a hard-core obligation that in all actions concerning children, states should take under high consideration the best interests of the child ²⁰. In Article 37, paragraph c, the CRC states that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”²¹. Detaining or imprisoning a child should always be confirmed by the law and should be only used as a last resort

¹⁹ UN Committee on the Elimination of Discrimination against Women (CEDAW). “UN Committee on the Elimination of Discrimination against Women: Concluding Comments.” CEDAW/C/MYS/CO/2 (2006), par. 24 Available at: <http://www.refworld.org/docid/453778438.html>; (accessed 2 June 2017)

²⁰ UN General Assembly. “Convention on the Rights of the Child.” 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 3 Available at <http://www.refworld.org/docid/3ae6b38f0.html>; (accessed 2 June 2017)

²¹ Ibid, Article 37c

measure and possibly for the shortest period of time, according to Article 37 paragraph b of the CRC ²². Focusing on cases of unaccompanied children and in regard to their migration-related detention, the Committee on the Rights of the Child states, in its 2005 General Comment No. 6, paragraph 62 on the “Treatment of Unaccompanied and Separated Children outside Their Country of Origin”, that “the states should further take into account that illegal entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child; More general, in developing policies on unaccompanied or separated children, including those who are victims of trafficking and exploitation, States should ensure that such children are not criminalized solely for reasons of illegal entry or presence in the country”²³.

Article 3 of the UDHR states and guarantees that «everyone has the right to life, liberty and security of person»²⁴ while Article 5 prevents any ill-treatment and declares that «no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment»²⁵. Under often overcrowded and improper living conditions in detention facilities, devoid of the minimum respect for human dignity, migrants live a degrading treatment or even torture. The terms inhuman or degrading treatment or punishment have not been defined and the difference between torture, on the one hand, and inhuman or degrading treatment on the other is unclear (Sadollah et al., 2014:944). The CAT defines

²² Ibid, Article 37b

²³ UN Committee on the Rights of the Child (CRC). “General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin.” CRC/GC/2005/6 (2005), par.62 Available at: <http://www.refworld.org/docid/42dd174b4.html>; (accessed 2 June 2017)

²⁴ Ibid. 12, Article 3

²⁵ Ibid, Article 5

in Article 1, paragraph 1 the term “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”²⁶.

On the other hand, the determination of whether an act constitutes inhuman treatment depends on the circumstances in each individual case, including such factors as age, gender and health status of the person subjected to the treatment, as well as the methods used and the duration of the punishment ²⁷. However, the degrading or cruel inhumane treatment of migrants can be caused by a number of means and most certainly affects their physical or mental health, either directly by any acts of human intervention or indirectly by abstaining from providing aid and assistance in order to protect their rights. This demonstrates not only the necessity to avoid the detention of migrants considering that it will not produce any other result apart from the restriction of their liberty but also necessitates and dictates the need for protection of migrants to prevent any inhumane act of violence, degradation or omission against them.

5.0 The case study of Morocco: Detention practices for irregular migrants

²⁶ Ibid. 22, Article 1.1

²⁷ Ibid. 37

Detention of irregular migrants in Morocco is justified according to Article 34 of the National Law 02-03, which states that authorities can detain for a period of 24 hours non – citizens who either have been prohibited to enter and stay in the country or have been issued an order for their expulsion or deportation. Moreover, detention also applies when non-citizens cannot leave immediately Morocco to their countries of origin or transit²⁸. When there is the necessity for an extension of the detention period for more than 24 hours, this cannot lead to more than 15 initial days which can be extended to an additional period of more 10 days²⁹. Due to the National Law provisions and because of the criminalization of the irregular migration in Morocco, irregular migrants face detention immediately following their arrest at the borders, transit zones and in the mainland, as a result of police operations and raids. Although detention is often used as a common practice by Moroccan authorities, there are no official statistics regarding the number of detained migrants for breaking the migration law.

However, there are allegations of mass arrests and violence in the context of raids and the detention of migrants and asylums seekers, particularly in the northern part of the country close to the Moroccan – Spanish borders. Moreover, there is an increasing number of foreigners who have been arrested during identity checks since 2009³⁰. In general, to the eyes of government officials, detention of migrants appears as commonplace in implementing

²⁸ National Legislative Bodies / National Authorities. “Maroc: Loi n° 02-03 relative à l'entrée et du séjour des étrangers au Royaume du Maroc, à l'émigration et l'immigration irrégulières.” / Law No. 02-03 on the entry and residence of foreigners in the Kingdom of Morocco, on emigration and the irregular immigration. 11 November 2003, (in French), Article 34 Available at: <http://www.refworld.org/docid/3ae6b4ed5c.html>; (accessed 17 May 2017)

²⁹ Ibid., Article 35

³⁰ UN Human Rights Council. “Report of the Working Group on Arbitrary Detention: Addendum: Mission to Morocco.” 4 August 2014, A/HRC/27/48/Add.5, par. 57 <http://www.refworld.org/docid/53eb30eb4.html>; (accessed 24 June 2017)

domestic law and migrant detention is justified as a result of common criminal activities that some migrants may have committed while in the country. Detention of these people is not discussed as a mean to handle identification and to provide them with access to health, food and other living conditions, but rather they are detained merely on the grounds that they are viewed as irregular migrants.

In the aftermath of the 2014 regularization campaign, which ended with 17,916 applications accepted in a total of 27,332 applications granting residence status permits to the successful applicants previously irregular migrants³¹, a mass operation was held by Moroccan police on February 10th, 2015 in the Gourougou forest near the city of Nador in the northern part of the country. The operation resulted in the evacuation of almost 1,200 irregular migrants who were arrested and led to Nador for identification and ultimately detained in several facilities across the country. According to the government, migrants were detained to facilitate their access to stay and work permits, but migrants' activists suspected that authorities were actually trying to deport them (Natter, 2015). The process of the regularization campaign in Morocco could have been seen as a significant change in the country's policy in regards to the irregular migration phenomenon as it appeared that the country had the will and the ability to reshape its policies and address issues such as the settlement of irregular migrants' status and the protection of their rights. However, the operation and the mass arrests, as well as the detention of those irregular

³¹ Fédération internationale des ligues des droits de l'homme (FIDH) and Le groupe antiraciste de défense et d'accompagnement des étrangers et migrants (GADEM). "Maroc. Entre rafles et régularisations. Bilan d'une politique migratoire indéfinie."/"Morocco. Between roundups and regularisations. Assessment of an undefined migration policy." (2015), p.19, Available at <https://www.fidh.org/La-Federation-internationale-des-ligues-des-droits-de-l-homme/maghreb-moyen-orient/maroc/maroc-entre-rafles-et-regularisations-bilan-d-une-politique>; (accessed 12 May 2017)

migrants, revealed to the international public once again the many faults of immigration-related detention practices that result in the treatment of migrants under conditions that do not respect the concept of upholding and protecting their human rights.

Moroccan legislation does not specify where the detained migrants should be placed when they are accused of breaking the law, following the provisions of the Migration Act for their arrest and detention. However, there is an element based on legal procedures which provides the opportunity for the establishment of migration detention centres, which should do not be under the prison administration («locaux ne relevant pas de l'administration pénitentiaire») (Grande & Flynn, 2014:16). So far, these types of migration detention centres have not been built or set up and there is currently no willingness or future plans by the local authorities to do so. In practice, migrants and asylum seekers are detained mainly in prisons, police stations, and Gendarmerie buildings, as well as in makeshift migration detention areas like youth centres and administrative buildings. According to UNHCR, Morocco does not have formal detention centres or camps where migrants are held, although it is understood that there are a number of informal and temporary retention areas at key locations along the frontier, including the maritime border near Laayoune, and in the area of Ceuta and Melilla³². The multitude of places that are used to detain migrants requires the involvement of several authorities in detention activities due to a lack of uniformity and common standards. Procedures involving migrants' detention depend on the time and place in which the specific incident occurs. Thus, the results of these detention practices

³² UN High Commissioner for Refugees (UNHCR). "Refugee protection and international migration: a review of UNHCR's role and activities in Morocco." March 2010, PDES/2010/03, par. 49 Available at <http://www.refworld.org/docid/4c47fde02.html>; (accessed 28 May 2017)

carried out by Moroccan authorities can have a serious impact on the treatment of irregular migrants.

The 73 detention facilities which are currently used today for irregular migrants in Morocco include 3 central prisons which operate for long-term imprisonment and 58 local prisons for short-term detention, fall under a number of separate jurisdictions of governmental institutions, which in many cases, act under different legislative frameworks. In light of the above, the Global Detention Project identifies that the migration detention situation in Morocco is a matter of responsibility of the General Delegate for Prisons (Le délégué général aux prisons) and the prisons administration (L'administration pénitentiaire), when the detainees are held in prisons. For those who are detained in police stations, responsibility for the detention operation is that of the Directorate General of National Security (La direction générale de la sûreté nationale) while the Gendarmerie Royale has the authority over the detention in its own Centre de La Gendarmerie Royale de Laayoune. When detention takes place in transit zones then falls under the authority of both the Directorate General of National Security and the Border Police (Police aux Frontières)³³.

A more problematic practice in the detention of migrants takes place when they are detained in public buildings and other facilities such as students' dormitories and military camps or bases, usually under the responsibility of the administrative or military authorities. This occurs mainly following the administrative detention of arrested irregular migrants and in cases of mass operations for the purpose of identification and registration. Coordination among these different authorities on matters concerning their jurisdiction and

³³ Ibid. 45, p. 7

in relation to detention conditions and needs of irregular migrants is necessary in order to avoid any infringement on the rights of detained migrants. However, there are many concerns regarding the achievable success and profitability in the distribution of so many responsibilities on different operating authorities which must work in unison on such serious issue as the management of migration-related detention.

Considering that most of the used makeshift detention areas are informal, and are generally not adequate to facilitate migrants under detention, it is difficult to examine if access to health and other living conditions is properly provided to detainees and in what capacity. However, at the formal detention centres and especially in prisons, conditions do not meet the appropriate level for migration detention and in many cases do not fulfil the necessary requirements according to international standards. In the Moroccan prisons where the irregular migrants may at times be placed among local criminal prisoners, these detention situations seem as an inhuman punishment. Inmates live in highly overcrowded cells and in some cases without beds due to the high number of inmates per cell and with mostly poor ventilation, while overcrowding inevitably leads to serious violations such as denial of or insufficient access to medical care, nutrition, sanitation, security and rehabilitation services³⁴. In addition, there is not always guaranteed access to legal representation and information regarding the rights that migrants are entitled to have, as well as the dangers they might face while in detention due to their irregular status. Moreover, because migrants are forcibly detained in Morocco, risky behaviours have started to appear against

³⁴ UN Human Rights Council. "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez: Mission to Morocco." 30 April 2013, A/HRC/22/53/Add.2, par. 47
<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/134/94/PDF/G1313494.pdf?OpenElement>;
(accessed 2 June 2017)

them, linked to activities that generate economic income, including sexual exploitation, prostitution, and forced labour linked to human-trafficking networks³⁵.

6.0 The National Human Rights Council and the challenges due to the OPCAT

Under these circumstances, it is increasingly difficult to prevent and avoid cases of degradation for detained migrants' physical and mental health as well situations that can cause bodily harm. As inhumane and ill-treatment practices can be classified as types of torture and all together categorized as non-proper actions and conditions which people are faced with while placed in detention, the non-organized and inefficient management and operational conduct of immigration-related detention in Morocco is susceptible to committing all this as it fails to assure the protection of rights of vulnerable individuals, namely the irregular migrants. Insidious abuse and ill-treatment are implied by poor or inadequate conditions of detention (Ledwige, 2006:72). Therefore, since the detention of irregular migrants under these conditions might have some psychological effect on them, without excluding additional effects of other negative acts against them (such as the threat of direct physical violence), this represents a clear case of the violation of the international human rights law and specifically to the provisions of the CAT which protects detained persons from any inhuman act and ill-treatment against them and expects high responsibility to be taken by the state authorities to prevent these in the future.

³⁵ Medecins Sans Frontieres (MSF). "Migrants, refugees and asylum seekers: Vulnerable people at Europe's doorstep." (2009), p. 6 Available at <http://www.doctorswithoutborders.org/sites/usa/files/MSF-Migrants-Refugees-AsslymSeekers.pdf>; (accessed 27 May 2017)

In view of the above, the need for monitoring systems to be in place in any centre or other facility of detention of irregular migrants in Morocco, appears as an essential requirement for the responsible authorities in order not to just guarantee the protection of rights and improvement of living conditions for migrants under detention but mainly as a way to prevent other actions against them that could lead to unacceptable operational levels and even torture and ill-treatment. An innovative international treaty, the Optional Protocol to the United Nations Convention against Torture (OPCAT), creates a system which represents an important opportunity for actors who work for the protection of the rights of refugees and migrants in detention³⁶. The OPCAT is the first instrument in international human rights, with universal application, that has preventive mechanisms built into it and represents a complimentary effort between international and national structures, namely the Sub-Committee for the Prevention of Torture (SPT) and the National Preventative Mechanisms (NPMs), which is explicitly delineated³⁷.

Since June 21, 1993, Morocco has ratified the CAT Convention and on November 1, 2012, started the ratification process of the OPCAT and finally deposited the ratification instruments on November 24, 2014, becoming the 76th State Party to the OPCAT. Article 17 of the OPCAT stipulates that “each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent National Preventive Mechanisms (NPMs) for the prevention of torture at the domestic level; mechanisms established by

³⁶ Association for the Prevention of Torture (APT). “The Optional Protocol to the United Nations Convention against Torture: An Opportunity for Refugee and Migrant Rights Protection.” (2009), p.1

³⁷ Ibid. 50, p. 73

decentralized units may be designated as National Preventive Mechanisms for the purposes of the present Protocol if they are in conformity with its provisions”³⁸. The OPCAT gives a strong opportunity to the national human rights institutions, in addition to activists and defenders from the civil society, to work, based on the rights that the Protocol guarantees, alongside the relevant parties associated with the monitoring and prevention of torture and bad treatment of immigrants on a national level.

The National Human Rights Council of the Kingdom of Morocco (*Conseil national des droits de l'Homme*) (CNDH), appeared to have the most relevance in the institutional field that could be designated as the Moroccan NPM, taking on the responsibility of applying the obligations that the Protocol stipulates to its State parties. The CNDH “declared its readiness to undertake, in close collaboration with the civil society actors, public authorities and all the other stakeholders, the role of the NPM since it believed that it owns all the necessary objective conditions, such its conformity with the principles of Paris”³⁹, for establishing national human rights institutions. However, the obligations under the Protocol are extremely demanding in terms of monitoring the detention facilities and preventing acts of torture within them. Therefore, the CNDH must be in the utmost prepared position to fulfil the requirements and to achieve its purpose as an NPM in accordance with the provisions of the OPCAT.

³⁸ UN General Assembly. “Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.” 9 January 2003, A/RES/57/199, Article 17 Available at <http://www.refworld.org/docid/3de6490b9.html>; (accessed 2 June 2017)

³⁹ Le Délégué interministériel aux droits de l'Homme (DIDH) / Inter-ministerial Delegation for Human Rights (IDHR). “La prévention de la torture dans le contexte de transitions démocratiques en Afrique du nord.” / Prevention of Torture in the Context of Democratic Transitions in North Africa. Rabat, IDHR (2012), p. 23

Following the aforementioned perspectives, in order for the CNDH to be considered as an effective NPM it must be able to work on the ground and cover the crucial elements of detention monitoring which can be identified as the following: independence, comprehensive mandate, scope of visits, professional composition, regular and unannounced visits, unlimited access, private interviews and confidentiality and protection against reprisals⁴⁰. Based on Article 4 of the OPCAT which gives a breadth concept of places of detention that have to be visited by its monitoring bodies, referring only to “any place where persons are or may be deprived of their liberty”⁴¹, the operational plan of the new designated Moroccan NPM should cover any possible facility that might be used for detention purposes and, in regards to irregular migration, any potential informal or makeshift site that could be designated for short or long term detention.

As a preventing mechanism, the CNDH should have unlimited access to all areas where persons are detained, as well as access to all information regarding these places, without barriers to free access by those authorities responsible for the operation of these detention facilities. Moreover, the operational structure has to be independent and based on guaranteeing not only keeping its financial and operational autonomy independent but also the ability to prove that its staff is able to work within their positions in compliance with the values of the institutions. The ability of an institution to function independently necessarily

⁴⁰ UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. “Guidelines on national preventive mechanisms”. 9 December 2010, CAT/OP/12/5 www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc; (accessed 2 June 2017) cited in Penal Reform International. “Safeguards against torture and ill-treatment: Independent monitoring of places of detention.” (2013), p.2) Available at <http://www.penalreform.org/wp-content/uploads/2013/06/Factsheet-on-preventive-monitoring.pdf> ; (accessed 26 May 2017)

⁴¹ Ibid. 53, Article 4.1

entails two essential components: adequate powers and adequate resources to fulfil its mandate (Steinerte and Murray, 2009:61). Therefore, the CNDH as a national monitoring body, should be able to act regardless of the facility of detention and address any wrong-doings in regard to the immigration-related detention conditions and the treatment of the detained migrants by the state.

Conclusion

Immigration related detention can be easily demonstrated as inadequately providing neither an acceptable solution to a problem on such a large scale like the current irregular migration flows and their management nor addressing the causes of irregular migrants' mobility from their countries of origin as a way to dissuade them from doing so. Rather, it results in an increase of the difficulties for migrants who, while under detention conditions, are facing ill-treatment by the state authorities as a result of how the irregular migration is viewed and approached in the countries of transit and destination. More often than not, irregular migration is criminalized and therefore detained migrants are treated under the state shadow instead of being guaranteed the direct protection of their rights. The protection of their fundamental rights is placed in a fragile situation especially while migrants are detained following procedures of arrest and detention which bring them under conditions of imprisonment that leads to the deprivation of their liberty.

Specific and effective migration practices carried out by the states in question would ensure better treatment of irregular migrants. However, the lack of these types of practices only increases immigration-related detention levels and impedes the rights of migrants contrary to the international human rights law which obliges the Contracting States to uphold and to promote human rights. Therefore, the ensuing practices within the detention facilities of many

countries conflict with their international obligations and the relevant agreements to uphold human rights protection in the attempt by state authorities to justify their acts based on their sovereignty and territorial security for protecting the country's rights. This implies that irregular migrants find themselves in a precarious position because of their irregular status and in light of the state's immigration policies. Placing them in closed environments has been shown to have harmful effects on their physical and mental health in addition to other violations of their rights, resulting in negative impacts only for the migrants themselves without, on the other hand, increasing any call to organize preventative measures in tackling irregular migration and protecting migrants from inhumane actions against them.

The vigilance of the international community and especially the human rights activists and defenders appears essential and imperative at this moment in order to demand the guarantees on the protection of irregular migrants' rights contrary to the practices of state authorities. Irregular migrants at present are an integral part of their host societies, which have to develop new policies in order to protect them, in the spirit of the universal idea of human rights. It is therefore necessary for the countries involved to move towards the implementation of policies that could bring to light a more cohesive and proper understanding of how the irregular migrants should be treated and that they have the right to move and choose where they wish to establish their life, outside of their countries of origin.

Therefore, it is paramount that countries, such as Morocco, that are involved in the migration movement as countries of transit and/or destination of irregular flows, accept their role by not handling migrants as a threat to their public order and security but rather treat them with solidarity and impart upon

them any protection that is guaranteed by the international human rights law. It is relevant the role of national human rights institutions that promote the active protection of migrants' rights and prevent violent actions or omissions against them that could result in any inhumane act, ill-treatment or acts of torture to detained migrants. The goal of migrants' rights protection and the prevention of their violations is necessary to avoid the marginalization of irregular migrants invoking punishment and discrimination but rather, favour integration processes that might result in the social inclusion of these migrants and cohesion through diversity and multiculturalism into the host societies.

About the author

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