

REFUGEE RIGHTS IN ISLAM AND IN MODERN REFUGEE LAW WITH SPECIAL REFERENCE TO THE NON-REFOULEMENT PRINCIPLE¹

Khadija Elmadmad²

Abstract

The Islamic humanitarian and protective principles relating to forced migration (*hijrah*) are important themes of the Islamic history and theory. In Islam, *hijrah* is a genuine human right. It is a duty, a right and a comprehensive and effective protection. Many verses of the Holy Quran and numerous Hadith (Sayings of Prophet Muhammed, *peace be upon him (PBUH)*) deal with forced migration and refugees. *Hijrah* law is quite different from modern refugee law. It guarantees more rights to forced migrants (*muhājirūn*), notably the right to be granted asylum, not to be returned and to be protected. Comparatively, in modern refugee law, forced migrants have the right to seek asylum, the right not to be refouled, but not the right to get asylum. The protection guaranteed in this law is quite limited. *Hijrah* law goes beyond the principle of non-refoulement as included in international refugee law. It guarantees for forced migrants the right to live as part of the host community and not only not to be refouled. The present Islamic world, which is supposed to be the world of peace and security (*dar assalaam wal amaan*), has become the world of conflicts and of forced displacement (*dar al-harb wal hijrah*). However, when dealing with forced migration and with migrants, this world refers rather to modern refugee law and hardly to the Islamic teachings and principles relating to *hijrah and muhājirūn*. until recently, *hijra* theory and law have been overlooked by scholars and researchers and only a few specific studies have been conducted about the subject. If taken into consideration and practiced, *hijrah* law could contribute a lot to enhancing the protection of the forcibly displaced persons and reduce the problems they are facing now, including refoulement.

Keywords: Forced Migration, *hijrah*, refugee law, refugees, forced migrants, migrants' rights, non-refoulement principle, Islamic law and principles relating to migration and population movements.

¹ This paper was presented at the conference on The Principle of Non-Refoulement and Voluntary Return in Islamic Law & International Law organized by The International Refugee Rights Association (IRRA) and Fatih Sultan Mehmet University Istanbul, Turkey, 26 October 2023 at Fatih Sultan Mehmet University (Turkey)

² Khadija Elmadmad is, at present, a Law Professor, Attorney, International Consultant, Director of the UNESCO Centre "The Law and Migration" (CUDM) in Rabat (Morocco), Vice Chair of the Legal Clinic of Casablanca Law Faculty and Coordinator of its Section on Migration Law as well as Peace Mediator at *FemWise-Africa*, at the African Union. She was before, among others, the Tenure of the UNESCO Chair "Migration and Human Rights" at Casablanca University, the Chairperson of the Governing Board of the UNESCO /UNITWIN Network on Forced Migration at Oxford University in the United Kingdom, the Legal Coordinator for Morocco at the Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM) of The European University Institute in Florence in Italy, the Director of Studies and lecturer of the training in Arabic, French and English on Migration and Refugee Law at the International Humanitarian Institute of Sanremo in Italy as well as the Chair of the Network of Moroccan Experts in Refugee Law (based at the UNHCR Office in Rabat). ORCID: 0009-0002-9134-3107 khadijaelmadmad@yahoo.fr

Received: December, 16, 2023

Accepted: December, 26, 2023

Copyright © 2020 • International Refugee Rights Association • <http://mejrs.com>

ISSN 2149-4398 • eISSN 2458-8962

Autumn 2023 • 8(2) • 51- 67

İSLAM HUKUKUNDA VE MODERN HUKUKTA MÜLTECİ HAKLARI: GERİ GÖNDERMEME İLKESİNE ODAKLI BİR İNCELEME³

Khadija Elmadma⁴

Öz

Zorunlu göç (hicret) ile ilgili İslami, insani ve koruyucu ilkeler, İslam tarihi ve teorisinin önemli temalarıdır. İslam'da hicret gerçek bir insan hakkıdır. Hicret, bir görev ve bir hak olup kapsamlı ve etkili bir koruma sağlar. Kur'an-ı Kerim'in birçok ayeti ve çok sayıda Hadis (Hz. Muhammed'in (s.a.v.) sözleri) zorunlu göç ve mültecilerle ilgilidir. Hicret hukuku modern mülteci hukukundan oldukça farklıdır. Zorunlu göçmenlere (muhacirlere), özellikle sığınma hakkı, geri gönderilmeme ve korunma hakkı gibi daha fazla hak garanti eder. Modern uluslararası mülteci hukukunda, zorunlu göçmenlerin sığınma talep etme ve geri gönderilmeme hakları vardır, ancak sığınma alma hakları yoktur. Yani garanti edilen koruma oldukça sınırlıdır. Hicret hukuku ise uluslararası mülteci hukukunda yer alan geri gönderilmeme ilkesinin ötesine geçmektedir. Zorunlu göçmenler için sadece geri gönderilmeme hakkını değil, ev sahibi toplumun bir parçası olarak yaşama hakkını da garanti altına almaktadır. Ancak, barış ve güvenlik dünyası olması gereken günümüz İslam dünyası, çatışmaların ve zorla yerinden edilmenin dünyası haline gelmiştir. Zorunlu göç ve göçmenler söz konusu olduğunda, günümüz dünyası daha ziyade modern mülteci hukukuna atıfta bulunmakta, hicret ve muhacirlerle ilgili İslami öğretilere ve ilkelere pek değinmemektedir. Hicret hukuku gündeme alınıp uygulandığı takdirde, zorla yerinden edilmiş kişilere sağlanacak korunmanın geliştirilmesine ve geri gönderme de dahil olmak üzere şu anda karşı karşıya oldukları sorunların azaltılmasına büyük katkı sağlayabilir.

Anahtar Kelimeler: Zorunlu Göç, hicret, mülteci hukuku, mülteciler, zorunlu göçmenler, göçmen hakları, geri gönderilmeme ilkesi, göç ve nüfus hareketlerine ilişkin İslam hukuku ve ilkeleri.

³ Bu makale, Uluslararası Mülteci Hakları Derneği (IRRA) ve Fatih Sultan Mehmet Üniversitesi tarafından 26 Ekim 2023 tarihinde Fatih Sultan Mehmet Üniversitesi'nde (Türkiye) düzenlenen İslam Hukuku ve Uluslararası Hukukta Geri Gönderilmeme İlkesi ve Gönüllü Geri Dönüş konulu konferansta sunulmuştur.

⁴ Khadija Elmadmad Hukuk Profesörü, Avukat, Uluslararası Danışman, Rabat'taki (Fas) UNESCO «Hukuk ve Göç» Merkezi (CUDM) Direktörü, Kazablanka Hukuk Fakültesi Hukuk Kliniği Başkan Yardımcısı ve Göç Hukuku Bölümü Koordinatörü ve Afrika Birliği'nde FemWise-Africa'da Barış Arabulucusudur. Daha önce de Kazablanka Üniversitesi'nde UNESCO «Göç ve İnsan Hakları» Kürsüsü Başkanlığı, Birleşik Krallık'taki Oxford Üniversitesi'nde UNESCO / UNITWIN Zorunlu Göç Ağı Yönetim Kurulu Başkanlığı, İtalya'daki Floransa Avrupa Üniversitesi Enstitüsü'nün Uluslararası Göç Üzerine Uygulamalı Araştırma için Avrupa-Akdeniz Konsorsiyumu'nda (CARIM) Fas Hukuk Koordinatörlüğü görevlerinde bulunmuştur, İtalya'daki Sanremo Uluslararası İnsani Yardım Enstitüsü'nde Göç ve Mülteci Hukuku üzerine Arapça, Fransızca ve İngilizce eğitimler veren ve aynı zamanda (Rabat'taki BMMYK Ofisi'nde bulunan) Faslı Mülteci Hukuku Uzmanları Ağı başkanıdır. ORCID: 0009-0002-9134-3107 khadijaelmadmad@yahoo.fr

Introduction

Islam is a religion and a way of life (*din wa dunya*): it regulates the relations of Muslims with God as well as their private and public life and their relations with non-Muslims, in all fields and activities, notably those relating to migration, including forced migration (*hijrah* in Arabic).⁵

Hijrah comes from the Arabic verb “*hājara*”, which means to give up, to abandon, to separate, to break ties with someone or to migrate (that is: to immigrate and to emigrate)⁶. Generally, the concept includes departure, exit, exodus, emigration and immigration, but it was originally linked to the obligation to flee and was similar to forced migration or seeking asylum due to lack of protection.

Hijrah and *muhājirūn* (migrants) are important themes of the Islamic history and theory. Thus, the Muslim era begins with the flight/*hijrah* of Prophet Muhammad (*PBUH*), from Mecca to Medina (*Yathrib* then) in 622 A.D to escape persecution, and not with the date of His birth.

The first Islamic *hijrah* took place in 613 A.D. and was an episode in the early history of Islam when the first companions of Prophet Muhammad (*PBUH*), the *Sahaba*, migrated from Arabia due to their persecution by Quraysh, the ruling Arab tribal confederation of Mecca then. They sought and were granted refuge in an ancient Christian State that was situated in modern-day Ethiopia and Eritrea, referred to then . This was followed by the *hijrah* from Mecca to Medina, a landmark practice of *hijrah* which was developed later on throughout the Islamic world.

In Islam, *hijrah* is a genuine human right and *hijrah* law is different from modern refugee law. It is governed by humanitarian and protective regulations, stresses the right to asylum and to protection and goes beyond the principle of *non-refoulement*, as included in international refugee law.

Currently, however, *hijrah* law is rarely referred to or invoked throughout the contemporary Muslim world (*dar al-Islam* or *al-ummah al-islamiya*). This world is represented, at present, by The Organization of Islamic Cooperation (OIC) and is accounting almost a quarter of the world’s population.⁷

Islam originates etymologically from the Arabic word of *assalaam*, meaning peace. Therefore, the Islamic world is supposed to be a world of peace and security (*dar assalaam wal amaan*). Yet, it has become rather the world of conflicts and of forced displacement (*dar al-harb wal hijrah*) and of forcibly displaced migrants and refugees (the abode of *al- muhājirūn wal-lājiūn*).

⁵ When speaking about Islam and Islamic law, this study refers more to the two primary sources: the Holy Quran and the *Sunnah*, the body of Islamic custom and practice based on Prophet Muhammad’s words and deeds.

⁶ For the different meanings of the verb *hajara* in Arabic, see the Arabic ALMAANY DICTIONARY, at <https://www.almaany.com/ar/dict/ar-ar/%D9%87%D8%AC%D8%B1/> accessed 25 December 2023. See also Egypt’s *Dar Al-Ifta*, A Journey to the real meaning of *hijrah!*”, at: <https://www.dar-alifta.org/en/article/details/1798/a-journey-to-the-real-meaning-of-hijrah> accessed on 22 December 2023.

⁷ The OIC was founded in 1969 and consists of 57 States with a collective population of over 1,8 billion. See for further information: https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en accessed on 22 December 2023.

The nexus between Islam and asylum has been largely disregarded until recently. Among the early publications related to the issue was the valuable work of Arnaout titled “Asylum in, the Arab-Islamic Tradition”, published by UNHCR in 1987. (Arnaout, 1987). The work of Zaat “The Protection of Forced Migrants in Islam” was published also by UNHCR in 2007, twenty years later. Zaat presented the scale of the lack of knowledge strikingly: “*the existence of Islamic Law protection and assistance mechanisms are little known to Islamic scholars, let alone Muslim States, the international humanitarian community, host communities, and forced migrants themselves.*” (Zaat, 2007) In 2009, UNHCR assisted in publishing the study of Abou El-Wafaa, in Arabic, named “The Right to Asylum between Islamic Shari’ah and International Refugee Law: A Comparative Study”, which is a detailed and informative publication about the comparison between the principles of international law and Islamic Shari’ah concerning the treatment of the refugee. (Abou El-Wafaa, 2007) In 2002, the author of this article published a book in French titled “Asylum in the Afro-Arab Countries”. It draws a comparison between Islamic Law on asylum and refugees, the African and Arab traditions pertaining to receiving and protecting foreigners and asylum seekers and modern refugee and forced migration law, at the national, regional and international levels.

Recently in 2022, Stevens has asserted that “*the examination of the literature on asylum and Islam reveals the somewhat hidden yet rich publications on the issue*” and provided valuable information about some scholarly contributions as well as some regional legal texts concerning the subject. (Stevens, 2022) However, it can still be argued that there is not a large body of academic research conducted on the theme. In addition, the references relating to the issue are not quite abundant, notably in other languages than in Arabic. There is then a need to investigate the subject and to reflect more about it.

Today, when dealing with forced migrants, most countries of the Islamic *Ummah* refer rather to modern refugee law and hardly ever to the Islamic teachings relating to *hijrah* and to *muhājirūn*, even though the modern refugee law is less protective of forced migrants than Islamic Law, including its principle of *non-refoulement*.

The aim of this paper is to expose the protective theory of *hijrah* and display the limitations of modern refugee law in safeguarding the rights of refugees and asylum seekers, with a particular focus on the principle of *non-refoulement*. It will suggest, thereupon, alternative ways for guaranteeing rights to the large numbers of forced migrants living in the Muslim world today. It will precisely try to show how *hijrah* law could advance modern refugee law and contribute to developing forced migrants’ rights, if taken into consideration.

For this purpose, this study will, first, draw a comparison between *hijrah* law and modern refugee law as well as between forced migrants’ rights in both laws. It will then deal with the principle of *non-refoulement* in refugee law, its content as well as its limitations and will contrast it with the protective principles pertaining to asylum in *hijrah* law.

I . Hijrah in Islam: A Human Right in Comparison with Modern Refugee Law

Hijra principles and law are quite distinct from those of modern forced migration law and from refugee law. They are closely linked to some pre-Islamic hospitable practices of the

traditional Arab society. They have been influenced also by commandments found in the two other celestial religions: Judaism and Christianity.

On the contrary, the dispositions included in modern refugee law are quite selective, circumscribed and less protective of forced migrants in general and of refugees and asylum-seekers in particular⁸.

A. Hijrah Law: Origin and Content

Hijrah law originates from some principles and practices towards foreigners and asylum-seekers which existed during the pre-Islamic Arab era, *al-Jāhiliyya*, as well as from commandments found in Judaism and Christianity. It includes rights and duties of Muslims, as migrants and as hosts, and grant extensive rights to those in need of protection.

1. Origin of Hijra Law

The origin of *hijrah* law in Islam could be traced back mainly to the Arab pre-Islamic traditions of hospitality and reception towards aliens. In fact, during the pre-Islamic, traditions of Arab hospitality dictated respect for and protection of the guest seeking asylum. Foreigners or strangers were almost sacred in pre-Islamic Arabia, especially if they come to ask for help and security against injustice, oppression or the hard nature of the desert. Even an enemy was granted protection and hospitality if he/she asked for this protection.

Hijrah in Islam has its origin also in the Judaeo-Christian laws on sojourners, aliens and asylum. In some respect, it is similar, to the concept of “sanctuary” in Judaism and Christianity, though it is more developed and legalised in Islam. In all these three religions, asylum is considered as an act of love to one’s neighbour and help people in need and distress. In Judaism, Christianity, and Islam, asylum has specific importance since the Prophets of these religions, namely, Moses, Jesus Christ and Mohammed experienced exile and sought asylum in foreign communities. Thus, *hijrah* theory follows but further develops the concept and teachings about forced migration introduced by the other two monotheist religions.

1. Content of Hijrah Law

In Islam, *hijrah*/asylum is a duty, a right and comprehensive and effective protection. Many verses of the Holy Quran and numerous Hadith deal with forced migration and refugees.

Asylum as a Duty

In Islam, asylum is the duty of both the state and the individual. A persecuted person should not stay in the place of persecution and should absolutely flee elsewhere (*See* Quran, verse 100 of the Chapter on women, *Sura An-Nisa*). *Hijrah* is then a duty of all Muslims who are not satisfied with their residence, their community members or their political leaders.

⁸ For more details on this comparison, see Elmadmad, Khadija, Asylum in Islam and in Modern Refugee Law, in Asylum and Islam, a Special issue of the Oxford Journal Refugees, Survey Quarterly, Volume 27, Number 2, 2008, Oxford University Press, pp. 51-63, at <https://academic.oup.com/rsq/article-abstract/27/2/51/1570533?redirectedFrom=fulltext> accessed on 15 December 2023.

Asylum is a duty of any Muslim individual (man or woman) who is obliged to give protection to asylum-seekers as it is a way of disseminating the Islamic faith and its humanitarian principles (see Quran verse 6 of the Chapter on Asking Pardon, *Surah Al-Tawbah*). Asylum given by non-Muslims living in the Islamic world is equally accepted and should be respected. For Arnaout, 'asylum constitutes both a subjective right of the individual and an obligation of the community.' (Arnaout, 1987, p. 32)

Asylum is also a duty of the political leader and of the head of the community who cannot oppose asylum granted by any individual of the community and who should agree on and make official the protection granted. As political and religious leader, he/she is also obliged to grant and provide protection to refugees and asylum seekers. Zaat stresses the obligation of Muslim authorities to protect forced migrants when asserting that in Islamic Law "*State and political authorities have a responsibility to both the human beings they are required to protect and assist and to God to ensure that the rights and obligations prescribed in the Sharia are not violated without justification.* The Author adds that "*The Quran, replete with references to the earliest Muslim community and the Jews and Christians (People of the Book) that came before them as "... the persecuted people ... oppressed in the land ... those who have been unjustly driven from their homes ... those that fled their homes or were expelled from them, and those that suffered persecution.*" (Zaat, 2007, p.9 and 32)

Asylum as a Right

Asylum is the right of any human being seeking protection. Asylum-seekers should be assisted and permitted to seek protection. Asylum should be granted to all those who are in need for protection, even to non-Muslims. The doors of Muslims must be held open to provide security and safety (*amaan*) to the people in need.

Asylum as a comprehensive Protection

The Islamic theory developed and legalized the pre-Islamic concept and tradition of protection (*amaan*) of foreigners and destitute persons. Granting asylum can various forms; even by saying do not be afraid or by making a welcoming gesture. However, no protected person (*mustāman*) could be returned, attacked or harmed. The person granted *amaan* is not obliged to become Muslim and is free to practice his/her own religion.⁹ (Abou E-Wafaa, 1987, pp. 43-47)

B. Modern Refugee Law: Limited Protection, Exceptions and Exclusions

In current refugee law, the protection granted to forced migrants is quite restricted and incomplete. There is no global international legal instrument on forced migration providing protection to all forcibly displaced persons.

⁹ For more developments on *hijrah*/asylum in Islam, see Elmadmad, Khadija (in French), *L'asile dans l'Islam* (Asylum in Islam), in *Asile et réfugiés dans les pays afro-arabes* (Asylum in the Afro-Arabes Countries), Editions Eddif, Casablanca, Morocco, 2002, pp. 65-92. See also Elmadmad Khadija (in Arabic), *Asylum in Sharia and in International Law*, in a book in Arabic entitled: *Human Rights: Practical Studies on the Arab World*, published by Mahmoud Charif Bassiouni, Mohamed Said Addakak and Abdel Adim Wazir, Dar Al-Ilm lil Malyin, Beirut, 1989, Volume 2, pp 108-131.

Today, global forced migration is fairly high, the figure exceeds 110 million people forced to flee from persecution, conflict, violence and human rights violations. Of the 35,3 million refugees, 76% of them leaving in low and middle-income countries. Additionally, 5,4 million asylum seekers and 62, 5 million internally displaced people representing 58% of the total.¹⁰

Most of the world forced migrants are not covered by a full legal protection. Refugees are the only category of forced migrants to have a universal convention and a protocol guaranteeing rights to them: the Geneva Convention on the Status of Refugees of 28 July 1951 and its 1967 Protocol. But, as shown above, refugees do not constitute the majority of forced migrants. Internally displaced persons (IDPs), who are forced to leave their home but who remains within their countries' borders, represent the majority of forced migrants at present and there is no binding universal legal instrument governing their conditions. At the universal level, there exists only the non-binding United Nations Guiding Principles on Displacement. At the regional level, there is the African convention on IDPs: The Kampala Convention or of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 23 October 2009. But it only applies in Africa.¹¹

Besides, contemporary refugee law provides protection only to a well-defined portion of forced migrants. Article 1 of the 1951 Refugee Convention defines a refugee as someone outside the country of his nationality or his former habitual residence, persecuted or fearing persecution for only five predetermined reasons: race, religion, nationality, membership of a particular social group or political opinion.

Concerning asylum, the 1951 Refugee Convention builds on Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries, but does not declare that they have the right to get asylum. In modern refugee law, asylum is a right of the states only and it is not a duty for them to grant it. Protection by states of forced migrants and refugees is not then an obligation and could be refused, even to those who have been determined as refugees.

With the passage of time and the emergence of new refugee situations, the 1951 Refugee Convention definition was enlarged, but only at the regional African and Latin American levels. More objective definitions were created in the 10 September 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the 22 November 1984 Cartagena Declaration.

In Africa, the Convention of the Organisation of African Unity (African Union since 2002) expanded and changed the refugee definition. It especially added to the definition of the term "refugee" five situational events, "*external aggression, occupation, foreign domination or*

¹⁰ For the detailed figures for each category of forced migrants, see UNHCR (the United Nations High Commissioner for Refugees) statistics for 2022 and 2023 regarding forced migration in the world, at <https://www.unrefugees.org/news/five-takeaways-from-the-2022-unhcr-global-trends-report/#:~:text=Global%20forced%20displacement%20is%20at,violence%20and%20human%20rights%20violations> accessed on 14 December 2023.

¹¹ See the text of this convention at <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> accessed on 14 December 2023.

events seriously disturbing public order” as reasons for flight. This includes persons fleeing environmental catastrophes such as drought and famine situations. This change in the definition has paved the way for “*prima facie*” group refugee status determination.

The African refugee Convention has made other significant advances from the 1951 Refugee Convention, stressing that discrimination against refugees is prohibited, “de-politicizing” the concept of asylum, declaring that it is a peaceful and humanitarian act, that it shall no longer be perceived by member states as an unfriendly act and urging the member states to grant asylum to those individuals who fall within the refugee definition. The African Convention contains also suggestions for burden-sharing, responsibility, solidarity and cooperation between the member states, such as regional resettlement and financial support¹².

On its part, the Latin-American Cartagena Declaration on Refugees of 1984, extended the refugee definition by allowing a broader category of persons in need of international protection to be considered as refugees. The declaration includes the similar additions made in the African refugee convention but extends them further. According to this declaration, refugees are those “persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”. This definition covers the broader causes of forced migration and links them to lack of human rights protection in their general meaning: civil, political, social, economic, cultural and collective rights or group rights, such as the right to development to peace, to security and to clean environment.

The Cartagena Declaration includes the most comprehensive definition of refugees. Nevertheless, it is only a regional legal instrument and its definition applies only to the South and Central Americas, Mexico and the Caribbean. Moreover, this definition is included in a declaration, that is, a non-binding legal instrument. Latin-American States are consequently not obliged to implement it as a domestic law.¹³

Furthermore, Article 1 of the 1951 Refugee Convention includes some exceptions and exclusions. For example, paragraph D declares: “*This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance*”. This is the case of the Palestinians, notably, who receive some assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Besides assistance, it is a matter of controversy whether UNRWA can also provide protection to Palestinian refugees. (Albenese & Takkenberg, s. 399, 2020) A mere assistance without real protection causes a protection gap in the international refugee law regime (Akram, 2014). Most importantly, this

¹² For the text of the 1969 African refugee Convention, see the African Union web site: https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf accessed on 14 December 2023.

¹³ For the text of the Cartagena Declaration, see UNHCR, Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984, in: <https://www.unhcr.org/media/cartagena-declaration-refugees-adopted-colloquium-international-protection-refugees-central> accessed on 14 December 2023.

UN agency has failed its mission in various occasions, particularly in Gaza after the Israeli attacks following the events of 7th October 2023. This is evident from the statements by the President of UNRWA in a dramatic letter to the President of the General Assembly of the UN: “In my 35 years of work in complex emergencies, I never have expected to write such a letter, predicting ... the collapse of the mandate I am expected to fulfil.” (UNRWA, The Gaza Strip, 2023)

The ongoing forced displacement of Palestinians in Gaza and their genocide (OHCHR Gaza, 2023) by the Israelis is a tragedy that is one of the darkest pages in the history of humanity. This drama illustrates not only the limitations and failure of the law of forced migration and refugee law in protecting displaced people, but it especially shows that the brutality of the Israeli armed forces and their unconditional backing by the first power in the world, resulted in the collapse of humanitarian laws and all international law and institutions in regulating international relations, safeguarding rights and guaranteeing justice and security in the world. The world finds itself at a dangerous crossroad and an uncertain future.

The dramatic forced displacement of the Palestinians by the Israelis since 7 October 2023 has made them the latest “displaced people” of our time. Up to 1.8 million people in Gaza, nearly 80 percent of the population, are estimated to be internally displaced. (OCHA, Hostilities in Gaza Strip and Israel, 2023) In this tragedy, “concerns have been raised particularly about vulnerable groups of people among them who are struggling with difficult shelter conditions.” (OCHA, Hostilities in Gaza Strip and Israel, 2023) This includes people with disabilities; unaccompanied children, “women who are pregnant, have recently given birth, or are breastfeeding; people who are recovering from injuries or surgeries; and those with compromised immune systems”. (OCHA, Hostilities in Gaza Strip and Israel, 2023)

Furthermore, modern refugee law, if compared with *hijrah* law, is quite general and it does not include special dispositions relating to some vulnerable categories of refugees and asylum seekers who constitute now the majority of the world refugee population: women and children.

Scholars and critics have started to question modern refugee law, to point its shortages and to consider the universal refugee definition unsuitable for the contemporary society. (Marshall, 2011) Some have argued that the 1951 Refugee Convention is unable to protect refugees and forced migrant now and called for a new treaty recognizing the complex nature of displacement in the 21st century and including all forced migration. (Marshall, 2011)

Others have called attention to the “European feature” at the origin of the 1951 Refugee Convention (Betts & Collier, 2017) and showed its exclusion of some humanitarian traditions and principles pertaining to forced migration and to the protection of migrants existing in other regions and cultures, namely the Islamic *hijrah* principles and laws; which, if included in refugee law, could be referred to and applied at least in the Muslim and Arab worlds.

In spite of this, there are now some optimistic developments within the international refugee regime: the process of Global Compact on Refugees. It brings states, international organizations, refugees, civil society, the private sector, and experts together. This fundamentally

aims to create more equitable and fairer responsibility-sharing mechanisms by easing pressures on host countries, enhancing refugee self-reliance, increasing access to third-country solutions and improving conditions in countries of origin.

It is important to note that the Compact is not a legally international binding instrument, but, according to UNHCR, it “constitutes a unique opportunity to transform the way the world responds to refugee situations, benefiting both refugees and the communities that host them”. It might contribute to lessen the shortages in protection characterizing the current refugee and forced migration law and could encourage searching for alternatives for protecting the displaced and destitute of our world. Recently, the Second Global Refugee Forum was held in Geneva as the world’s largest international gathering on refugees. Nevertheless, it is still too early to evaluate the success and achievements of the Global Compact process. It remains to be seen whether it will fulfil its promises.

In sum, the modern refugee law does not provide adequate protection anymore and that the rights it promises depend on the will of states and that these rights are not always effectively implemented, including the fundamental principle of non-refoulement. Hijrah law goes beyond non-refoulement and emphasises genuine rights to most forced migrants.

II. Hijrah Law Includes Non-Refoulement and Goes Beyond It

Modern refugee law recognises various rights to refugees. Among these rights, the right to *non-refoulement* is fundamental. It gives a kind of “half protection” from expulsion for those seeking asylum, at least theoretically. However, it is not the equivalent of the right to stay and to be protected, as incorporated in Islamic *hijrah* law.

A. Non-Refoulement: The Most Important Right in the Modern Refugee Law

The Refugee Convention of 1951 set out the rights which individuals are entitled to once they have been recognised as Convention refugees (articles 12 to 30). Amidst these rights, the principle of *non-refoulement* is fundamental.

1. Refugee Rights in the 1951 Refugee Convention

Among the rights recognized to refugees in the 1951 Refugee Convention, we could mention the right to be granted identity papers and travel documents that allow them to travel outside the country.

Refugees must receive the same treatment as nationals of the receiving country with regard to free exercise of religion and religious education, free access to the courts, including legal assistance, access to elementary education, access to public relief and assistance as well as to social security. Other rights are also guaranteed, such as protection of intellectual property, of literary, artistic and scientific work, equal treatment by taxing authorities etc.

Refugees must receive the most favourable treatment provided to nationals of a foreign country with regard to the right to belong to trade unions and to other non-political non-profit

organizations as well as the right to engage in wage-earning employment.

Refugees must be accorded the most favourable treatment possible, which must be at least as favourable to that accorded to aliens generally in the same circumstances, with regard to the right to own property, the right to practice a profession, the right to self-employment, to access to housing and to higher education.

But these rights are not generally and automatically granted to refugees in all countries. In some cases, the rights of refugees and asylum seekers are unimplemented and limited by states, including the right to *non-refoulement*.

1. The Principle of Non-Refoulement and its Limitations

Non-refoulement is the prohibition of forced return of a refugee. It is one of the most fundamental principles in international refugee law. This principle is laid out in Article 33 of the Convention Relating to the Status of Refugees, which declares that no state “*shall expel or return (‘refouler’ in French) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*”¹⁴

Non-refoulement refers to the generic repatriation of people. It is a principle of customary international law, as it applies even to states that are not parties to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol.

It is worth noting that the African 1969 Convention developed a bit more the right to *non-refoulement*. It introduced the “*absolute*” prohibition of refoulement, whereas the 1951 Refugee Convention allowed return or expulsion of refugees if the national security of the state would be at risk. However, if asylum seekers commit certain serious crimes, they will be excluded from the refugee definition and could still be returned or expelled. Refoulement is thus only limited but not absolutely prohibited.

The principle is supposed to be somehow a non-negotiable aspect of international law. It is, however, not strictly respected by all states. Many states try to prevent asylum-seeker from reaching their borders and apply for refugee status and numerous violations of this principle occur, including by some Islamic States.

As there is no obligation on states to guarantee asylum and rights to refugees and asylum seekers and as there is no control over them, they are free to consider or not the claims of asylum seekers and take refugees. Many states detain them upon arrival and deport them (*refoulement*).

Asylum-seekers are very often considered as irregular/undocumented migrants and expelled, irrespectively of the principle of *non-refoulement*. Yet this is not allowed in *hijrah* law which goes beyond *non-refoulement* and guarantees the right not to be returned together with the right to stay to forced migrants.

¹⁴ For precise information about this principle, see UNHCR Note on the Principle of Non-Refoulement, at <https://www.refworld.org/docid/438c6d972.html> accessed on 14 December 2023.

A.Hijrah Law: The Right to Non-Refoulement as well as The Right to Asylum

In the Islamic *hijrah* theory, not only not to be refouled, forced migrants have the right to be protected thoroughly and live as part of the host community. As invoked earlier, in Islam, doors should be kept open to provide security/*amaan* to people in search of protection. Asylum seekers should be assisted and permitted to seek protection and no protected person (*mustāman*) could be returned, attacked or harmed.

In Islam, the principle of non-refoulement cannot be separated from asylum or from the global protection acknowledged to forced migrants. It is part of it and is contained in its scope, as illustrated in the Islamic history of protecting people forcibly displaced. (Al-Dawoody, 2011)

The right to asylum necessarily encompasses the right not to be returned to a place where one faces persecution or oppression. No formal requirements are needed to be protected in Islam. The declaration of an asylum-seeker to place himself under the protection of Islam is sufficient for him to be granted asylum and full protection and not be returned or expelled. As Arnaout puts, it is not permitted that “*the asylum-seeker to be refused access or admission to the territory of the country where he has requested refuge.*” (Arnaout, 1987, p.19)

Further, Islamic law elevates the standing of those who provide protection and assistance to persons in need, including forced migrants, noting that “*whomever saves a human life shall be deemed as though he had saved all mankind*” as recommended by the Prophet Mohammad (PBUH). (Zaat, 2007, p.9)

Hijrah principles apply to any individual forced to migrate and in search of protection. The Islamic definition of forced migration/refugee is thus broader than that found in refugee law. The person is not even obliged to give the reasons behind asking for protection. In addition, asylum seekers are not obliged to prove that they have been persecuted to be protected and not to be *refouled*. They are accorded asylum immediately after their arrival and upon their request only.

The only exclusion from protection/*non-refoulement* in the Islamic theory concerns asylum seekers who have committed crimes before seeking asylum. All crimes should be punished and there is no difference in Islam between political and non-political crimes, except in the case of legitimate defence. (See Qur’an, verse 34 of Chapter on the Table (*Surah Al-Ma'idah*))

Once granted *amaan* /protection, refugees should benefit, from all the rights guaranteed to the members of the community, including the right to work, to education, to free movements, family reunification participation in the social life and also political life. The departure of a forced migrant from the place where she/he has received protection depends on her/his decision only.

These are some of the protective rights, inclusive of *non-refoulement*, which are granted by Islam to forced migrants, if compared with current international refugee law. The Islamic rules and principles pertaining to forced migration are mostly ignored now, while they are extremely needed in the present Muslim world which is accommodating a big proportion of the uprooted.

In fact, statistics show that the majority of refugees and displaced people in the world are Muslims today and that millions of them were forced to flee their homes and communities for many reasons: wars (civil and interstates), dictatorship, droughts, earthquake, tsunamis. Many have crossed the borders as refugees and a lot of them have remained within the borders as IDPs.

The UN statistics show also that Muslim States are on the top of the list as countries of origin of forced migrants as well as host countries for forced migrants. These are: Afghanistan, Bangladesh, Egypt, Iran, Iraq, Jordan, Lebanon, Pakistan, Somalia, Sudan, South Sudan, Syria, Turkey.¹⁵ The uprooted people in the Islamic world are the “*forgotten of the Ummah*”. More attention needs to be paid to them, notably by the Muslims themselves.

Zaat suggests that the lacuna existing in promoting and practicing *hijrah* law should be addressed and needs the “rediscovery” of relevant norms in Shariah source relating to forced migration, emphasizing the right of all humanity to enjoy protection and assistance. The author puts an accent on “*the concomitant obligation to protect and assist those in need and calls upon the Muslim States to work closely with UNHCR through the OIC in order to establish an expansive Islamic Protection Framework which could be implemented by National Human Rights Commissions monitoring and reporting on the application of Islamic Law protection and assistance currently afforded to forced migrants and ensuring that any such future application takes place in a way that both conforms with and informs international protection regimes*”. (Zaat, 1987, p.34)

Indeed, the Organization of Islamic Cooperation (OIC) could or should play a crucial role in promoting and fostering *hijrah* law and principles. Particularly, the OIC ought to intervene to protect the rights of the “uprooted Muslims”.

Actually, the OIC has organized few meetings on migration in the Muslim world, issued some resolutions about the question and also took some actions in favour of Muslim refugees and internally displaced persons. For example, on 21 September 2023 the OCI participated in New York, in a roundtable on the Regional Perspective of the Refugee Crisis in the Muslim region, jointly organized by the Islamic Development Bank (IsDB), the Islamic Solidarity Fund for Development (ISFD) and United Nations High Commissioner for Refugees (UNHCR) and stated its commitment to supporting refugees in the Muslim world. The OIC took part also in the establishment of the international Islamic refugee fund in partnership with the UNHCR, ISFD, and the IsDB. The OIC views this initiative as an “*innovative, sustainable and sharia-compliant financing tool aimed at enhancing the international community’s response to forced displacement and providing new financing channels to assist millions in need*”¹⁶.

Concerning the drama of the Palestinians’ forced displacement in Gaza, the OIC expressed

¹⁵ For complete statistics of refugees and displaced persons originating from and hosted by Muslim countries, see: UNHCR Global Trends: Forced Displacement in 2022, at <https://reliefweb.int/report/world/global-trends-forced-displacement-2022> accessed on 16 December 2023.

¹⁶ OIC Participates in “Regional Perspective on Refugee Crisis” Symposium in New York on 21 September 2023, in: https://www.oic-oci.org/topic/?t_id=39601&t_ref=26643&lan=en

its will to end this humanitarian disaster and renewed its constant support to the Palestinian cause and rights. In a meeting held on 21 December 2023, the OIC considered quick measures and procedures to be taken to provide the necessary humanitarian support to the Palestinian people in the face of the ongoing attacks and the severely deteriorating humanitarian conditions suffered by the Palestinian people in general and Palestinian women in particular.¹⁷ Nevertheless, further frameworks must be considered in order to provide effective and adequate protection to refugees. Additionally, the OIC is required to organize meetings, undertake studies and arrange training on *hijrah* law and its application in the Muslim States.

Conclusion

In summary, modern refugee law is no more protecting and is not fit for modern time. The shortages in protection characterizing the current refugee and forced migration law, urges to search for alternatives for protecting the displaced and destitute of our world.

As developed above, the Islamic law and values pertaining to *hijrah* and treatments of forced migrants are characterised by human compassion and practical concerns which are unparalleled with modern refugee law. If taken into consideration and practiced, *hijrah* law could contribute a lot to the protection of the forcibly displaced persons and reduce the various problems they are facing now, including *refoulement*.

Going back to the traditional hospitality and care for people in need of protection might be one of the solutions for humanity to overcome the inhuman period we are going through now, specifically in the case of the current dramatic Palestinian displacement.

To advance modern refugee law and to improve forced migrants' rights, it is worth trying to revive some humanitarian traditions and practices. This could start first at the Islamic and Arab regional or sub-regional levels by enacting binding legal instruments combining modern refugee law with traditional forced migration principles and laws, such as *hijrah* law. (Elmadmad, 1991)

Bibliography

Books

ABOU EL-WAFEE, A., *The Right to Asylum between Islamic Shari'ah and International Refugee Law: A Comparative Study*, Press of Naif Arab University for Security Sciences, Riyadh, 2009.

ALBANESE F., TAKKENBERG A., *Palestinian Refugees in International Law*, 2nd Edition, Oxford University Press, 2020.

ARNAOUT, G. M., *Asylum in the Arab-Islamic Tradition*, UNHCR/International Institute of Humanitarian Law, Geneva, 1987.

¹⁷ OIC General Secretariat Participates in the Emergency WDO Ministerial Council to Discuss the Brutal Israeli Aggression on the Palestinian Territories, 21 December 2023, in: https://www.oic-oci.org/topic/?t_id=40134&t_ref=26831&lan=en

BETTS, A. and COLLIER, P., *Refuge: Transforming a Broken Refugee System*, 1st edition, Allen Lane, 2017.

ELMADMAD, K. (in French) *Asile et réfugiés dans les pays afro-arabes (Asylum in the Afro-Arabes Countries)*, Editons Eddif, Casablanca, Morocco, 2002, see https://books.google.co.ma/books?id=ivzUGt6y5_sC&pg=PA213&lpg=PA213&dq=khadija+elmadmad&source=bl&ots=HoVKBxBmfO&sig=QpHM0n45I3s-EQprbQEd5QQ2IMs&hl=fr&sa=X&redir_esc=y#v=onepage&q=khadija%20elmadmad&f=false

ELMADMAD, K. (Ed.) (in French), *Les Migrants et leurs droits au Maghreb (Migrants and their Rights in the Maghreb)*, Edition La Croisée des Chemins, Casablanca, 2004, see UNESCO web site : <https://unesdoc.unesco.org/ark:/48223/pf0000139531>

ZAAT K., *The protection of forced migrants in Islamic law*, UNHCR publication, Geneva 2007, in: <https://www.unhcr.org/media/protection-forced-migrants-islamic-law-kirsten-zaat>

Chapters of Books

AKRAM, Susan M., 'UNRWA and Palestinian Refugees' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* Oxford University Press, 2014.

ELMADMAD, K. *Migration Law and Migrants' Rights: an Underdeveloped Branch of Law: the Moroccan Experience*, in OUCHO John O Editor, *Migration in the Service of African Development: Essays in honour of Professor Aderanti Adepoju*, Safari Books Ltd, Ibadan (Nigeria), 2011, in: <https://dokumen.pub/migration-in-the-service-of-african-development-1-nbsped-9789788431510-9789788431169.html>

ELMADMAD, K. *Asylum in Islam and in Modern Refugee Law*, in *Asylum and Islam*, a Special issue of the *Oxford Journal Refugees*, Survey Quarterly, Volume 27, Number 2, 2008, Oxford University Press, pp.51-63 in: <https://academic.oup.com/rsq/article-abstract/27/2/51/1570533?redirectedFrom=fulltext>

ELMADMAD, K. *The Human Rights of Refugees with Special Reference to Muslim Refugee Women*, in INDRA Doreen, *Engendering Forced Migration: Theory and Practice*, Berghahn Books, New York and Oxford, 1998 pp 261-, 271 in: https://books.google.co.ma/books?id=cG_imYi0vDUC&pg=PA261&lpg=PA261&dq=Khadija+elmadmad+Women's+Rights+Under+Islam&source=bl&ots=hCoF6f8xH4&sig

ELMADMAD, K. *Asylum in Past and Present Morocco*, in, *Morocco: The Journal of Moroccan Studies*, N° 2, 1992, published by the Centre of Near and Middle Eastern Studies, The School of Oriental and African Studies (SOAS), London, UK, pp.28-33.

ELMADMAD, K(in Arabic). Asylum in Sharia and in International Law, in a book in Arabic entitled: Human Rights: Practical Studies on the Arab World), published by Mahmoud Charif BASSIOUNI, Mohammed Said ADDAKAK and Abdel Adim WAZIR, Dar Al-Ilm lil Malyin, Beirut, 1989, Volume 2, pp. 108-131.

Articles

AL-DAWOODY, A., The principle of non-refoulement under Islamic Law and International Law: Complementing International Legal Protection in Muslima Context, *Humanitarian Law & Policy*, International Committee of the Red Cross (ICRC), 2011, in: <https://blogs.icrc.org/law-and-policy/contributor/ahmed-aldawoody/>, accessed on 10 December 2023

EGYPT'S *DAR AL-IFTA*. A Journey to the real meaning of *hijrah!*”, at <https://www.dar-alifta.org/en/article/details/1798/a-journey-to-the-real-meaning-of-hijrah>

ELMADMAD, K., Asylum in the Arab World: Some Recent Instruments, in *Journal of Peace Studies*, Vol.6, Issue 1, Publication of the Centre for Peace Studies, New Delhi, January-February 1999, pp.24-34

ELMADMAD, K., Asylum in Islam, Judaism and Christianity”, in *Africa Legal Aid Quarterly*, Maastricht, Holland, January-March 1998, pp. 26-29

ELMADMAD, K., An Arab Declaration on the Protection of Refugees and Displaced Persons in the Arab World”, in *The Journal of Refugee Studies*, Vol.6, No. 2, 1993, Oxford University Press, pp.173-175

ELMADMAD. K., An Arab Convention on Forced Migration: Desirability and Possibilities, in *International Journal of Refugee Law*, Vol 3, 1991, Oxford University Press, pp. 461-481 <https://academic.oup.com/ijrl/article-abstract/3/3/461/1549390?redirectedFrom=fulltext>

MARSHALL, L.W., Toward a new definition of ‘refugee’: Is the 1951 Convention Out of Date? Vol. 37, Issue 1, 2011

STEVENS, D., The Right to Asylum in International Law and Islamic Law: Some Reflections, *Refugee Law Initiative Blog*, 14.12.2022.

Legal texts and documents of specific Institutions

AFRICAN UNION. Kampala Convention, at <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>

AFRICAN UNION. 1969 African Refugee Convention, at https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf

UNHCR (United Nations High Commissioner for Refugees Cartagena Declaration on Refugees, , 22 November 1984, at <https://www.unhcr.org/media/cartagena-declaration-refu->

[gees-adopted-colloquium-international-protection-refugees-central](#)

UNHCR. Note on the Principle of Non-Refoulement, at <https://www.refworld.org/docid/438c6d972.html>

UNHCR statistics for 2022 and 2023 regarding forced migration in the world, in: <https://www.unrefugees.org/news/five-takeaways-from-the-2022-unhcr-global-trends-report/#:~:text=Global%20forced%20displacement%20is%20at,violence%20and%20human%20rights%20violations>

UNHCR. Statistics of refugees and displaced persons originating from and hosted by Muslim countries, Global Trends: Forced Displacement in 2022, at <https://reliefweb.int/report/world/global-trends-forced-displacement-2022>

UNRWA (The United Nations Relief and Works Agency for Palestine Refugees in the Near East), The Gaza Strip: In The Darkest Hour as Humanitarian Situation Untenable <https://www.unrwa.org/newsroom/official-statements/gaza-strip-darkest-hour-humanitarian-situation-untenable%E2%80%AF>

OCHA (United Nations Office for the Coordination of Humanitarian Affairs), Displacement (Gaza Strip), 28 November 2023, at <https://www.un.org/unispal/document/hostilities-in-the-gaza-strip-and-israel-ocha-flash-update-53/>

OCHA, Hostilities in the Gaza Strip and Israel – OCHA Flash Update #52, at <https://www.un.org/unispal/document/hostilities-in-the-gaza-strip-and-israel-ocha-flash-update-52/>

OHCHR, Office of the United Nations High Commissioner for Human Rights, Gaza: UN experts call on international community to prevent genocide against the Palestinian people, at <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>