UNIVERSITÀ DEGLI STUDI DI NAPOLI "L'Orientale"

MAPS

Migration and Asylum Policies Systems

Co-funded by the
Erasmus+ Programme
of the European Union

EACEA

EVALUATION SCIENTIFIC COMMITTEE

PROF. RAFAEL CASADO RAIGÓN
University of Cordoba

PROF. NATHALIE ROS
University François Rabelais of Tours

PROF. MASSIMO STARITA
University of Palermo

MIGRATION AND ASYLUM POLICIES SYSTEMS' NATIONAL AND SUPRANATIONAL REGIMES

The General Framework and the Way Forward

Edited by

GIUSEPPE CATALDI and PETER HILPOLD

Editoriale Scientifica

Via San Biagio dei Librai, 39 – 80138 Napoli
ISBN 979-12-5976-529-1

M.A.P.S NETWORK

Jean Monnet Activities are designed to promote excellence in teaching and research in the field of European Union studies worldwide. The activities also foster the dialogue between the academic world and policymakers. In particular Jean Monnet Networks aim to create and develop consortia of international players (Higher Education Institutions, Centers of Excellence, departments, teams, individual experts, etc.) in the area of European Union studies in order to gather information, exchange practices, build knowledge and promote the European integration process across the world. Activities include:

- gathering and promoting information and results on methodologies applied to high-level research and teaching on EU studies
- enhancing cooperation between different players and other relevant bodies throughout Europe and around the world
- exchanging knowledge and expertise to improve good practices
- fostering cooperation and exchanges with public actors and the European Commission services on highly relevant EU subjects

INDEX

PREFACE

GIUSEPPE CATALDI*

This volume collects the proceedings of the Conference that concluded, at the University of Naples L'Orientale (leading partner University), the activities of MAPS (Migration and Asylum Policies Systems. Weaknesses, Shortcomings and Reform Proposals), a network that brought together ten European universities in the execution of the project approved by the EACEA (European Education and Culture Executive Agency) within the Erasmus+ Programme of the European Union Commission.

The activities took place over four years (2018-2022). Therefore, one year longer than planned, due to the Covid 19 pandemic, which slowed down the work and unfortunately prevented, in many cases, the organisation of in-person events. Despite these difficulties, I believe that the satisfaction with the result on the part of the writer, the Network's coordinator, can be considered legitimate. Over the months and years, and within the framework of the meetings, the overall situation in Europe and the individual national systems in the field of migration and asylum have been analysed, exchanging and disseminating, for the benefit of scholars, students, practitioners and policy makers, useful information on the state of the art of the subject and on best practices, reflections and proposals. This took place in particular in the conferences held in the individual partner universities, the proceedings of which were subsequently published. An important added value were the video-recorded lectures, which gave students in particular the opportunity to benefit from the teaching of lecturers and specialists from ten different European universities.

What can be a quick summary of the main conclusions reached by this research group, and which are also largely contained in the writings in this volume? Below, in a very schematic manner, and referring for further study to the proceedings of the conferences held within the Network, we will attempt to indicate them.

* University of Naples L'Orientale; MAPS General Coordinator.

First of all, in the area of migration, it is evident how far the European Union is still from being a federal State, with the weight of Member State governments still prevailing. Indeed, a unanimous conviction emerged in the debate within the Network, namely that in most cases, the difficulties and limitations that the national systems of the EU Member States encounter, at a regulatory and political level (but the issue also concerns, as in the case of North Macedonia, third States that cooperate closely with the Union and its members), are a consequence of the fact that the European Union itself has not yet found a convincing and, above all, unified position on the issue of the migration regime, notwithstanding the Commission President's 2020 State of the Union address, when she said that migration was a European challenge with regard to which "all of Europe must do its part". 'No EU migration deal under our watch', this the first significant statement of the Swedish presidency on 4 January 2023.

Linked to the previous one is the consideration that the 'emergency' approach on the part of the Brussels institutions is not justified and must give way, at last, to a balanced and steady regime that agrees above all with those general principles, in terms of solidarity and human rights, written in block letters in the Treaties. In this regard, another practice that has become widespread and that has emerged in the discussions as being absolutely contrary to the principle of non-discrimination is the utilitarian conception of immigration, through the acceptance of an alien as a 'prize', or by privileging one person over another with the same requirements but with a different qualification, level of education and social class.

It is undeniable that in the search for a balance between humanitarian aspects and the control of the Union's external borders, the EU institutions and the Member States currently favour the latter, especially through a questionable outsourcing and relocation of the management of the migratory phenomenon, as confirmed by the European Parliament's refusal to adopt a motion for a resolution tabled on 21 October 2019 by the Committee on Civil Liberties, Justice and Home Affairs "on search and rescue operations in the Mediterranean", which essentially reaffirmed the need for Member States to respect their obligations under European and international law in this area. Despite being a document lacking in innovative proposals, the proposal was rejected by the Parliament (290 votes against, 288 for and 36 abstentions). Outsourcing the management of migration flows and refugees through agreements with

States with lower human rights standards than the average European country is contrary to the common constitutional traditions of European States and the principles of EU law. The so-called Statement of the EU Member States with Turkey, the agreement between Italy and Libya, the agreement between the United Kingdom and Kenya, commented at length in the writings that follow, are precedents that should absolutely not be followed and forgotten.

Of course, an organic discipline would be needed that also incorporates the reform of the Common European Asylum System (CEAS). Indeed, under the so-called Dublin system, the country of first entry is responsible for the execution of the asylum procedure, which leaves open the question of how the burden of granting asylum is to be shared among EU Member States, problem remained unresolved especially in the face of the rejection (condemned by the Court of Luxembourg) of the quota system by some Eastern European States with reference in particular to the serious humanitarian crisis triggered by the large migration flows in the Eastern and Central Mediterranean in 2015 and 2016.

The European Commission finally acknowledged in the "Proposal for a Regulation on Asylum and Migration Management" adopted on 23 September 2020 that solidarity has been lacking. Anyway, despite its highly controversial nature, the centrality of the entry criterion remains in this new "Pact on Asylum and Migration" (as defined by the Commission), whose Art. 21(1) reproduces Art. 13(1) of the Dublin III Regulation. The Commission's remedy for imbalances is essentially left to the so-called "solidarity mechanisms". These mechanisms should operate according to a complex procedure (Art. 47-49), and States are not obliged to offer their contributions in terms of relocations, but are free to combine relocations with other contributions (capacity building, support to operations, cooperation with third States) in accordance with their distribution key. The Commission would constitute a "solidarity pool", taking into account the contributions offered by the Member States. Although these proposed changes seem to merit a mild positive assessment, it is obvious that the Pact is, as usual, the result of an effort to combine the positions of the EU Mediterranean States with those of their European partners, in an effort of Realpolitik.

Other important points have emerged in discussions during these difficult years, marked first by the management of landings in the central Mediterranean and transit via the 'Balkan route', then by the health emergency due to Covid 19, and finally by the war in Ukraine. First of

all, that the distinction between refugee and economic migrant is very difficult as well as questionable, and could only be valid if a legal order has nevertheless established possibilities and procedures for legal immigration. In the present situation the reification of irregular border crossing into a criminal activity is a legislative choice contrary to the sense of humanity and values of the so-called 'first world', and the issue of force carried out by border police against migrants seeking to cross borders irregularly is the biggest human rights challenge at the EU's external borders.

Concerning in particular the subject of refugees, it is worth mentioning two important aspects. Firstly, the difficulty of including in the definition provided by the 1951 Convention the new figure, so significant and unfortunately destined to become increasingly important, of the 'environmental refugee'. Secondly, the debate on the customary value, and therefore beyond the 1951 Convention, of the principle of 'non-refoulement'. This value now appears to be established in practice, but it is interesting on this point to read prof. Hathaway's contrary opinion as well as prof. Goodwin-Gill's response, in the writings contained here.

Returning to the issue of Ukraine, surely the decision of the European Union of March 2022 which applied the directive on temporary protection, an emergency mechanism applicable in cases of massive influxes of people and aimed at providing immediate and collective protection (i.e. without the need to examine individual applications) to displaced persons who cannot return to their country of origin, can be described as historic. Rights include residence, access to the labour market and housing, medical care and access to education for children. The evaluation of this initiative can only be positive, except to point out that this is the first time that such a decision has been taken, despite the fact that the directive dates back to 2001. Beyond the political discretion that must undoubtedly be recognised, are we sure that there have not been occasions so far that would have required similar treatment? The fear is then that a 'competition among desperate people' may be triggered, i.e. that it will be forgotten that under international law States have an obligation to recognise (and not grant) refugee status to all those who are entitled to it, regardless of nationality. Unfortunately, we are already witnessing the attitude of countries which, depending on whether or not they sympathise with Ukraine's cause, either create a 'fast track' for its citizens or, on the contrary, relegate them to the last place among those destined to receive them. In either case we are faced with a blatant violation of the rules on the subject.

One definitely positive aspect that emerges from the analysis carried out by the Network participants is the fundamental role of guarantee played, in an independent manner, by the domestic and supranational judiciary. The hope is that this role, so well exemplified in the judgment of the French Conseil constitutionnel of 6 July 2018 on the constitutional value of the principle of fraternity, or in the judgments of the Italian tribunals that denied the legitimacy of the 'closed ports' policy, will continue to guide and censure governmental choices.

To conclude, we cannot remain silent on the point that the problem of migration by sea remains a challenge for the EU and for all European States, not only those that border the Mediterranean, a litmus test of the degree of cooperation between States among themselves and between States and the Brussels institutions, and of the degree of civilisation of the Continent. It is intolerable that this sea continues to be the graveyard of those who try to improve their fate.

* * * * * * *

I feel it is my duty to conclude this brief introduction with some thanks. First of all, to the European Commission and its agency EACEA, which believed in this project and allowed it to take place through the Erasmus+ Programme. Secondly, I want to thank all my colleagues who, with enthusiasm, passion, dedication and competence, have supported me in this adventure. First of all, all the research groups from the ten partner universities, who also participated in the organisational effort, and then the distinguished guests who animated the scientific meetings. As far as this volume and the conference whose papers are reproduced here are concerned, special thanks go to Ana Nikodinovska Krstevska, who, in addition to having contributed in an extraordinary manner to the overall success of this project, agreed to chair one of the sessions, and to Peter Hilpold, who assisted me in the editing of the proceedings and who did his utmost to obtain high quality papers and presentations, as can be seen from just reading the table of contents.

Lastly, my sincere thanks to my team of collaborators, and in particular to Marianna Pace, for the project phase, to Noemi Corbelli, for her administrative assistance, to Anna Fazzini, for the responsibility she assumed in relation to the recorded lectures, and to Giuliana Doria, for her tutorship of the project and for collaborating in finalising the text of this volume.

PART I

Maps National and Supranational Regimes

The General Framework and the Way Forward

WHERE ARE THE MIGRANTS COMING FROM?

GIOVANNI GOZZINI*

The immigration policies led by the European Union are founded upon a key distinction between economic migrants and refugees. Famously, only the latter have the right to asylum if and when they are in a «clear and present danger» of survival. Nowadays, the refugees represent less than one tenth of the whole stock of migrant population, i.e., «foreign-born population», according to the official definition adopted by the United Nations.

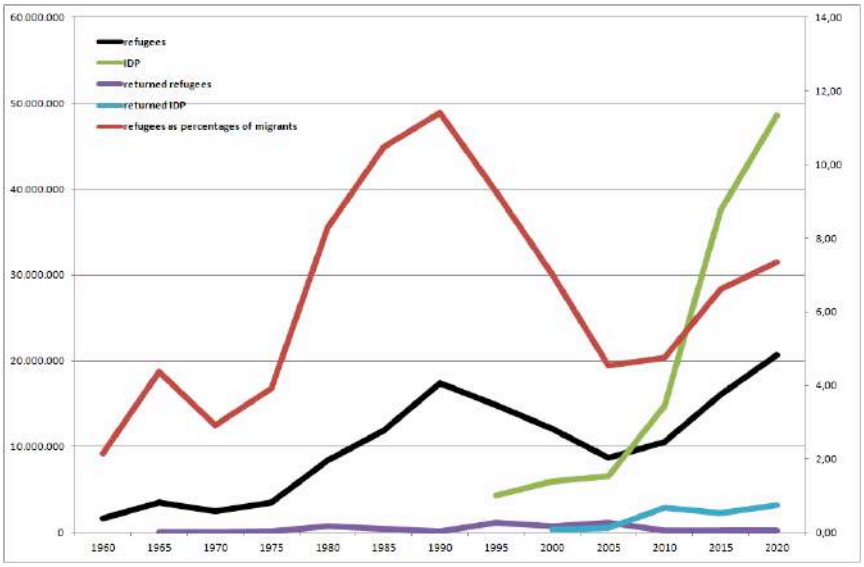


Figure 1. Refugees and Internally Displaced Persons, 1960-2020, million and percentages of total migrants (right axis). [1]

Their number peaked at the end of the Cold War, declined thereafter,

* University of Siena.

[1] Source: United Nations High Commissioner for the Refugees, Refugee Statistics.

and peaked again during the civil wars (Syria, Libya) which arose from the failure of the so-called "Arab Springs". Just on the occasion of the first crisis the United Nations High Commissioner for the Refugees adopted a policy aimed at containing the refugees within the boundaries of their nation (IDP, Internally Displaced Persons). The general purpose was twofold; both to avoid conflicts between refugees and foreign hosting population and to facilitate the home return. If we add IDP to refugees their share out of migrant population raises up to one quarter of the total. Conversely, the increasing figure of returned IDP reduces that share by one percentage point.

The long-run analysis (Figure 1) shows that refugees' condition cannot be considered as a transitory one. In fact, the armed conflicts' typology has been changing in the last decades.[2] The 1992 Balkans War, which was the case study observed on the field by Mary Kaldor, was not the first «new war» of the history because many post-colonial civil wars (such as 1967 Biafra or 1975 East Timor) had the same characters. But it was fought in the core of the Old World and apparently portrayed the changing nature of the armed conflict, by comparison with traditional wars such as 1960s Vietnam War. All the basic features of the «new wars» are tightly connected with the generation of refugees. First, the collapse of the central state means the end of both monopoly of violence and protection of civilians by the rule of law. In that light the current typology of «new wars» overwhelmingly corresponds to internal, and civil wars. Second, the absence of the rule of law produces a privatization of violence that implies the proliferation of paramilitary bands; in the Balkans they were numbered in more than eighty. Their main occupation is to extract the resources to survive (food, heating, shelter) from the civilian population. Hence, third, the terror on the civilians and the subsequent escape of refugees are the main aspect of the new wars. The phenomenon of the so-called «baby soldiers» (which is apparent in many African armed conflicts) has nothing to do with the recruitment of additional militants. Instead, it is a tool to permanently blackmail the original household of the baby jointly with the whole village wherein it is located. If the family wants the child again at home, it has to satisfy the requests of the paramilitary band. Fourth, just because the criminal bands can survive only exploiting the civilians, they are interested at all cost to boycott pacification processes that could shed light on their cri-

[2] M. Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 1999 (it. tr. Rome 1999).

mes. To the contrary, bands are only aimed at controlling a restricted portion of territory, terrorizing and draining resources from the local population. Thus, until this condition is respected, they try to avoid reciprocal fighting with other bands. Fifth, as a consequence, armed conflicts tend to transform into endemic and «low intensity» wars (according to the international conventions, with less than one thousands of yearly victims). Even for that reason, they are very often forgotten by international mainstream media. But the low numbers of returned refugees document the long-lasting nature of this kind of armed conflicts.

A global flow of refugees we cannot hope to decrease in the near future, is the almost unavoidable result of the «new wars». The top five countries of refugees' origin largely correspond to the map of this typology of armed conflicts, with the only exception of Myanmar where migrants are composed by a stateless people such as the Rohingya, actively prosecuted by the military regime. An unfortunate new entry among the countries sending refugees abroad is Venezuela, with more than four million refugees, asylum seekers, and migrants. Even in this case they are for the most part an outcome of the policies adopted by the government; thus they embody a mixed character of both refugees and economic migrants, seeking work, food, and a better life. The current situation of refugees from Ukraine (product of an old war between regular armies) is more unstable, alternating moments of mass flight and moments of home return.

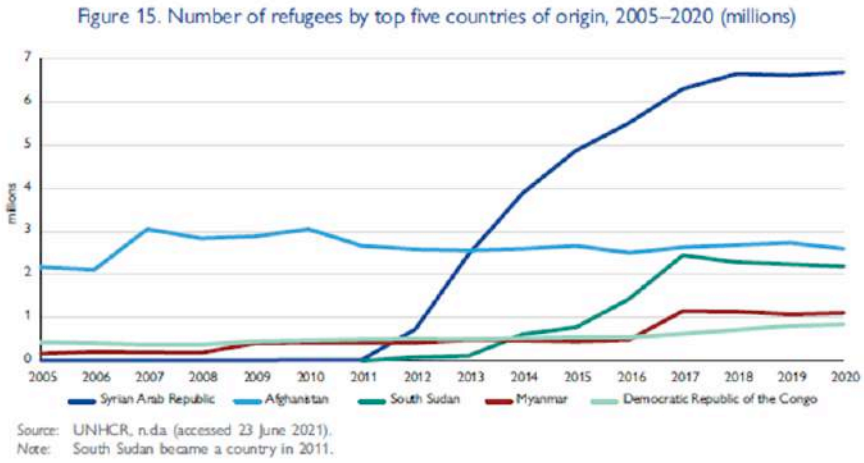


Figure 2. Top five countries of origin of refugees, 2005-2020. [3]

[3] Source: UNHCR.

But the same overlapping between refugees and economic migrants is taking place in other contexts. Many Syrian refugees in Turkey, for instance, were part of the urban middle class and were forced to escape with their families from the war. Thereafter, they realized that the perspective of a prompt return to the homeland was disappearing. In fact, it is unbearable for everyone to spend years in a refugee camp, without education for the children, without any prospect of a regular job; summing up, without any future. At that moment, the opportunity provided by criminal organization of an illegal entry into Europe can be seemingly better than the present, even though the refugees are conscious of the dangers it involves. There is an unintentional connection between the exclusion of economic migrants from the right to asylum and the smuggling and trafficking of human beings practiced by criminal organizations.

Accordingly, the data shows a slow but constant increase of the applicants for asylum in Europe, only temporarily interrupted by the peak of inflow caused by the outbreak of the «new war» in Syria. In that emergency Germany and partially Sweden offered a prompt rescue; other European countries did not open their borders. The largely predominant fear among politicians is to raise arguments for a xenophobe far-right.

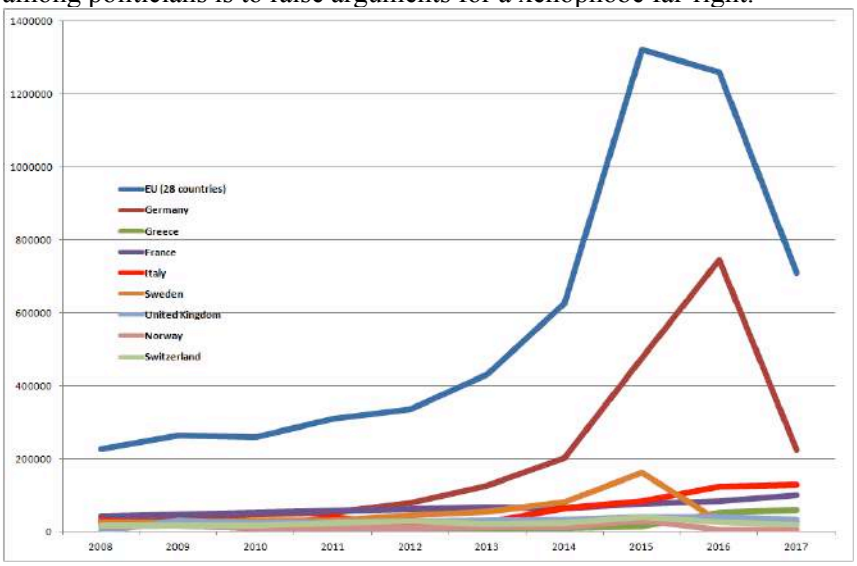


Figure 3. Asylum and first time asylum applicants - annual aggregated data (rounded).[4]

[4] Source: Eurostat.

The European program of resettlement of the asylum seekers is founded upon a shared management of the immigrant flows by the proactive collaboration of the member states. Famously, it was contrasted by some eastern countries, by totally false arguments. Hungary, for example, over the last 15 years has regularly accepted a yearly average of 20-25 thousands of immigrants; but it refused the resettlement of 1,300 refugees landed in Greece and Italy. Hungary does not deserve to be part of Europe.

The general consequence is that European policies on immigration appear largely inadequate. Mediterranean Sea has become the place where the death of migrants is by far more likely.

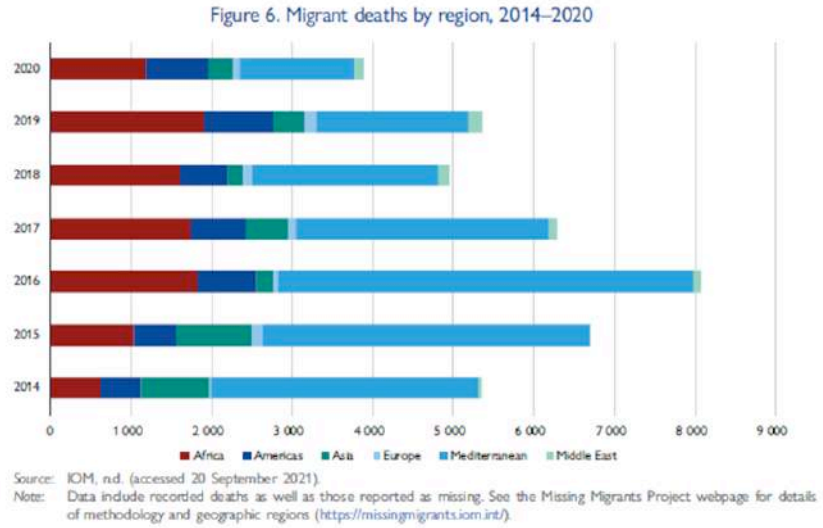


Figure 4. Migrant deaths by region, 2014-2020.[5]

However, a significant minority of migrants is dying in Africa. This is a further case in point of both the «new wars» and the overlapping between refugees and economic migrants. Migrants who die in Africa are often in transit toward other continents under the racket of criminal organizations which control their passports. Especially for women the crime of smuggling is converted into the crime of trafficking, i.e. the reduction of individuals in condition of near-slavery, forcing them to pro-

[5] Source: International Organization for Migrations (IOM).

stitution after cheating them by promises of rapid careers in the entertainment sector. As a matter of fact, one of the most important new features of today migrations related to the historical migrations of one century ago, is that nearly one half of migrants is formed by women.[6] But the other new feature is the proactive presence of criminal organizations. One century ago, before World War 1 receiving nations (e.g., in the Americas) had policies encouraging immigration, since they had more land than settlers, with no regard for the effects on native populations. Today, restrictive legislations encouraged the business of criminal organizations. According to the estimates of Interpol, in 2010 around 40 thousands of people are employed in smuggling and trafficking human beings in more than thirty countries.[7] The revenues range from 3 to 6 thousands of dollars for each migrant and the grand total is evaluated between 3 and 6 billion. Notwithstanding the seemingly big figures, they are yet minimal in comparison with the business on drugs which grants revenues estimated around 320 billion of dollars. The criminal organization involved in the exploitation of migrants are still few in numbers and size, so that it is still possible to combat them and to win. Humanitarian rescue led by the European Union and the Non-Governmental Organizations risks to be counterproductive if it is not accompanied by police and military actions against the criminals. Admittedly, criminal organizations are the worst enemy for both immigrants and receiving countries; they are responsible for thousands of deaths and constrain immigrant inflows within an illegal mood which provokes the overreaction by hosting populations. The elimination of criminal organizations could make the global migration much more manageable and useful for all.

However, an entirely new push factor is appearing and increasingly constrain international migrations. The refugees provoked by natural disasters as desertification, droughts, and floods are overcoming the refugees produced by the new wars. The new factor is connected to a structural climate change, that is difficult to contrast.

[6] Internation Organization for Migration, *World Migration Report 2022*, Geneva: United Nations 2022; K.M.Donato and D. Gabaccia, *Gender and International Migration: From the Slavery Era to the Global Age*, Russell Sage, New York 2016.

[7] United Nations Office on Drugs and Crime, *The role of organized crime in the smuggling of migrants from West Africa to the European Union*, New York: United Nations 2011.

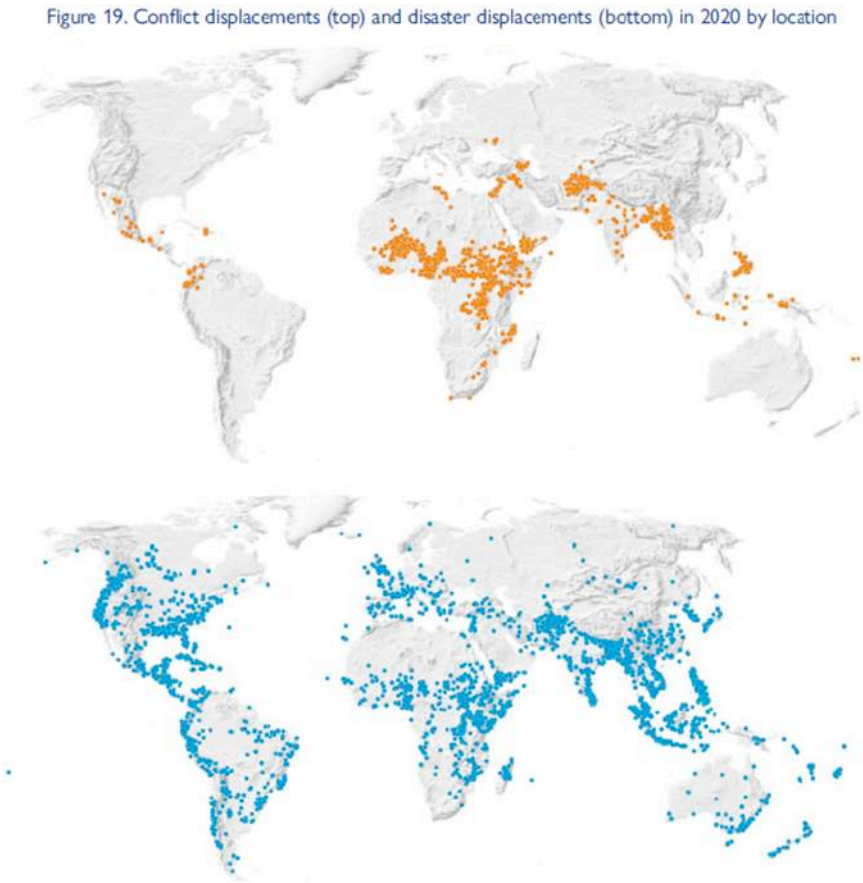


Figure 5. Maps of conflict displacements (top) and disaster displacements (bottom) in 2020.

Nevertheless, the large majority of international migrants (approximately 90 percent) is classified as economic migrants. What does it mean? Sociology of migration refers to push and pull factors, wherein the first involves the attempt to escape from a situation of poverty, and the latter implies the attraction exerted by higher earnings in a foreign country. The two factors are not reciprocally excluding, but indeed complementary even within the same person. Economic migration, in other words, belongs to the original imprinting of the mankind. The first human groups were composed by hunters and gatherers ignoring agriculture; they predated the natural resources (flora and fauna) of a micro-

local environment and then they moved. Push and pull factors were at work. Over the last thirty years historical genetics cancelled the so-called polygenetic hypothesis, according to which different human races appeared simultaneously on the Earth. To the contrary, using archeological data combined with mitochondrial and Y-chromosomal DNA analysis, geneticists are able to offer evidence that every human being has only one common ancestor and the same root of DNA was moving over millennia all over our planet. A now well-established thesis maintains that the human species evolved to its modern form, starting from a common origin located in East Africa some 250,000 years ago. Thereafter they embarked on populating the entire globe in a stepwise migration process beginning about 90,000 B.C.[8]

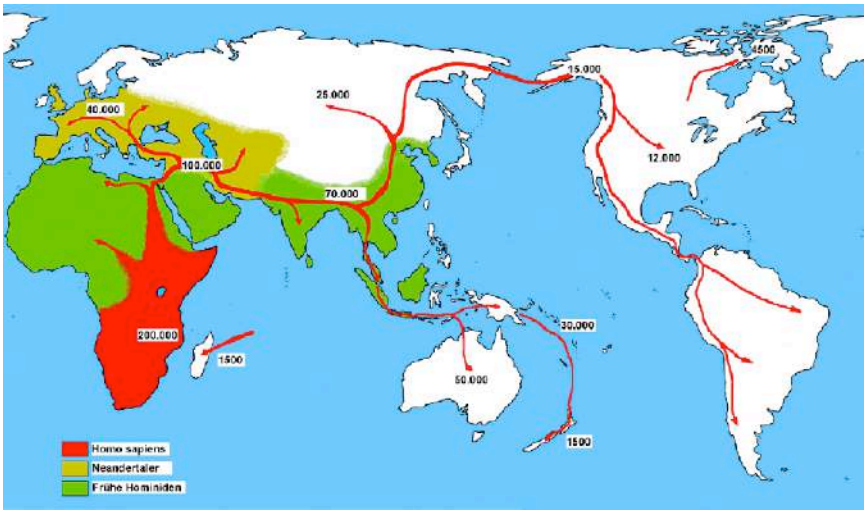


Figure 6. World expansion of Homo Sapiens, 200,000 b.C.-1,000 b.C.

Thus, since the beginning, migration is not an abruptly arising emergency, but a human activity somehow normally practiced. Over the last century the stock of foreign born population (according to the official definition of the United Nations, everyone who lives in a country different from the country where she/he is born) calculated as a percentage of world population has been constant, close to 3 percent. The

[8] L.L.Cavalli Sforza-P.Menozzi-A.Piazza, *History and Geography of Human Genes*, Princeton University Press, Princeton NJ 1994.

1990s increase (roughly 27 million), in fact, was wholly related to the administrative dissolution of the Soviet Union; especially Russians transferred by Stalin during the 1930s to Ukraine or Georgia, were considered immigrants even though they never moved in the last decades. Excluding those administrative migrants, the current percentage (3.1 percent) confirms the stability of the phenomenon.

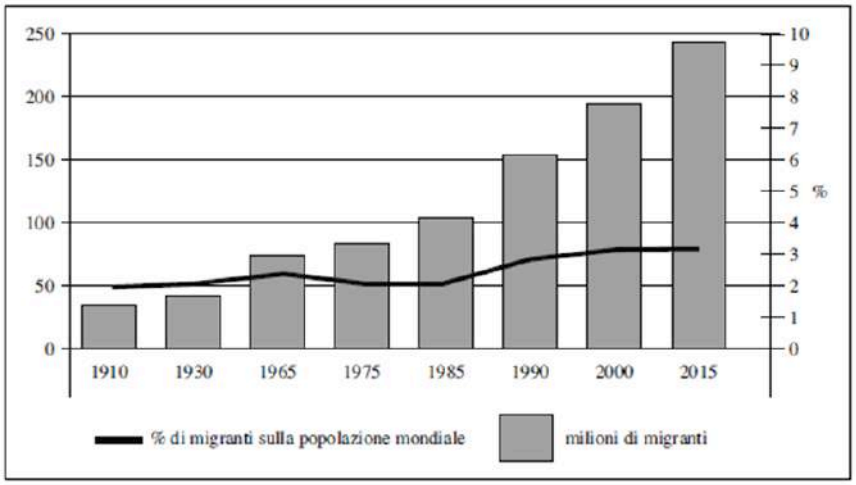


Figure 7. Stock of international migrants, million and percentages over the world population, 1910-2015. [9]

The flattening percentage of migrants is particularly significant if considering both the current global inequality and higher people density. In 1910 the world population was fewer than one fourth of the current one and the greater gross domestic product per capita differential (between United Kingdom and regional average of Africa) was 7:1, while in 2020 (between United States and Subsaharan Africa) was 15:1.[10] Further, an increasing share of migrants is moving along South-South directions (especially from South-East Asia to Persian Gulf, toward petrodol-

[9] J.C. Moya-A. McKeown, "Global Migration in the Long Twentieth Century", in M. Adas (ed.) *Essays on Twentieth Century History*, Philadelphia: Temple University Press 2010, tab. 1.3; United Nations Department od Economic and Social Affairs, Population Division, International Migration, International Migrant Stock 2015.

[10] A. Maddison, *The World Economy: A Millennial Perspective*, Paris: Oecd, 2001, tab.B-10 p. 241, tab. B-21 p. 264; Maddison Data Project 2020 (https://www.rug.nl/ggdc/historicaldevelopment/maddison/releases/maddison-project-database-2020?lang=en).

lar-financed public works) and the corridor South-North recently lost the position of relative majority. Today, the largest attractors of immigrants (US and Germany) have low and stable unemployment rates, as compared to other advanced economies. The main reason is the dual structure of the labour market; accordingly, the immigrants are employed in secondary occupations, which are commonly renamed as «3D» (Dirty, Dangerous, Demanding) and are not particularly requested by native population (notably, domestic service to aged people, undocumented jobs in construction industry, retail, and restoration).[11] It ought to be added a demographic factor such as the sharp fall of fertility rates in a large majority of European countries, which implies a decline in working age population and a subsequent rise of the dependency ratio (i.e., the increasing share of unproductive population at the expenses of national welfare systems). At least temporarily (because over time immigrants tend to imitate native population's behaviour, even in the reproductive sphere) immigration is able to provide a valid counterbalance.

Recent historical research is finding that mobility (even international mobility) was a common feature of everyday life in early modern Europe.[12] Seasonal laborers moving between countryside and cities, sailors, soldiers, merchants corresponded to significant minorities of preindustrial European societies (up to one third of the whole population), experiencing circular cross-border movements. Traditional historiography accustomed to treat national belongings as the unique and exclusive identities of the people, and national borders as the natural and equally exclusive containers of human experience, has to be deeply revised.

Obviously, economic inequality remains a powerful driver of population movements. There is an apparent correlation between the mean income of the countries and the stock of immigrants.

[11] For an early exhibit of the situation see Sopemi (Système d'observation permanente des migrations), *Trends in International Migration. Annual Report 2002*, OECD, 2002, chart I.14. For an update see S.Castles, *Guestworkers in Europe: A Resurrection?*, «International Migration Review», 40, 2006, 4, pp. 741-66.

[12] J. Lucassen-L. Lucassen, *From mobility transition to comparative global migration history*, «Journal of Global History», 6, 2011, 4, pp. 299-307.

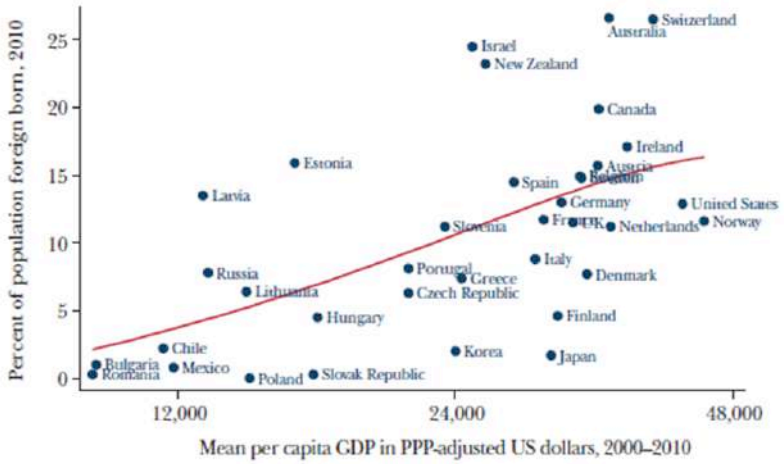
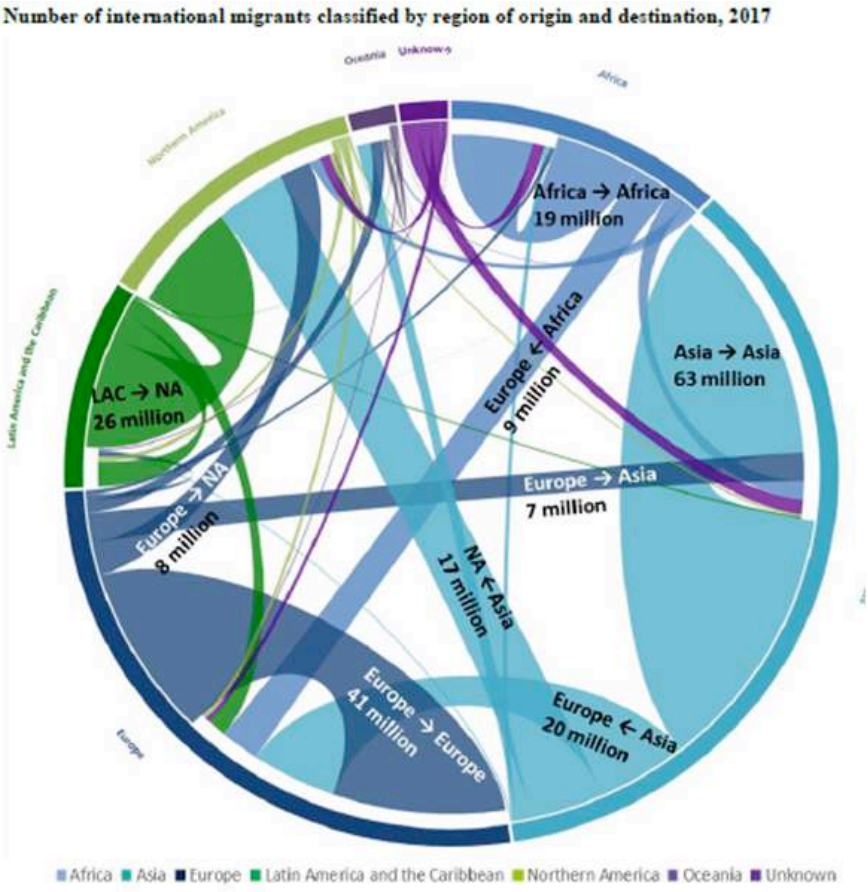


Figure 8. Percentage of foreign-born population and gross domestic product per capita, 2000-2010.[13]

Meanwhile, the map designed by international migrations shows a much more intricate and connected network. It is not a one-way picture from the South to the North.

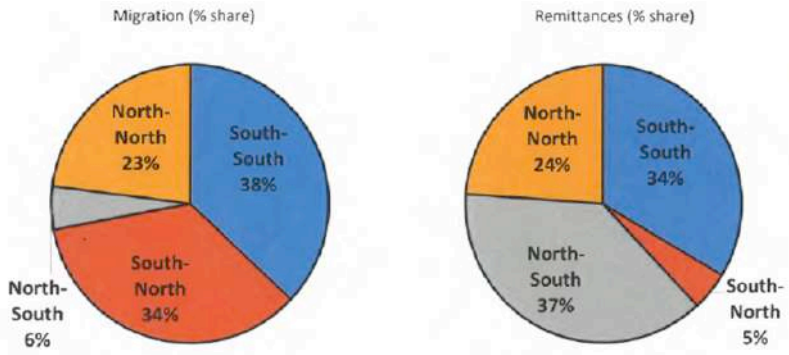
[13] G. Hanson-C. McIntosh, "Is the Mediterranean the New Rio Grande?", Journal of Economic Perspectives, 30, 2016, 4, Figure 1.



Source: United Nations (2017a)
Notes: NA refers to Northern America, LAC refers to Latin America and the Caribbean

Figure 9. International migrants by region of origin and destination, 2017.[14]

[14] United Nations, Department of Social and Economic Affairs, International Migration Report 2017, New York: United Nations 2017.



Sources: World Bank staff calculations based on Migration and Remittance Factbook 2016, UN Population Division, and national censuses. Definition of the "North" and the "South" in this chart follows UN classification. The data on migration are for 2013, the latest year for which data are available. The data on remittances are forecasts for 2015. According to the UN, the term "North" refers to countries or regions traditionally classified for statistical purposes as "developed," while the term "South" refers to those classified as "developing." The developed regions include Europe and Northern America plus Australia, New Zealand and Japan. Using World Bank classification of Developing Countries as "South" and High Income Countries as "North" implies that South-South and South-North migrants constitute 56.4 mil (23%) and 128.6 mil (52%) of total international migrants, respectively.

Not only the South-South migrations overcame the South-North ones but international migrations increasingly follow a «two-way» trajectory. The first factor which underscores this peculiar and reciprocal trajectory between sending and receiving countries is embodied by the remittances. Over the last decade the amount of money send home by migrants has reached the level of the foreign direct investment operated by private multinational companies into the developing countries and it is currently 3-4 times the volume of the official financial aids provided by «rich» governments. Further, the remittances to developing countries have been constantly increasing over the last twenty years.[15]

[15] World Bank, *Migration and Remittances Factbook 2016*, Washington DC: World Bank Group 2016.

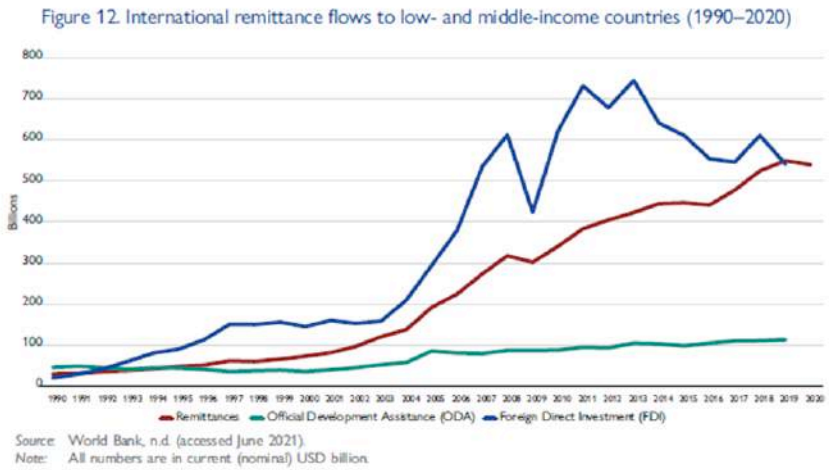


Figure 10. Remittances to low- and medium-income countries, 1990-2020.[16]

As compared to the other financial flows, the remittances have two unequivocal advantages. First, a greater resilience against global and local conjunctures (such as the 2008 Great Recession). Second, the ability to reach directly the needing situations, without both the institutional corruption and bribery often suffered by the ODA and the profit-oriented exploitation of private investment. It is estimated that some 40 percent of remittance flows are not registered by the official channels, because they prefer informal long-distance transfer systems, such as individual travels or local phone centers.

The problem is, however, the employment of remittances. It is documented a working nexus between the increase of remittances and poverty reduction in developing countries. From a development economics point of view, however, the multiplier effect of remittances is limited to the purchase of goods and services (especially in health and education). On average, only about one tenth of the remittances is used for small business investments, which imply the multiplier effect in terms of additional jobs and future progress. In contrast, the largest share corresponds to conspicuous consumption (i.e., marriages or purchase of houses).[17]

[16] World Bank, Migration and Remittances Factbook 2016, Washington DC: World Bank Group 2016.

[17] R.H. Adams-J. Page, *Do International migration and remittances reduce poverty*

As it happens in many other variables concerning low income countries, the positive difference is often granted by women. For example, if and when women are the home recipients of the remittances, the latter are employed more likely for the education of children, that becomes particularly relevant for long-term human development, as professional prospects of the next generation improve and generate less dependency on remittances in the future. Famously remittances represent a historical constant; one century ago, they corresponded to similar magnitude and mode of employment.[18]

The second dynamics relates to return migration, which is almost always obscured by media.[19] Significant minorities of immigrants choose to go back home after a period of stay, on average, no longer than five years. Even this is an historical constant; in the past, the Asian migration system of indentured laborers (5 years of work contract abroad, such as the Indian miners in South Africa) was working in the same way, with even higher (about 80 percent) of remigrants.[20] The reasons of return could and can be quite opposite, deriving from the success or failure in the receiving country. Still, what is important is the symptom of an enduring transnational identity of the migrants. They neither cancel their original roots (as the assimilationist paradigm ima-

in developing countries?, «World Development», 33, 2005, 10, pp. 1645-69; I.Sirkeci *et al*, eds., *Migration and Remittances during the Global Financial Crisis and Beyond*, 2012; R.P.C. Brown-E. Jimenez Soto, *Migration and Remittances*, in B. Chiswick-P.W. Miller, eds., *Handbook of the Economics of International Migration*, v.1B, 2015, pp. 1077-1140.

[18] R. Esteves and D. Khoudour Casteras, "Remittances, capital flows and financial development during the mass migration period 1870-1913", *European Review of Economic History*, 15, 2011, 3, pp.443-74; G. Massullo, "Economia delle rimesse", in P. Bevilacqua, A. De Clementi and E. Franzina (a cura di), *Storia dell'emigrazione italiana. Partenze*, Roma: Donzelli 2001, pp.161-83; M. Hörner, "Immigration into Latin America, Especially Argentina and Chile", in P.C.Emmer and M. Hörner, eds., *European Expansion and Migration. Essays on the Intercontinental Migration from Asia, Africa, and Europe*, New York-Oxford: Berg 1992, p. 238; M. Wyman, *Round-Trip to America.The Immigrants return to Europe 1880-1930*, Ithaca-London: Cornell University Press 1993, pp.60-1.

[19] C. Dustmann, I. Fadlon and Y.Weiss, "Return migration, human capital accumulation and the brain drain", in *Journal of Development Economics*, 95, 2011, pp.58-67; B. Chabé Ferret, J.Machado and J.Waliba, "Remigration intentions and migrants' behavior", in *Regional Science and Urban Economics*, 68, 2018, pp. 56-72.

[20] A. McKeown, "Les migrations internationales à l'ère de la mondialisation industri elle 1840-1940", in *Mouvement Social*, 2012, 241, p. 38.

gined) nor make them revive in the destination country (as the multiculturalist paradigm maintained). The historical and current migrants are moving people, both virtually by remittances and physically by home journeys.[21]

	2007	2017
Germany	**82,8**	**64,0**
United Kingdom	**53,4**	**42,7**
Japan	**63,8**	**54,6**
Hungary	**18,1**	**35,4**
Sweden	**24,4**	**18,7**
New Zealand	**35,9**	**28,3**
Italy	**3,9**	**13,5**
Belgium	**41,2**	**44,1**
Denmark	**60,5**	**84,6**
South Korea	**50,6**	**77,0**
Netherlands	**59,7**	**52,4**
Norway	**24,9**	**53,4**
Spain	**21,6**	**61,7**
Switzerland	**38,7**	**57,4**

Table 1. Remigrants, percentages on immigrants, 2007 and 2017.[22]

Remittances and remigration underscore that migration is a rational choice operated by rational players, within personal and family strategies of survival and improvement. The dangerous ways they use to reach the destination countries are, in turn, the consequence of the interaction between restrictive legislations and criminal organizations. To break that negative connection is in the interest and, possibly, the priority of the «rich» countries.

My concluding remark is that every actual data confirms that today high income countries do not face a barbarian invasion. A consistent minority of international migrants is formed by refugees from a new kind of armed conflicts, which tend to become endemic. Thus, they are no longer an occasional emergency, but a structural feature of the global

[21] D. Hoerder, *Cultures in Contact. World Migrations in the Second Millennium*, 2002.

[22] Source: International Migration Outlook 2019 – OECD 2019.

reality. The majority of international migrants is embodied by economic migrants, who are the equally structural consequence of global inequality and underdevelopment. The advanced economies have the responsibility and the opportunity to manage them, as an inescapable pillar of a new world order. In fact, a well-regulated immigration could represent a driver of economic progress for both sending and receiving countries. The only apparent alternative is chaos and war.

THE DE-LEGALIZATION OF GLOBAL REFUGEE PROTECTION

JAMES C. HATHAWAY*

How might the global refugee regime evolve over the next decade or two?

At least three things are in my view unlikely to change.

The first thing that I believe will not change is what I have labeled "the politics of *non-entrée*"[1] – the determination of states to combine formal participation in the refugee protection regime with barriers that as a practical matter stymie the ability of refugees to claim the rights which are in theory on offer. Practices of this kind – visa controls, carrier sanctions, first country of arrival rules, safe third country rules, safe country of origin designations, even excision of territory – have of course been with us for decades. Despite wishful legal thinkers proclaiming *non-refoulement* to be customary international law[2] – a view that flies in the face of masses of contrary state practice[3] – the truth is that both developed states and an increasing number of poorer states that have the capacity to resist unwanted refugee flows will continue to do so.

* Degan Emeritus Professor of Law, University of Michigan.

[1] J. Hathaway, "The Emerging Politics of *Non-entrée*," *Refugees*, vol. 91, 1992, p. 40. See also T. Gammeltoft-Hansen, "Refugee Policy: The Case of Deterrence Policies," *Journal of Refugee Studies*, vol. 27(4), 2014, p. 574; and P. Orchard, *The Right to Flee: Refugees, States, and the Construction of International Cooperation,* 2014, at Ch. 8 ("The *non-entrée* regime").

[2] See eg. J. Allain, "The *Jus Cogens* Nature of *Non-refoulement*," 13 *International Journal of Refugee Law* 533, (2001) at 538; E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*," in E. Feller et al eds., *Refugee Protection in International Law,* 2003, p. 87; W. Kälin, "Article 33, para.1," in A. Zimmermann ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*" 2011, p. 1327; and C. Costello and M. Foster, "*Non-refoulement* as Custom and *Jus Cogens*? Putting the Prohibition to the Test," in M. den Heijer and H. van der Wilt eds., *Netherlands Yearbook of International Law*, 2016, p. 273.

[3] See J. Hathaway, *The Rights of Refugees under International Law*, 2021 ("Hathaway, *Rights of Refugees*"), at pp. 313-337 (documenting pervasive contemporary state practice of *refoulement*) and pp. 435-459 (explaining why the test for a customary international legal norm is not satisfied in relation to *non-refoulement*).

The second thing that I think will not change is the pattern of non-accession to the Refugee Convention and Protocol. Nearly one in four countries still stands outside the global refugee regime,[4] including four of the ten most important refugee receiving states – Bangladesh, Lebanon, Pakistan, and Turkey.[5] Most tragically, the pace of accession to the global refugee regime, one of the most fundamental responsibilities of UNHCR,[6] has completely stalled, with only a single new state coming onboard over the course of the last decade.[7] What this means is that even those refugees able to get past barriers to arrival are increasingly dealt with outside the bounds of international refugee law – treated at best as the objects of discretion, and far too commonly as simply entitled to nothing. And sadly non-accession may be a profoundly sensible domestic policy choice for many states that find themselves exposed to significant refugee flows; after all, why would any state that views itself as vulnerable bind itself to grant refugee rights when the world community obligates itself to provide those states with nothing by way of guaranteed support in return?

This links to the third thing I do not expect to change – the failure to complete the burden and responsibility sharing project envisaged by the drafters of the Refugee Convention, leaving us instead with the politics of vague promises. Beyond the common definition of a refugee and the quite extraordinary catalog of refugee rights it sets, the drafters of the

[4] Of the 193 member states of the United Nations, 44 are parties to neither the Refugee Convention nor the Refugee Protocol: www.treaties.un.org, accessed Oct. 15, 2022.

[5] Bangladesh, Lebanon, and Pakistan are parties to neither the Convention nor Protocol. Turkey took advantage of a provision allowing it to maintain a Europe-only geographical reservation when it acceded to the Protocol, meaning that it has no treaty obligation to protect the refugees who presently seek protection there: www.treaties.un.org, accessed Oct. 15, 2022. See generally M. Janmyr, "The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda," *International Journal of Refugee Law*, vol. 33(2), 2021, p. 183.

[6] "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by... [p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto": Statute of the United Nations High Commissioner for Refugees, UNGA Res. 319 A (IV), adopted Dec. 3, 1949, at Art. 8(a).

[7] South Sudan became a party to the Refugee Convention (with a reservation guaranteeing protection only to pre-1951 refugees) and the Refugee Protocol (extending protection obligations to all refugees) on Dec. 10, 2018: www.treaties.un.org, accessed Oct. 15, 2022.

Convention acknowledged that refugee law would not work unless burdens and responsibilities were fairly shared out. Yet here we are more than 70 years later in the bind that the Convention's Preamble acknowledged had to be addressed:[8] with most of the world's refugees living in poorer countries;[9] nothing more than dribs and drabs of often poorly timed discretionary funds going to those inadequately resourced asylum states;[10] and 75% of the world's refugees stuck in protracted refugee situations[11] with no clear solution in sight.[12] And yet the best that UNHCR was able to offer by way of an answer to this horrible predicament was the so-called Global Compact *on* Refugees[13] – note the label, not a compact "for" refugees, but "on" refugees – which contains not a single binding obligation beyond the duty of states to talk on a regular basis about doing better. The Compact was truly a "global cop-out on refugees":[14] it has done nothing to ensure justice for poorer receiving states, much less to guarantee practical solutions for refugees. And this politically fungible approach is, quite frankly, appealing not only to powerful

[8] "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation...": Refugee Convention, at Preamble.

[9] "Low and middle-income countries hosted 83% of the world's refugees... The Least Developed Countries provided asylum to 27% of the total": UNHCR, "Global Trends Report 2021" (2022), at 2.

[10] UNHCR's 2022 field operation budget, including the cost of running its own offices, is $9.316 billion: https://reporting.unhcr.org/financial, accessed Oct. 15, 2022. As a very rough approximation and based on the agency's current estimate of 100 million persons of concern (www.unhcr.org/ph/persons-concern-unhcr, accessed Oct. 15, 2020), less than $100 is available per refugee or other individual under the UNHCR's mandate. This figure undoubtedly overstates the per capita funds available to refugees in poorer and middle income countries since at least $800 million of the $9.3 billion sum is spent for UNHCR operations in wealthier states.

[11] "At the end of 2021, an estimated 15.9 million refugees (74% of the global refugee population) were in a protracted situation. This represented an increase of more than 203,000 refugees compared to the previous year. There were a total of 51 protracted refugee situations in 31 different host countries": UNHCR, "Global Trends Report 2021" (2022), at 20.

[12] "The probability in these [protracted] situations of someone remaining a refugee for at least five years – i.e. the minimum duration that UNHCR defines as protracted – varies between 63 and 99 percent...": UNHCR, "Global Trends Report 2021" (2022), at 20.

[13] UN Doc. A/73/12 (Part II), adopted Dec. 17, 2018, UNGA Res. A/RES/73/151.

[14] See J. Hathaway, "The Global Cop-Out on Refugees," *International Journal of Refugee Law*, vol. 30(4), 2018, p. 591.

states anxious to maximize their autonomy, but also to a UN refugee agency keen to stay busy, politically relevant, and hence funded.

The bottom line of what I think will not change – *non-entrée*, non-accession, and a preference for no more than vague promises of support – is the de-legalization of global refugee protection. While the Refugee Convention and Protocol will I believe remain as the formal core – and will be trotted out whenever expedient – the day-to-day reality will be politically malleable. This does not mean that there will not be moments of collective self-interest or goodwill that enable protection, the reception of Ukrainians being the most obvious recent example.[15] But at its core, I believe that the vision of a global refugee protection system predicated on an agreed definition + common rights + a system to ensure the practical implementation of those norms is likely to continue to slip away from us.

Is there any politically realistic way of responding to this tripartite dilemma?

Let me offer three ideas that I believe may have legs, starting with the most viable and moving toward the most aspirational – though attempting as always to avoid the propensity to engage in wishful legal thinking.[16]

The first and most viable project is to focus our efforts on building *regional* refugee protection capacity. With no small amount of sadness, I have come to see the salience of the concessions made by human rights scholars like Michael Ignatieff that the interest convergence on human rights values at the global level is tragically thin.[17] The thinness of the global consensus means that the prospects of binding and comprehensive universal refugee *responsibility* sharing – that is, for guaranteed sharing of the actual, physical protection process – are bleak.[18]

[15] Council of the European Union, Implementing Decision No. 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

[16] The importance of this approach was first noted in K. Hailbronner, "*Non-refoulement* and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?," *Virginia Journal of International Law,* vol. 26, 1986, at pp. 861-867.

[17] M. Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World*, 2017.

[18] See eg. T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, 2011; and K. Ogg, *Protection from Refuge: From Refugee Rights to Migration Management*, 2022.

Yet in contrast to the failure of responsibility-sharing at the global level, we have time after time seen some real openness to the admission of refugees at the regional level. Think, for example, of the massive numbers of Afghans taken in by Pakistan;[19] of the millions of Palestinians living in Arab states for more than half a century;[20] of the protected status offered by Colombia to more than a million Venezuelan refugees;[21] and yes, think also of the speedy roll-out by the European Union of temporary protection for Ukrainians.[22] In each of these cases, shared ethnicity, politics, religion, history or some combination of these factors has engendered an openness to the admission of refugees from within the host country's own region, even if that protection has often been imperfect. As confronting as it is for us globalists to concede, human society may simply not be sufficiently evolved to see all refugees as equally worthy of inclusion based simply on the reality of their predicament.[23]

But recognition that most responsibility-sharing is likely to be particularized rather than global need not amount to an *apartheid*-like concession, at least if we eschew purely geographical notions of "regional" to imagine also sharing of responsibilities within what Alex Neve and I labeled "interest-convergence groups"[24] – for example, groups of states defined by a shared history that binds former colonizers to the states that they once colonized, or linguistic or religious affinities that straddle geographical regions. But the bottom line is that some realistic version of dependable responsibility-sharing is essential if front-line receiving states are to be persuaded to keep their doors open to those seeking asy-

[19] See M. Zieck, "The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises," *International Journal of Refugee Law* , vol. 20(2), 2008, p. 253.

[20] See S. Akram, "Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution," *Journal of Palestine Studies*, vol. 31(3), 2002, p. 36.

[21] See A. Gluski, "What President Duque Has Done for Venezuelans Is Heroic," *Americas Quarterly*, Oct. 15, 2021.

[22] See I. Tharoor, "Millions of Ukrainian refugees may stay in E.U., Top Official Says," *Washington Post*, June 6, 2022.

[23] See eg. Chatham House, "Ukraine exposes Europe's double standards for refugees," Mar. 30, 2022; "For Ukraine's Refugees, Europe Opens Doors That Were Shut to Others," *New York Times*, Feb. 26, 2022.

[24] J. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," *Harvard Human Rights Journal*, 1997, p. 115.

lum. The current allocation of protective responsibility based nearly completely on accidents of geography – with just ten, mostly poorer, countries hosting fully two-thirds of the world's refugees[25] – is just not sustainable, especially as the national deterrent capacity of traditional first arrival states increases over time (witness, for example, Pakistan's recent erection of a 2600 km. fence along its land border with Afghanistan[26]).

A focus on sharing human protection responsibilities within regional or other interest-convergence groups links to a second reasonably viable project: devising a global refugee *burden* (ie. money, not people[27]) sharing mechanism. Financial burden-sharing (to replace the current model of selective charity[28]) is a more straightforward form of binding extra-regional contribution since it carries less domestic political risk than does the admission of people. And if properly conceived – in particular if funding is linked to respect for refugee rights – it can be a protection-enhancing mechanism for refugees, in addition to its obvious core goal of advancing interstate equity. The current system under which rich countries spend several times more each year to address the claims of just 17% of the world's refugees than is available to fund the needs of the 83% in the global South[29] is simply a very bad way to invest protection funds.

The third and most ambitious, if still plausible, project is to add a modest layer of human responsibility-sharing to the core of regional re-

[25] Of the total global refugee population of 21.2 million persons, 14.4 million (67%) are living in Turkey, Colombia, Uganda, Pakistan, Sudan, Bangladesh, Lebanon, Ethiopia, and Iran: UNHCR, "Global Trends Report 2021" (2022), at 19.

[26] A. Gul, "Pakistan Vows to Continue Fencing Afghan Border, Downplays Taliban Disruptive Acts," Voice of America, Jan. 3, 2022.

[27] A. Acharya and D. Dewitt, "Fiscal Burden Sharing," in J. Hathaway ed., *Reconceiving International Refugee Law* 111, 1997.

[28] G. Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, 1996.

[29] This is based on an average cost of $11,500 per refugee (OECD, "Who Bears the Cost of Integrating Refugees," (Jan. 2017) 13 *Migration Policy Debates* 1) and an average of 1,650,000 refugee claims made in developed countries in 2015-2016 (OECD, "Key Statistics on Migration in OECD Countries" (2018). This is likely a very conservative estimate since while states aim to process refugee claims in the first year, backlogs and appeals mean that procedures and hence support costs may extend into a second or subsequent year: ECRE, "The Length of Asylum Procedures in Europe" (2016). Indeed, extrapolating from data on costs in Germany, it has been suggested that "the world spends approximately $75bn a year on the 10% of refugees who moved to developed regions": A. Betts and P. Collier, *Refuge: Transforming a Broken Regime* (2017) ("Betts and Collier"), at p. 129.

sponsibility-sharing supported by global burden-sharing. Drawing on the international environmental law norm of "common but differentiated responsibility,"[30] one might imagine extra-regional states being persuaded to *bind themselves* to resettle a regular flow of refugees – in particular those in protracted refugee situations – out of the states providing asylum within regions of origin. Moving resettlement out of the purely discretionary and episodic place where it now lives to become a core part of the protection paradigm would be a manageable means for countries farther from most refugee flows to nod in the direction of their Convention duties,[31] as well as a practical mechanism to keep faith with the regional states doing the lion's share of human protection work.

Could we convince states to reverse the present trend to de-legalize international refugee protection by supporting the international refugee law regime with *binding* asylum responsibility-sharing within regional or other interest-convergence groups, *binding* international burden-sharing, and *binding* commitments from extra-regional states to significantly ramp up resettlement efforts out of countries of first asylum?

The reality is of course that even this three-part proposal – which many will no doubt see as unacceptably modest – appears to run up against my third foundational concern: namely, that states are increasingly wedded to pious pronouncements rather than formal, binding commitments. My reason for modest optimism is that I continue to believe that closely connected states can be made to see the insurance-based logic of agreeing to share responsibility for refugee flows; that guaranteed funding from a broader range of states could be seen as a smart investment in promoting protection elsewhere;[32] and that resettlement as a limited form of global responsibility-sharing might be seen to be both a *de minimis* and manageable way of keeping faith with the global refugee protection enterprise.

At the end of the day, though, this is a decidedly modest proposal, at least if compared to the comprehensive global reform project that I have

[30] Y. Zhang and C. Zhang, "Thirty years with common but differentiated responsibility, why do we need it ever more today?," Oxford University Blavatnik School of Government Voices, May 4, 2022.

[31] See T. deBoer and M. Zieck, "The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU," *International Journal of Refugee Law* vol. 32(1), 2020, p. 54.

[32] See eg. D. Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World*, 2018.

championed for many years.[33] As a matter of principle a comprehensive option would be by far the best option for all concerned: for wealthier countries, for poorer states, and especially for refugees themselves. But with the UN's global compact process having conceded defeat on that broader agenda even before it was formally attempted, I believe we are entering a space in which the least bad option may be to insist on the value of a relatively thin but still clearly binding universal legal net that supports a much stronger legal protection regime embedded in regional and other interest-convergence groups.

I offer these brief reflections in the spirit of "the perfect is the enemy of the good":[34] not as anything close to an ideal vision of the future of global refugee protection, but as a workable and principled path forward. Pragmatism of this kind will no doubt be resisted by those focused on perfecting the refugee systems of wealthy countries. But in my view such partiality comes at the expense of ensuring meaningful and accountable rights-based protection for all refugees, in all parts of the world – a goal that should, I believe, be our collective guiding star.

[33] See note 24 above. The five core planks of the proposed integrated model are unrestricted access to protection; international, normally group-based, refugee status assessment in the country of first arrival; full respect for refugee rights once admitted to a country of protection for duration of risk (PDR); guaranteed international burden-sharing for both protection costs and to engage host communities contingent on respect for refugee rights; and guaranteed extraregional resettlement after five years of PDR assuming neither lawful repatriation nor legal resettlement has occurred: see J. Hathaway, note 14 above, at pp. 597-600.

[34] Voltaire, "La Bégueule ," in *Contes en vers*, 1772.

THE PROTECTION OF THE REFUGEE IN INTERNATIONAL LAW

GUY S. GOODWIN-GILL*

When last I spoke in Naples in May 2015, a so-called crisis of refugee movements was getting under way. Today, that crisis has been eclipsed by the plight of Ukrainians – by mid-2022, over 5.4 million people had fled their country because of the Russian invasion, and a further 6.3 million were displaced internally.[1] Nor can the plight of Ukrainian refugees be considered any less numerous or less dire than that of Syrians, Afghans or Iraqis, although their reception – *faute de mieux* – initially proved easier and the call for protection was heeded, time and again, although with some worrisome exceptions.[2]

In 2015, however, other forces were at work. At the time, Italy had acted as the conscience of Europe, rescuing many tens of thousands at sea, but without the moral and material support of partners in the European Union. What was clearly needed, if protection was to succeed, was a scheme of effective, equitable sharing of responsibilities among a community committed in principle to common, fundamental principles. I argued then for a European Migration and Protection Agency to monitor solutions in light of obligations, and I argued further that Europe, particularly the European Union, had special responsibilities given its assertion of an entitlement to monitor the movement of people across the Mediterranean.[3] That responsibility and the complex of protection obligations that go with it arose because of a combination of context, circumstance, knowledge, and engagement. The legal interests of States of origin, transit and intended or actual destination are all engaged, and only a rights-based strategy was or is likely to have any impact.[4]

* Emeritus Fellow of All Souls College, Oxford, and Emeritus Professor at the University of Oxford.

[1] UNHCR, 'Mid-Year Trends 2022': https://www.unhcr.org/mid-year-trends.html.

[2] Including with regard to stateless refugees and non-Ukrainians, particularly those of African descent; see also https://www.kaldorcentre.unsw.edu.au/news/5-questions-guy-s-goodwin-gill-response-ukraine%E2%80%99s-refugees

[3] G. S. Goodwin-Gill, 'The Mediterranean Papers: Athens, Naples, and Istanbul', *International Journal of Refugee Law,* 2016, 28 285-88, pp. 289-97.

[4] *Ibid.*, pp. 292-94.

However, it was not to be, and in the years after 2016 the European Union and its neighbours proved to be a congeries of dislocated, dysfunctional sovereign States. In Greece, Turkey, Hungary, Poland, Croatia, Serbia and Belarus, among others, official approval was given to pushbacks, assaults, abandonment, denial of access, and denial of disembarkation, in order apparently to send a message to the refugee and to asylum seekers – you are not welcome. And still they came, seeking safety, refuge, asylum, and an opportunity to earn a living.

A report by the non-governmental organisation (NGO), Mare Liberum, published in April 2022, presents a catalogue of the individualised violence inherent in pushbacks.[5] In the Aegean and at land borders, pushbacks have become the norm against people on the move. Used systematically, and often coupled with humiliating practices and the threat of deportation and *refoulement*, they are now integrated nationally as a strategic means of supposed deterrence. A campaign is being waged against asylum seekers and migrants at the external borders of the European Union, conducted by national border forces and the coast guard with the complicity of the EU's own agency, Frontex. An investigation by *Der Spiegel*, Lighthouse Reports, *Le Monde* and others confirmed that Frontex's own reporting system was used to conceal pushbacks in the Aegean and to gloss over the agency's involvement.[6]

According to the International Organization for Migration (IOM), in the four months to April 2022 more than 4,400 people had been intercepted and returned by the so-called Libyan coast guard, which is also funded by the EU. IOM urged that the loss of life in the Mediterranean 'must not be normalized'.[7] That same coast guard reportedly threatened civilian res-

[5] Mare Liberum, 'Pushback Report 2021', Berlin, 2022; in fact, it is difficult to imagine a 'pushback' that does not involve violence or the threat of force.

[6] G. Christides and S. Lüdke, 'Frontex in illegale Pushbacks von Hunderten Flüchtlingen involviert', Spiegel Ausland, 27 April 2022: https://www.spiegel.de/ausland/frontex-in-illegale-pushbacks-von-hunderten-fluechtlingen-involviert-a-086f0e5a-0172-4007-b59c-7bced325cc75.

[7] Burak Bir, '6 dead, 29 others missing after boat capsizes off Libya: UN', 16 April 2022: https://www.aa.com.tr/en/middle-east/6-dead-29-others-missing-after-boat-capsizes-off-libya-un/2565392#. International Organization for Migration, 'Migration Data and Resources': https://libya.iom.int/data-and-resources. See also, The Libya Update, 'Sea Watch sues EU's Frontex over working relations with Libya', 29 April 2022: https://libyaupdate.com/sea-watch-sues-eus-frontex-over-working-relations-with-libya/; Sea-Watch, 'Crimes of the European Border and Coast Guard Agency Frontex in the Central Mediterranean Sea', 12 May 2021: https://sea-watch.org/frontex_crimes/.

cuers in international waters, and there have been persistent and extensive reports of widespread human rights violations in war-torn Libya.[8]

One particularly worrying aspect of this practice is that the European Union, at the political level, appears to condemn what goes on at the ground level, but then does nothing about it – there has been no follow-up, no serious investigation, no prosecution. Even though finally some measures seem to have been taken to hold that agency to account,[9] it should be recalled that in October 2021, several Member States urged reform of the Schengen Borders Code, so as to allow preventive and deterrence measures.[10] Member States have also provided significant resources to Frontex, the EU's largest agency, whose budget has gone from 6 million euros in 2005 to 543 million euros in 2021 and more than 750 million euros in 2022.[11]

Many have reported difficulties in obtaining information because of obstruction and other measures taken against NGOs and non-State volunteers. States have adopted spurious legislation allowing the authorities to curtail sea-going operations, while so much of what is done to migrants, refugees and asylum seekers is done out of sight, on the high seas, or on remote islands between Greece and Turkey. Any self-respecting society faced with incontrovertible reports of violence on the border would call for inquiry and look seriously at the question of legal liability, asking first who dictates the policy, and secondly, who implements policy. More than naming and

[8] See Human Rights Council, 'Report of the Independent Fact-Finding Mission on Libya', UN doc. A/HRC/49/4, 23 March 2022, paras. 45–54 and generally.

[9] The Director General of Frontex, Fabrice Leggeri, who had been criticised in the European Parliament for his failure to protect the human rights of those intercepted when seeking asylum, resigned in April 2022: Rankin, J., 'Head of EU border agency Frontex resigns amid criticisms': *Guardian*, 29 April 2022; J. Pascual & V. Malingre, 'The story behind Frontex director Fabrice Leggeri's resignation', *Le Monde*, 1 May 2022: https://www.lemonde.fr/en/international/article/2022/05/01/the-story-behind-frontex-director-fabrice-leggeri-s-resignation_5982123_4.html.

[10] ECRE, 'Frontex: MEPs withhold discharge of Frontex budget, Swiss poll reveals support for continued funding the Agency ahead of referendum, increased cooperation with INTERPOL', 8 April 2022: https://ecre.org/frontex-meps-withhold-discharge-of-frontex-budget-swiss-poll-reveals-support-for-continued-funding-the-agency-ahead-of-referendum-increased-cooperation-with-interpol/

[11] Statista, 'Annual budget of Frontex in the European Union from 2005 to 2021': https://www.statista.com/statistics/973052/annual-budget-frontex-eu/; see also, FragDenStaat, 'Resources at the disposal of violence: How European countries make Frontex operations possible': https://fragdenstaat.de/en/dossier/frontex-countries/.

shaming is called for, and prosecutions and criminal sanctions are needed, rather than criminalizing a few refugees, who may have steered a few boats, and arbitrarily sentencing them to years of imprisonment.

A recent feasibility study reviewed the evident failings of *ad hoc* monitoring mechanisms, agreed by the European Commission, in Croatia and Greece.[12] It noted that the expansion of Frontex powers and resources had come at the expense of the fundamental rights of those seeking to cross the EU's external borders, and that credible reports of rights violations had been routinely dismissed by national and EU authorities, leading to lack of political oversight and judicial control, resulting in impunity. Taking account of the criteria of independence, an adequate mandate, funds and powers, transparency and publicity, as well as solidarity between monitoring bodies in Europe, it recommended that existing institutions – Ombudsman, National Human Rights Institutions and National Preventive Mechanisms against torture – could make up a system to provide effective human rights monitoring at the EU's external borders. If adopted, such a mechanism would go a long way towards overcoming the obstacles recounted by countless observers.

The 1951 Convention is by no means the perfect treaty, as some would have it. It contains nothing on admission, which States expressly rejected, and it leaves them to 'co-operate' in sharing the 'unduly heavy burden' that may fall on countries of first asylum – hence the admittedly patchwork response to resettlement and the voluntary provision of funds. States prefer to keep such matters within their discretion, which explains why a 25 year old scheme to re-imagine the world remains where it began,[13] its mandatory elements having gained no traction, just like the 1986 Danish scheme or Grahl-Madsen's allocations from a decade earlier.

[12] M. Jaeger, A. Fotiadis, E. Guild, L. Vidović and N. Busuttil, "Feasibility Study on the setting up of a robust and independent human rights monitoring mechanism at the external borders of the European Union", 4 May 2022: https://www.proasyl.de/wp-content/uploads/Feasibility-Study-FINAL.pdf. See also, ECRE Policy Paper, 'Holding Frontex to Account: ECRE's Proposal for Enhancing Nonjudicial Scrutiny Mechanisms', 21 May 2021: https://ecre.org/ecre-policy-paper-holding-frontex-to-account-ecres-proposal-for-enhancing-nonjudicial-scrutiny-mechanisms/

[13] Cf. J. Hathaway and A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, vol. 10, 1997, p. 115; J. C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal,* vol. 31, 1990, p. 129; see also, A. Grahl-Madsen, Territorial Asylum, 1980, pp 102-14;

1. Other developments in obstructing asylum

The EU has also proposed regulating through the Artificial Intelligence Act a medium likely to have an impact on asylum, migration and border control.[14] In its various manifestations, artificial intelligence may influence decision-making and the assessment of credibility, for example, but nowhere in the proposals is it suggested that protection or international obligations should be factored in to its implementation. The approach is risk-based, but with too little attention to the impact on fundamental rights and, in particular, to the danger of in-built bias and discriminatory outcomes.

As Aleinikoff and Owen have noted recently, States want control over their borders,[15] and according to Boris Johnson, it's what the people voted for when they voted for Brexit.[16] But being in control, is not the same as closing borders and pursuing arbitrary detention and arbitrary expulsion. Being in control means developing and maintaining legal migration channels and effective asylum procedures; it means subscribing to the rule of law and to respect for fundamental rights. What people need is not closed borders, but confidence in government that it can manage migration in all its aspects, but what we see everywhere is evidence of failure – the United Kingdom and Rwanda memorandum of understanding (MOU) underlines the years of Home Office failure and the 'hostile environment' introduced by Theresa May as Home Secre-

[14] J. Kilpatrick and C. Jones, "A clear and present danger: Missing safeguards on migration and asylum in the EU's AI Act", Statewatch, May 2022: https://www.statewatch.org/media/3285/sw-a-clear-and-present-danger-ai-act-migration-11-5-22.pdf; C. Jones, J. Kilpatrick and Y. Maccanico, 'Building the biometric state: Police powers and discrimination', Statewatch, February 2022: https://www.statewatch.org/media/3143/building-the-biometric-state-police-powers-and-discrimination.pdf; P. Molnar and L. Gill, 'Bots at the Gate: A Human Rights Analysis of Automated Decision Making in Canada's Immigration and Refugee System', University of Toronto, Citizen Lab, International Human Rights Program and IT3 Lab, September 2018: https://ihrp.law.utoronto.ca/; https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf.

[15] A. Aleinikoff and D. Owen, 'Refugee protection: "Here" or "there"?', 2022, 10 *Migration Studies,* p. 464: http://doi.org/10.1093/migration/mnac002.

[16] A. Taub, 'Why "Border Control" Politics Is More About Control Than Borders', *The New York Times*, 20 April 2022: https://www.nytimes.com/2022/04/20/world/border-control-politics.html.

tary.[17] The MOU will solve nothing, but instead will visit hardship on a limited number of individuals, as was the case with so-called off-shore processing in Australia.[18]

2. Old times

There can be no protection without law, without obligation. Since the time of the League of Nations, it has been recognised that, given the breakdown of the relationship with their country of origin or because of external events, refugees have basic needs that must be met by the international community. They also require protection, and the rules of protection can all be traced back to the essential idea of no compulsory return to the risk of danger. Before any high commissioner, any recommendation, any organisation, or any treaty, this basic principle was adopted instinctively by those in the League of Nations called on in 1921 to discuss what was to be done for refugees.[19]

[17] See G. S. Goodwin-Gill, 'Introductory note to the Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda', *International Legal Materials*: https://doi.org/10.1017/ilm.2022.36; M. Grundler and E. Guild, 'The UK-Rwanda deal and its Incompatibility with International Law', 29 April 2022; https://eumigrationlawblog.eu/the-uk-rwanda-deal. See also *R (on the application of the Public and Commercial Services Union and Others) v Secretary of State for the Home Department* [2022] EWCA Civ 840; and on the background and consequences of the 'hostile environment', see A. Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment*, 2019.

[18] The Australian approach appears to have been an important influence on the UK's decision to remove asylum seekers, with two former ministers (Tony Abbott and Alexander Downer) actively campaigning for its adoption. Much of the evidence relating to costs, efficacy and impact provided by the Australian High Commissioner to the UK Parliament was erroneous, however, and was later corrected in a submission from the Kaldor Centre for International Refugee Law, Faculty of Law & Justice, University of New South Wales; see Gleeson, M. and Yacoub, N., 'Cruel, costly and ineffective: The failure of offshore processing in Australia', Kaldor Centre Policy Brief, 11 August 2021: https://www.kaldorcentre.unsw.edu.au/publication/policy-brief-series; see also, 'Offshore processing resources': https://www.kaldorcentre.unsw.edu.au /offshore-processing-resources.

[19] For a brief account of this history, see G. S. Goodwin-Gill, 'The Lawyer and the Refugee', 2021, 39 *Berkeley Journal of International Law* 1: https:// www.berkeleyjournalofinternationallaw.com/current-issue; International Refugee Law

The idea of no compulsory return reflects a basic, humanitarian response to a fundamental human predicament, and the development of international refugee law ever since has put flesh on the bones, even as some States have tried, from time to time, to curb its development and its scope of protection. The evidence in support of customary international law protecting the rights of refugees is overwhelming,[20] which makes it all the more surprising to hear Professor Hathaway trying to make the contrary case even though it has long been rejected.

In a chapter published in 2014, for example. I reviewed the notion of temporary refuge as a rule of customary international law which requires admission and non-return to danger. I considered doctrinal analysis, including not only jurisprudential writing, but also the judgments of the International Court of Justice (and not just the *North Sea Continental Shelf* and *Nicaragua* cases), the ICRC *Study on Customary International Humanitarian Law* and the work of the International Law Commission on the identification of customary international law. I concluded that there was ample support for such a rule in light of State practice and *opinio juris*, including 'the special value which members of the international community attach to the protection of those displaced by persecution or conflict, and to the obligations of admission and non-return.'[21]

In the fourth edition of *The Refugee in International Law*, published in September 2021, we also undertook a thorough analysis of the law and practice on *non-refoulement*, looking at the recent past and with an eye on the future, and we confirmed that this central principle of refugee protection is as robust as ever, both from a theoretical and practical perspective.[22] Its status as customary international law is indisputable, even

in the Early Years', in C. Costello, M. Foster, and J. McAdam (eds.), *Oxford Handbook of International Refugee Law*, 2021, p. 23.

[20] See, for example, H. Lambert, 'Customary Refugee Law', in C. Costello, M. Foster, and J. McAdam (eds.), *The Oxford Handbook of International Refugee Law*, 2021, p. 240, p. 248 and sources cited at note 11.

[21] G. S. Goodwin-Gill, '*Non-refoulement*, Temporary Refuge, and the "New" Asylum Seekers', in D. Cantor and J-F. Durieuxeds., *Refuge from Inhumanity? War Refugees and International Humanitarian Law*, 2014, p. 433. For a more recent and lengthy analysis of customary international law, among other sources, see G. S. Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law', 2020, 69 *International and Comparative Law Quarterly* 1, *passim.*

[22] See G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 2021, in particular at pp. 300-306.

among States that have, for different reasons none of which refers to *non-refoulement*, so far failed to ratify the 1951 Convention and the 1967 Protocol. Moreover, several judicial decisions have recognized the customary international law status of the rule,[23] including in Bangladesh (with a population of some 1 million Rohingya refugees), India, Malaysia (which also has a significant refugee problem), and in the Inter-American Court of Human Rights.[24]

In his doctoral thesis, Brian Barbour, who has considerable experience actually working over many years with the governments of Japan, Taiwan, Thailand, Malaysia, India, Bangladesh, Hong Kong and South Korea, notes that Hathaway refers mostly to violations of the prohibition of *refoulement* by States that are in fact party to the Convention. These incidents have been consistently and soundly condemned and should be characterised as treaty violations, not as evidence against customary international law, as the International Court of Justice said in the *Nicaragua* case.[25] Similarly, Barbour notes that Hathaway provides pages of anecdotal incidents of what he terms *non-entrée*, including pushbacks, border closures, barriers to entry, interdiction, refusal of access to procedures and the like, primarily in countries that are party to the 1951 Convention, together with a few non-parties, but few if any examples of *refoulement*. He takes issue with Hathaway's use of non-ratification as somehow evidence of rejection of *non-refoulement*, and in his thesis challenges the idea of Asian exceptionalism, showing that there are many reasons why a State may have chosen not to ratify the 1951 Convention. None is on record as having objections to the principle of *non-refoulement*, and Barbour demonstrates that Asian States are in fact managing refugee protection in accordance with accessions to relevant international conventions and the adoption of domestic laws, policies and practices.

In the latest defence of his claim,[26] Hathaway does not deal with the opposing arguments, although he cannot have been unaware of them. He

[23] Other than the well-known 2008 Hong Kong case, *C v Director of Immigration* 18 February 2008, HCAL 132/2006.

[24] See also Lambert, above note 20.

[25] Likewise, anecdotal examples can be found of violations of the prohibition of torture, genocide and slavery, but no one suggests that therefore no customary international law obligation prohibits such conduct.

[26] J. C. Hathaway, *The Rights of Refugees under International Law*, 2021, pp. 438-59.

cites frequently to a 2016 article by Cathryn Costello and Michelle Foster which makes numerous references to the above-mentioned chapter,[27] which itself appeared in a collection that he himself appears content to mention on other occasions. Such an unwillingness to engage at all with evidence to the contrary of his position speaks tellingly of the level of international legal scholarship in general, and of his position on this point of customary international law in particular.

Given the powerful normative force of *non-refoulement*, it is hardly surprising that State practice continues to look for ways around it or at times to question its obligatory scope. The question of who is to be protected is easy to propose but less easy to answer. It depends very much on who is asking, and in seeking to advocate for protection as refugees of this or that group, many necessarily fall by the wayside. National systems of refugee determination, valued by States for their gateway function, are over-burdened, over-legalised, and over-judicialised. This is not to undermine or to discount what has been achieved in expanding protection through the courts, but it is to signal that we need to think outside the Convention box when looking at the protection of those in need. If a refugee is someone with a well-founded fear of being persecuted on certain grounds, then what of refugees who simply identify themselves as refugees; what value do their voices carry? And how should we respond, administratively and practically, to their requests for protection?

Recognition of basic principles, such as non-return, guided early policy, which was translated into practice, and finally into obligations. The notion of protection expanded, although there have always been some regrettable exceptions. Nansen, for example, and many of those who followed him, believed in national treatment of refugees in the labour market, but here their reach exceeded their grasp, to this day.

The role of law in the protection of refugees has many dimensions. Obviously, international legal instruments and national laws and jurisprudence are a very present part of the ever evolving regime of international protection, but the law leaves many questions unanswered, such as the meaning of asylum.[28] At first, solutions in thinking and in practice

[27] C. Costello and M. Foster, '*Non-refoulement* as Custom and Jus Cogens? Putting the Prohibition to the Test', in den M. Heijer and H. van der Wilt (eds.), Netherlands *Yearbook of International Law* , 2016, p. 273.

[28] Two contrasting views are provided by Mr Hoare (UK) and Mr Chance (Canada).

were essentially political, and this carried over into the first years following adoption of the 1951 Convention. There is little evidence that it was seen to be a rights instrument, and how it would develop was far from clear. Certainly, the Universal Declaration of Human Rights was mentioned in the preamble, providing a useful anchor for the future, but there are few references to rights as such in the Convention.

It is self-evident that States do have obligations, between themselves, in relation to many of the instances of international movement and the implications of refugee status and *non-refoulement* through time. It is now accepted that refugees and asylum seekers, considered as individuals, do have rights – refugee rights, human rights. It was not always so, but there is no going back to a pre-rights era, given the evolution that has taken place with regard to the 1951 Convention and protection more generally.

The linkage to asylum in the sense of a durable solution nevertheless remains contested, which inspires States to think that protection can be a temporary response to what is, in their view, a necessarily temporary phenomenon. This perspective, though it is belied by experience, encourages States – some more than others – to support short-term responses that become longer and longer, and end up wasting the capital of refugees' lives. It would be far better to think and act as if refugees were with us indefinitely – to enable them to plan for the long-term, to acquire skills and to earn, to see their children educated, not detained hopelessly and without hope.

3. Externalisation

Perhaps the major challenge to the international legal regime today lies in the push to externalise asylum. Australia has already done this

The former said that the Convention was primarily concerned with minimum rights and guarantees, which applied to refugees once admitted; it did not deal with admission, although the status of refugee should be granted to any person fleeing persecution. For the latter, nothing could be worse for refugees, whether already in Canada or waiting to enter, than to have a sense of being apart from the community; while no Convention right would be denied to refugees, it was preferable that they should not regard themselves as refugees. See 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting', 13 July 1951: UN doc. A/CONF.2/SR.19, 26 November 1951, 6, pp. 17-19.

with regard to people intercepted while seeking to arrive by boat. Many have been detained for long periods in Papua New Guinea and Nauru, while substantial amounts have been paid in compensation for the ill-treatment they suffered. No one has actually been sent to PNG or Nauru since 2014,[29] but this did not stop the Australian High Commissioner to the United Kingdom misrepresenting the facts when he gave evidence to the House of Commons on the Nationality and Borders Bill.

Among other things, he had served as Attorney-General in the Government at a time when proceedings were started against Australia in the International Criminal Court, but nevertheless he expressed ignorance of this while downplaying the ill-treatment, the compensation paid, and the very great costs involved in maintaining offshore detention while hoping for regional processing to eventuate. Although the Kaldor Centre pointed out these and other errors,[30] this did not stop the United Kingdom from signing a memorandum of understanding with Rwanda under which certain asylum seekers will be selected for sending there, where their claims will be processed. This will take place within a framework that even the United Kingdom describes as one of international obligation (although its understanding of international law and international obligation appears a little shaky, if its statements regarding the Northern Ireland Protocol are anything to go by). However, the United Kingdom is keen to insist it is not acting in breach of its Convention obligations or international law, and that it is not claiming an absolute right of transportation.

Externalisation blurs the lines of responsibility and the process of determining whether someone is a refugee; in Australia and the United Kingdom, it was clearly manifestly introduced in light of local failures and in an attempt to secure electoral advantage. Leaving aside the merits or demerits of the policy, the government has to take certain decisions with regard to who to send, which means that it must decide according to law, not choose arbitrarily or disproportionately. The European Court of Human Rights has ruled in the case of *S.A.S.* that article 14 prohibits direct discrimination and indirect discrimination, wherever 'a general policy or measure... has disproportionately prejudicial effects on a particular group… even where it is not specifically aimed at the group and

[29] The regime of detention in Papua New Guinea was ruled illegal in *Namah v Pato* [2016] PGSC 13; SC1497 (26 April 2016).

[30] See above, note 18.

there is no discriminatory intent.'[31] It will be for lawyers and advocates at all levels to challenge, both this policy and the means and methods of its implementation.

The 1951 Convention is likely the most litigated treaty in the world. Every day, someone somewhere is considering how to interpret and apply its provisions. Much of it is run of the mill stuff, but every so often a new point of principle will emerge, or governments will seek to narrow the scope of protection, and lawyers, NGOs, human rights advocates, and UNHCR must take up the case, either for the individual or the group, either for the case or strategically, for the good of all.

Here, we can see the international impact of 'local' case law in contributing to the emergence of settled interpretative practice, for example, with regard to the meaning of persecution, or the reasons for a well-founded fear, or in the application of the principle of non-penalisation. We see, too, the impact in international refugee law of the jurisprudence of human rights bodies for whom the return to risk of harm of those seeking protection is to be avoided at all costs. Faced with the strengthening endorsement of basic principles, States seek ways and means to prevent arrival, by physical obstacles and by visas, carrier sanctions, denial of disembarkation, or by often spurious arguments of protection elsewhere, that someone else is surely responsible.

There is no new treaty, no updated UNHCR Statute,[32] and no evident prospect of such emerging, even as times have undoubtedly changed and the covid-19 pandemic has brought in opportunities to control the movements of people between States, irrespective of their needs. Add to that an awareness of the increasingly protracted and unresolved nature of refugee problems in the world and increasing movements of refugees to where they might find better protection for themselves and their children, and the hallmarks of intensified confrontation emerge, in matters on which States appear unwilling to commit themselves.

States, indeed, find themselves in a quandary, uncertain how to react and unwilling in general to be seen to cooperate, equitably and meaningfully, with others. On the one hand, they continue to place barriers in the way of refugee movement, while on the other hand, their own and inter-

[31] *S.A.S. v France*, Appl. 43835/11, Grand Chamber, 1 July 2014, para. 161.

[32] See G. S. Goodwin-Gill, 'The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change', *International Journal of Refugee Law*, vol. 28, 2016, p. 679.

national jurisdictions insist that a small but important measure of protection – *non-refoulement* – is available to all who are touched by the agents of the State and who are at risk of return to harm. Somewhere in all of this stands UNHCR, the Office of the UN High Commissioner for Refugees, which States have formally mandated to provide protection and to seek solutions. Whatever governments may claim, protection is not straightforward, but considered in its legal dimensions, is the constantly evolving product of a dialectic involving legislative and executive power and the individuals to whom it is applied. It is here that the courts must maintain the balance – unelected judges, yes, who are essential in any democratic society committed to the rule of law and to fundamental rights, and to ensure that the exercise of power is not arbitrary.

We are looking at a world in which migration has become normalised, and so too have refugee flows. Responding to them needs to be driven by commitment to freedom, respect for human rights and human dignity, equality and solutions. In the threefold spectrum of flight, refuge, and solution, the responsibility for protection falls on States and, of course, on international institutions. But it is also the responsibility of civil society at large to see that the law is upheld in relation to refugees, or those displaced further to disasters or climate change, or those threatened with statelessness as a result of deprivation or denial of citizenship.

MIGRANTS AT THE GATES OF EUROPE: THE PROBLEM OF IMPUNITY REGARDING USE OF FORCE AT BORDERS

ELSPETH GUILD*

1. Introduction

The management of the external borders of the EU have attracted much attention over the past years. In particular, allegations of violence against migrants carried out by state authorities have been rife. Many reports have been published in highly reputable newspapers not only of Member State border police violence against migrants but also of the tolerance by the EU border agency, Frontex to such violence.[1] At the end of April 2022, the director of Frontex resigned following the presentation of a damning report by the EU's Anti-Fraud Office to his Board (a report which has yet to be made public).[2] According to reputable news reports, the OLAF report substantiates claims of brutality and violence against migrants at the EU external borders not only carried out with the knowledge of the Director and other in the agency, but with their blessing.[3] One of the questions which is being asked now is what legal response should there be to these confirmed uses of force, particularly in light of the blanket denial by the director and his colleagues of any wrong doing or complicity in violence against migrants since the first big revelations in 2020. These denials have included statements on the record to the European Parliament which according to the OLAF report were misleading and untrue. In this chapter, I examine the rules on

* Queen Mary University of London.

1 https://www.nytimes.com/2020/11/26/world/europe/frontemigrants-pushback-greece.html (accessed 4 August 2022).

2 J. Pascual and V. Malingre, "The story behind Frontex director Fabrice Leggeri's resignation", Le Monde, May 1, 2022 https://www.lemonde.fr/en/international/article/2022/05/01/the-story-behind-frontex-director-fabrice-leggeri-s-resignation_5982123_4.html (accessed 4 August 2022); https://www.lighthousereports.nl/investigation/frontex-the-eu-pushback-agency/ (accessed 4 August 2022).

3 https://www.euronews.com/my-europe/2022/07/29/leaked-report-finds-frontex-covered-up-illegal-migrant-pushbacks-by-greek-authorities (accessed 4 August 2022).

use of violence by state authorities in the context of border control operations and reflect on the difficulty of breaking a pattern of impunity.

2. Violence and Legitimacy

One of the issues which is particularly concerning regarding force exercised by EU border police on persons seeking to cross the EU external border is the extent to which that force is legitimate.[4] Public officials of course are entitled to use force where it is reasonable and so long as they are lawfully exercising their powers.[5] But many images and reports, widely diffused in highly reputable media worldwide, regarding the use of force at EU borders by border police against would be migrants raise serious concerns about the necessity and legality of the force used. On 13 October 2021, the British Home Secretary called for border police to be given immunity over refugee deaths occurring in the context of push-backs and subsequently pushed through the UK Parliament a provision with this objective.[6] Already legal experts have condemned the proposal as neither consistent with national law nor the UK's international obligations. However, that the interior minister of a Council of Europe country, bound by the European Convention of Human Rights should suggest such action indicates both how pervasive the use of forced in in border policing and how reluctant at least one Council of Europe state is that the risk of prosecution should be an impediment to that use of force even when illegal and resulting in death. Later in the same month (October 2021) a criminal court in Italy found guilty of the criminal offence of failure to rescue a ship captain who rescued migrants at sea but handed them over to the Libyan authorities for debarkation.[7]

[4] J. Kleinig, "Legitimate and illegitimate uses of police force." *Criminal justice ethics* vol. 33.2, 2014, ppò. 83-103; J. McBride, *Human rights and criminal procedure: The case law of the European Court of Human Rights*. Council of Europe, 2018.

[5] "A handbook for police officers and other law enforcement offcials", The European Convention On Human Rights And Policing, Council of Europe https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[6] https://www.theguardian.com/uk-news/2021/oct/13/uk-border-force-could-be-given-immunity-over-refugee-deaths (accessed 14 October 2021).

[7] N. Scavo, *Sentenza. Migranti consegnati ai libici, prima condanna in Italia per un comandante*, published in Avvenire.it, October 14, 2021.

As one Council of Europe body has stressed '[t]he best possible guarantee against ill-treatment is for its use to be unequivocally rejected by police officers themselves'.[8] This is particularly relevant to use of force in border policing operations where use of force at some border crossing places appears to have become endemic. A number of NGO experts have indicated that while there may be many border crossing places in their country, the places where there are systematic complaints about border policing violence are limited to a small number and often associated with some specific teams of police. Yet, all efforts to end the apparent immunity of these teams have been thwarted first by a blanket denial by the authorities themselves that the violence occurred and secondly by the reluctance of prosecutorial authorities to investigate complaints even where well documented with photographic and video testimony. A clear comparison is evident here with actions of police in some Council of Europe states inside the borders.[9] But the lack of independent monitors is even more problematic in the case of use of force in border control operations as the remoteness of the places where it takes place and the unsociable hours of the incidents as well as the reluctance of border police to give permission to monitors to be present are endemic. As an OSCE/ODIHR report states regarding 'the importance of accountability in relation to monitoring mechanisms […] it is essential that such mechanisms provide for monitoring reports to lead to action, redress and positive change, including through links to prosecutorial agencies and judicial processes'.[10]

The issue of force carried out by border police against migrants seeking to cross borders irregularly is the biggest human rights challenge at the EU's external borders. In this chapter I will test an example of border violence against the rules established by the ECtHR regarding

[8] Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 22 September 2008 CPT/Inf (2010) 3 at paragraph 16.

[9] CommDH (2004) 3, 'Report of the Commissioner for Human Rights on the visit to Latvia, 5-8 October 2003', paragraphs 10-13 at paragraph 13: 'In a country where, in civil society, there are serious concerns about the conduct of some members of the police it is particularly hard to understand how no cases can have been brought direct before the courts.'

[10] OSCE/ODIHR *Border Police Monitoring in the OSCE Region: Upholding a Human Rights Approach to Migration* 13 April 2021, Meeting Report.

the legitimate use of force by state authorities reported in the media to understand the problem and how it should be addressed. My focus in this section is on the role of independent monitoring in ensuring human rights compliant border controls.

3. The Case Study

According to a range of press reports, on the night of 21-22 September 2021 French police in Dunkirk, France, fired rubber bullets at migrants allegedly to stop them from trying to cross the Channel in a rubber dingy in the direction of the UK.[11] According to these reports, two Iranian Kurds were struck by the bullets and were taken to hospital following the shooting – one with a fractured leg and the other with a broken hand. Further, the articles state that an Iranian Kurd calling himself Mohammed recalled what he saw of the shooting. He said: 'There were eight of us holding the boat near the beach. We were getting ready to launch it for 40 people who wanted to cross to your country [the UK]. Then three or four police arrived in one vehicle. One policeman shot Juanro Rasuli at point blank range. I can't remember how many times they fired the rubber bullets. When the police saw us, they shouted stop, we stopped and they still shot us. Then we ran away as best we could'. The newspaper has in its possession a video of the shooting taken by the migrants corroborating the story and showing Mr Rasuli lying on the ground with his leg bleeding (the video can be accessed online via the newspaper's website). The other shot man shows his injured hand to the camera. A voice says in Kurdish: 'You can see the police laughing at us'.[12] Again, according to one of the newspapers which ran the story, the shooting happened in darkness, in poor weather conditions at Dunkirk at 2 am. The two injured men were taken to the local hospital where they are being treated for their wounds. According to one report, the French police authorities have opened an internal investigation into the event.

[11] https://www.standard.co.uk/news/world/french-police-shoot-migrants-dunkirk-b958449.html; https://www.mirror.co.uk/news/world-news/french-police-open-fire-migrants-25121920; https://www.dailymail.co.uk/news/article-10050681/Horror-Dunkirk-beach-French-police-open-fire-migrants-dinghy-rubber-bullets.html; (accessed 3 October 2021).

[12] https://www.dailymail.co.uk/news/article-10050681/Horror-Dunkirk-beach-French-police-open-fire-migrants-dinghy-rubber-bullets.html (accessed 3 October 2021).

The newspapers which reported on the incident concurred that this event marked major escalation of tension on the beaches as French gendarmerie [acting in their capacity as border police] carry out night patrols seeking to prevent people leaving France irregularly with an apparent destination: the UK. According to the Anglo-French Sandhurst Agreement 2018,[13] the UK agreed to pay the French authorities £54 million (Euro 63 million) to patrol the French beaches to prevent irregular departures. According to the British press, the UK Home Secretary is threatening to withhold the payment if the number of irregular arrivals from France does not diminish.[14]

This account raises many difficult issues regarding border violence which are by no means particular to the French border police but rather widely reported in the Western Balkans,[15] Italy,[16] Greece,[17] and North Eastern Europe[18] including at the Hungarian Serbian border.[19] First, the activity which the border police sought to stop constituted neither a threat to the life of the police nor of anyone else and did not, apparently, involve violence other than that of the border police. The approach of the French border police indicates a shoot-first-ask-questions-later modus operandi. Secondly, assuming the press reports are correct, the migrants complied with the French police demand that they stop but were shot at anyway. Thirdly, the shooting seems to have been fairly indiscriminate and with little regard to the damage which might be (and ultimately was) caused. Fourthly, the bullets used (rubber) are widely acknowledged to be potentially lethal and their use is prohibited in

[13] https://www.gov.uk/government/news/uk-and-france-sign-action-plan-to-tackle-small-boat-crossings (accessed 3 October 2021).

[14] https://www.standard.co.uk/news/world/french-police-shoot-migrants-dunkirk-b958449.html (accessed 3 October 2021).

[15] Network, Border Violence Monitoring. "The Black Book of Pushbacks." *Vol. II: https://documentcloud. adobe. com/link/track* (2020).

[16] G. Campesi, "Italy and the militarisation of euro-mediterranean border control policies.", *Contemporary Boat Migration. Data, Geopolitics and Discourses* , 2018, pp. 51-74.

[17] D. Howden, A. Fotiadis, and Z. Campbell. "Revealed: the great European refugee scandal." *The Guardian* 12, 2020.

[18] https://www.euronews.com/2021/09/30/poland-carried-out-migrant-push-back-at-belarus-border-amnesty-says (accessed 3 October 2021).

[19] CPT report on periodic visit to Hungary in November 2018 and the response of the Hungarian authorities.

many Council of Europe countries.[20] Fifthly, assuming the reports are correct and the documentary evidence is reliable, the statement of one of the victims that the French border police then laughed at the men after they had been shot is deeply concerning, an indication of the dehumanisation of the migrants in the minds of the police.

4. The Standards

There are a substantial number of authoritative standards for use of force consistent with European human rights obligations. Both the Council of Europe and the OSCE/ODIHR have produced extensive guidelines for law enforcement authorities regarding the use of force in policing, including in the context of border operations. The Council of Europe published an authoritative handbook on the European Convention on Human Rights and Policing in 2013,[21] which takes as a starting place the case law of the ECtHR on use of force in policing and provides very detailed guidance on what is and what is not consistent with human rights law. The OSCE/ODIHR recently produced a report on Border Police Monitoring in the OSCE Region: A Discussion of the need and basis for human rights monitoring of border police practices.[22] This report focuses on border operations and how they can be carried out with full respect for human rights.

Following the case law of the ECtHR on use of force by police (including at borders), the first requirement is that police respect and protect human dignity and uphold the rights of all persons. This requirement is also contained in the SBC Article 7(1).[23] The right to dignity has been considered by the CJEU in the migration context where it has been

[20] https://www.statewatch.org/media/documents/news/2017/oct/germany-parl-researxh-situation-report-on-use-rubber-ammunitio-%20in-%20Europe.pdf (accessed 5 October 2021).

[21] https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf (accessed 3 October 2021).

[22] https://www.osce.org/odihr/486020 (accessed 3 October 2021).

[23] "Border polices shall, in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons." Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) *OJ L* 77, 23.3.2016, p. 1-52.

held to be justiciable. The actions of state authorities in migration contexts must be consistent with the right to dignity of the individual which includes a prohibition on actions which denigrate the individual.[24] Applying the human dignity requirement to the case study, the alleged action of the border police to laugh at the plight and suffering which they had themselves caused to the people seeking to move is clearly inconsistent with the right to respect for human dignity.

Police may be required to exercise force in the course of their duties, specifically, to arrest a violent person, to protect themselves and/or others or to prevent a crime.[25] However, any use of force by police must be the minimum necessary to achieve the specified objective, applied lawfully and must be accounted for. These are three separate requirements all of which need to be fulfilled. Lethal or potentially lethal force is lawful only where such use is absolutely necessary for the protection of life. The 'absolutely necessary' requirement is subject to a strict proportionality test. Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment) ECHR are the core sources of limitations on police use of force. These rules are as relevant in border operations as in policing activities within the state. Indeed, it can be argued that they are even more important as people seeking to cross borders are not per se criminals and certainly not per se violent criminals. In the case study, assuming that the press reports are accurate, where the would-be migrants ceased all action to put the dingy in the water when the French border police called for them to stop would mean that any force exercised thereafter would be of questionable legality. There is no necessity of force where the people have already complied with the request of the border police and no proportionality as the would-be migrants did not constitute a threat to the police or themselves. In such circumstances the use of force becomes punitive rather than necessary to protect the life of an individual and proportionate to the risk at hand. It

[24] C-148/13 *ABC* ECLI:EU:C:2014:2406 "In relation, in the third place, to the option for the national authorities of allowing, as certain applicants in the main proceedings proposed, homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter."(para 65).

[25] Council of Europe supra p 24.

fulfils neither the test of absolute necessity nor the strict proportionality test.

Lethal or potentially lethal force may only be used for a lawful purpose and the only lawful purpose which can justify this is where it is absolutely necessary to protect the life of a person (irrespective of whether this is the person using the force or someone else).[26] Thus, in the case study, the firing of rubber bullets, a known potentially lethal use of force, to stop people carrying a dingy to the water when they had already stopped in any event, does not appear to fulfil the requirement. Further, this use of force is disproportionate to the activity being carried out which does not constitute an immediate threat to the life of a person.[27] Should someone seek to argue that crossing the Channel at night in a dingy is a potentially dangerous activity which may result in the loss of life, this is insufficient as a justification for the use of potentially lethal force on land. It is neither immediate nor obviously life threatening as many people cross that body of water in similar conditions. Further the use of force cannot be justified on the ground that the border police were seeking to prevent the crime of leaving France without permission. Such a crime does not present, in the circumstances, an act which puts at risk the life of any individual; indeed, it is an administrative crime and is not even accompanied by the justification that the individual is fleeing to evade prosecution for some other crime. The reification of irregular border crossing into a criminal activity is an unfortunate legislative choice which has been promoted by the EU.[28] It cannot, however, transform irregular border crossing from a normally peaceful and non-violent action into a crime of violence so serious as to justify border police use of violence against the perpetrators.

Responsibility for human rights violations in use of force by border police extends beyond the police who carry out the force to include also those who planned and controlled it.[29] Police must not use tactical options which make the use of lethal force inevitable or highly likely. There must be adequate and effective safeguards against arbitrariness and abuse of force.[30] None of these requirements appear to have been

[26] Council of Europe supra p. 24.

[27] McCann and Others v UK, Application No. 18984/91 (Grand Chamber) , 1995.

[28] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence *OJ L 328*, 5.12.2002, p. 17-18.

[29] Council of Europe supra p. 24.

[30] *Makaratzis v Greece* 20 December 2004.

met in the case study above. There is however, the difficult issue of the potential liability of the UK authorities on whose behalf the French border police appear or are alleged to have been carrying out the use of force. There is much academic interest in what is currently known as anti-impunity[31] whereby the failure to respect human rights obligations is re-framed as evidence of the commission of criminal actions (in particular international crimes under the statute of the International Criminal Court).[32] While it may be that there is certain complicity of the UK authorities in containment measures carried out by the French border police, that use of force is an inherent part of the plan is beyond the scope of this investigation.

Potentially deadly force can never be used where the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent crime.[33] Again this requirement does not appear to have been respected in the case study. The rules governing use of force apply in all situations even where there are rapidly unfolding and dangerous situations, internal political stability or other public emergency, these arguments cannot justify a departure from the standards.[34] According to the press reports, in the case study, there was no evidence of a rapidly unfolding dangerous situation such as the ECtHR has considered in respect of the use of forced by police in its case law.[35] The fact that some persons seek to leave France was certainly neither a threat to internal political stability of France nor a public emergency of any kind. Further, there is no indication that this was a rapidly unfolding dangerous situation such as the ECtHR had in mind when it considered this ground of potential justification of the use of force.[36]

This leads to the question of an investigation, first internal but also necessarily by an independent monitor. The duty on border police to make and retain accurate records of every incident of use of force is a key requirement necessary to establishing the legitimacy of the violence

[31] Engle, Karen. "Anti-impunity and the turn to criminal law in human rights." *Cornell L. Rev.* 100 (2014): 1069; Mann, Itamar. "The new impunity: Border violence as crime." *University of Pennsylvania Journal of International Law* 42 (2020).

[32] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html (accessed 5 October 2021)

[33] *Nachova v Bulgaria* 6 July 2005.

[34] *Gorovenky and Bulgara v Ukraine* 12 January 2012.

[35] McCann and Others v UK, Application No. 18984/91 (Grand Chamber) , 1995.

[36] McCann and Others v UK, Application No. 18984/91 (Grand Chamber) , 1995.

itself. Transparency in the form of publication of both internal reports and those of the independent monitors is also an inherent part of an Article 3 ECHR compliant investigation.

The Council of Europe guidelines recommend that five questions be posed by officers who have used lethal force:

- Was the use of force in accordance with the law;
- Was the amount of force used proportionate in the circumstances;
- Were other options considered, if so what;
- Why were the other options discarded;
- Was the method of applying force in accordance with police procedures and training.

The necessity to keep records when lethal or potentially lethal force is used is a high priority for ECtHR compliant police action. In the investigation into the circumstances set out in the case study, these questions will be of great importance. However, for any investigation to be effective, there must be a willingness on the part of the investigators to examine all of the circumstances and to be fully independent of the police they are investigating. All too often, these investigations are carried out internally with a bias in favour of the account given by the border police who carried out the use of force.

Additionally, the OSCE/ODIHR report[37] complements the Council of Europe's Guidelines regarding use of force. Here it is emphasised that any use of force in the context of border security and migration management must be exceptional, necessary and proportionate to the specific threat.[38] All police must seek to minimize damage and injury and respect and preserve life. The Report recognises that policing actions affecting irregular migrants at borders can include 'interception, apprehension, screening, identification, referral, capture, pushbacks,[39] frisking and body searches, as well as the use of physical restraint'.[40] However, it recognises that for border policing to be lawful, accountable, non-arbitrary and non-discriminatory it needs to be implemented in full respect for human rights, refugee and humanitarian law and in line with procedural safeguards prescribed in international and national law.

[37] OSCE/ODIHR *Border Police Monitoring ain the OSCE Region: Upholding a Human Rights Approach to Migration* 13 April 2021, Meeting Report.

[38] OSCE/ODHR report *supra*, p. 6.

[39] Though the consistency of pushbacks with international human rights law is highly contested in Europe.

[40] *Ibid* p. 6.

The standards applicable to police carrying out border control activities are clear. They are well spelt out both by the Council of Europe and the OSCE/ODIHR in their work. The guidelines of these two bodies are carefully referenced in accordance with the decisions of the ECtHR. The standards applicable to border policing are the same as for policing within the state. There is no particular derogation possible under European human rights law to differentiate between use of force within the state and at the border. In the border control context, the only lawful exception to these rules on policing is in the context of war or armed conflict.[41] Yet, as press reports indicate, there seems to be a chasm between the law and practice in many Member States. The question then is how to bridge that gulf and bring the use of force in border policing into line with the rules of use of force in all other peacetime situations.

5. Monitoring as part of the solution

The problem with the European standards on use of force in border policing is not that they are inadequate for the purposes but rather that compliance by border police with them is questionable in some parts of Europe. There are a number of specific issues which arise in the border situation which render those people who encounter border police use of force particularly vulnerable. The first is that complaints, where made by migrants, are too often simply disregarded by border authorities which deny the validity of all evidence of the incident. Even where there are photos, video and other forensic evidence which corroborates the incident, border authorities choose to deny any wrongdoing and refuse even to engage with that evidence.[42] Further, reports indicate that some border police systematically destroy migrants' mobile phones before subjecting them to force (both violence and unlawful push-backs). This destruction of personal property appears to be intended to impede the recording of their actions.[43] As regards the investigation of border police

[41] M. Sassòli, "Ius Ad Bellum and Ius in Bello the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?", *International law and armed conflict: Exploring the faultlines*, 2007, pp. 241-264.

[42] https://www.front-lex.eu/wp-content/uploads/2021/06/The-First-Legal-Action-v.-Frontex-the-Full-Document.pdf (accessed 4 August 2022).

[43] The confiscation by border police of personal effects (including identity docu-

allegedly unlawful use of force within the context of Frontex coordinated operations, only once, where the CJEU found that there were fundamental rights violations in respect of Hungarian border controls, did Frontex withdraw from that operation.[44] All other allegations have been met with blanket rejection irrespective of the strength of the evidence.[45] It seems only validation of fundamental rights abuses by the EU's highest court can stop Frontex from participating in operations where unlawful border violence is taking place.

The second obstacle is the victims' status as potentially an irregular migrant. As such, even though the full panoply of international human rights law applies to them, in particular as regards the limitations on use of force by police, migrants in these precarious situations are too often unable to access their rights.[46] Without access to lawyers, the assistance by NGOs and social workers, or facilitation of communication through interpreters, these people find it almost impossible to access their rights. This is recognised in the OSCE/ODIHR report.[47] It recommends that just as detention or forced returns where monitoring is already an established practice in many states, border police operations ought to be subject to examination by independent monitors with the view to preventing human rights violations and where they are alleged, investigating them.

Thirdly, without independent monitoring, practices and identification of systemic deficiencies is not possible. But the remoteness of locations where border police operations are typically carried out makes it extremely difficult to carry out effective monitoring without the consent and co-operation of law enforcement. Additionally, access and permission is often need for observers and monitors which may or may not be granted, and may or may not even be covered by rules. In the case

ments) which are not returned to the migrant is also highlighted in the ECtHR judgment *Hirsi Jamaa* paragraphs 11 and 104 *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: https://www.refworld.org/cases,ECHR,4f4507942.html (accessed 12 October 2021).

[44] https://www.europarl.europa.eu/doceo/document/E-9-2021-001120_EN.html (accessed 4 October 2021).

[45] There is one exception where the Frontex Director General admitted to the European Parliament LIBE Committee's Frontex Scrutiny Working Group that there appeared to be a problem.

[46] E. Guild, S. Grant and C. A. Groenendijk (eds.), *Human rights of migrants in the 21st century*, 2017.

[47] *Ibid* p 7.

study, the unsocial hours of the border police activity is also a consideration. Unless independent monitors are made aware of the operation, they will not be on the spot at the relevant time, for instance 2 am on a beach outside Dunkirk.

Migrants' capacity to make complaints against police use of force is hindered by the fact that most migrants encounter police violence when they are seeking to move from one place to another, most frequently when trying to cross international borders. According to a number of experts interviewed for the main study, migrants often prefer to suffer border police violence without making complaint out of fear of reprisals if they do and in hopes that on their next attempt they will succeed to cross the border and thus escape the border police. Examples where migrants have been able to make complaints which resulted in criminal prosecutions and convictions of border police have mainly been by minors who because of their status are non-expellable.[48] Two cases from France are exemplary. Two minors were apprehended crossing the Italian-French border irregularly. The French border police who stopped them menaced them and exercised force on them ending with the stealing of their money. Subsequently the minors encountered another police authority to which they complained about the theft and violence. The crimes committed against minors included violence and theft of a substantial sum of money (Euros 600 from one and 200 from another). The facts make most uncomfortable reading as the actions of the border police so resemble extortion with all the hallmarks of a sense of entitlement on the part of the person extorting the money. The two responsible border police were prosecuted and convicted.

Another case of prosecution of border police for border violence, also from France, again involves a minor, once again protected by law against expulsion.[49] Adults are not so lucky and fear their expulsion if they make complaints. Another issue which migrants have which mitigates against complaints is the cross-border nature of their activities. Many reports indicate that migrants who suffered violence at the hands

[48] https://www.lemonde.fr/societe/article/2020/07/30/deux-policiers-condamnes-pour-violences-sur-un-migrant-et-detournement-de-fonds_6047759_3224.html (accessed 3 October 2021).

[49] https://www.lefigaro.fr/flash-actu/arrestation-illegale-et-violente-prison-ferme-pour-des-policiers-a-marseille-20200507#:~:text=Deux%20policiers%20ont%20%C3%A9t%C3%A9%20condamn%C3%A9s,d'un%20contr%C3%B4le%20de%20confinement. (accessed 3 October 2021)

of border police in Hungary were pushed back to Serbia where it was virtually impossible for them to make complaints against the Hungarian border police. Only the persistence of NGOs in assisting some of them has resulted in some complaints against border police use of force to Hungarian prosecutors. Unfortunately, the prosecutors have not investigated the complaints further, notwithstanding substantial documentary evidence of the violence. Instead, the Hungarian government has chosen to criminalise the activities of NGOs assisting migrants (a state response not limited to Hungary).[50]

6. The particular problem of the sea borders and use of force: prosecution for failure to rescue and kidnapping

European sea borders present particular problems as regards the effective monitoring of the use of force by border police. First, while monitoring can be complicated and require the assistance of the border police in respect of land borders, it is even more difficult as regards sea borders where normally monitoring bodies do not have their own vessels to carry out the activity. If the monitoring body is not represented on the vessels of the border police, then their monitoring activities are primarily dependent on access to satellite and other technologies to determine what is actually happening at sea and reports from media, NGOs and the testimony persons who allege that unlawful use of force has occurred. Here the use of services like those of bodies like Forensic Architecture,[51] techniques in spatial and architectural analysis, open-source investigation, digital modelling, and immersive technologies, as well as documentary research, situated interviews, and academic collaboration to establish the facts of a specific event may be indispensable.

Because of the obstacles as regards monitoring of use of force by border police at sea, the example of Italian efforts by prosecutorial services to investigate and prosecute failure to rescue and kidnapping, both crimes at the national level may be useful. All of these prosecutions have taken place after the fact, when prosecutors seek to establish the facts and criminal responsibility for loss of life or confinement of mi-

[50] A. Ćuća and B. Nagy, *Criminalisation of Humanitarian Assistance: An Analysis of Italy, Hungary and Croatia*, 2019.

[51] https://forensic-architecture.org/about/agency (accessed 11 October 2021).

grants on boats. Italian state monitoring bodies beyond the prosecutors do not appear to have played a role; rather most information which is available about these prosecutions is available only from open-sources, mainly media. All of the prosecutions have arisen in respect of specific border police failures, either on account of disputes about search and rescue responsibilities with another state (Malta) or the so-called closed ports policy of the Italian authorities according to which ships carrying people rescued at sea were prohibited from carrying out disembarkation in Italian ports. It seems that the main criminal prosecutions have been for failure to provide assistance at sea or, in the case of the closed ports policy, kidnapping (the consequence of preventing disembarkation resulting in the blockage of people on ships). As a consequence of the nature of the offence which directly results from state policy, instead of specific border police being subject to prosecution the main criminal proceedings have been against the political figures responsible for the policies. A number of the prosecutions are still outstanding; some have been authorised to proceed. Because of the status of those accused, authorisation from Italian Parliamentary bodies (the Senate) has been required but has been forthcoming in more than one case.

Partly because of the difficulties in carrying out effective monitoring of border police at sea borders, the search for responsibility for loss of or serious risk to life of migrants and refugees at sea has, in the Italian example, turned to criminal prosecutions of the architects of the policies which have led to the crisis. Consequently, the issue has become highly politicised with potentially very serious consequences for (former) politicians. While this may be a salutary example for political leaders who put into effect policies which prevent successful rescue at sea, it results in a very high politics within the state which has substantial costs for political authority. If effective monitoring of border police in sea operations were possible by a state authority to ensure full human rights compliance at least the lower level compliance problems could be diminished.

7. Monitoring by whom?

There is no silver bullet regarding the monitoring of border police activities. It is apparent that multiple actors are needed and overlap should be encouraged, not avoided, in monitoring border police. There is an obvious protection gap at present which urgently needs to be

closed. A single administrative body without cross border networking with equivalent bodies across borders will not succeed for the reasons set out above. At the moment, the main actors in monitoring border police use of force are NGOs and the media (with outstanding but isolated examples of monitoring action by administrative authorities). The missing actor is state authorities charged with upholding human rights – Ombudspersons, National Human Rights Institutions (NHRIs) and National Preventive Mechanisms (NPMs).

Just as border policing is a state action, so too monitoring must be included as an activity of a public authority. While NGO and media activity and monitoring has been critical to the revelation of human rights violations in European border policing and is likely to be an important component in the future as well, there needs to be effective and independent monitoring by a body which is a state authority. There are many reasons for this, not simply the weight of authority of the monitoring body in respect of the border police, but also the stature of the monitoring body in the public sphere, access to Parliament on a privileged basis and the exercise of powers which are state prerogatives. have already discussed the issue of independence in the previous section which is a prerequisite for effective and legitimate monitoring bodies to achieve their purposes. In addition to independence, they need to have the authority of being, also, state bodies, a status which provides them with protection from many of the problems which beleaguer NGOs in this field, not least criminalisation of their activities. There are generally three kinds of state authority which are currently carrying out border monitoring: Ombudspersons, NHRIs and NPMs. First there are ombudspersons whose mandate may include this activity (such as in Croatia).[52]

The European Ombudsman has a wide mandate which includes investigation of Frontex activities but this is not mirrored by the mandates of all ombudspersons at the Member State level. This could be remedied by the inclusion of a mandatory competence of national ombudspersons in the EU Ombudsperson regulation[53] and a role for such a body in the

[52] T. Strik, "Mechanisms to prevent pushbacks", *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union*, 2020, pp. 234-258.

[53] Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom *OJ L 253, 16.7.2021*, p. 1-10.

Schengen evaluation mechanism.[54] The European Ombudsman's office has established a European Network of Ombudsmen which is mainly focused on sharing information about EU law and best practice.[55] But it has not (or not yet) evolved into a coordinated border monitoring network. But this would be possible through a minor amendment to the Ombudsman Regulation to provide for this.[56] Secondly, there are national human rights institutions which frequently have mandates sufficient to cover the monitoring of border police activities. These NHRIs also have a European regional body, ENNHRI which aims to enhance human rights across the continent.[57] It has published an extensive report on the human rights of migrants at borders.[58] As mentioned in section 4, the use of Article 111(4) Frontex Regulation[59] which presupposes a framework of responsible human rights bodies at the national level to receive and investigate border violence complaints which come to the FRO but are not within his competence, to develop an EU wide network of NHRIs (or others) seems logical. This is also made necessary as the FRO does not fulfil the EU legal requirement of independence in any event. Thus complaints of border violence must be investigated by competent independent authorities with a system to overcome the obstacles of cross border cooperation. Since July 2019, ENNHRI has supported NHRIs to promote and protect the rights of migrants at borders – a major focus of its work. Under the Paris Principles (see annex 3) the UN Human Rights Office assists NHRIs to achieve the stand-

[54] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen *OJ L 295, 6.11.2013,* p. 27-37.

[55] https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/about/en (accessed 6 October 2021).

[56] Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom *OJ L 253, 16.7.2021*, pp. 1-10.

[57] https://ennhri.org/ (accessed 6 October 2021).

[58] https://ennhri.org/wp-content/uploads/2021/09/The-human-rights-of-migrants-at-borders_Regional-report.pdf (accessed 6 October 2021).

[59] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 PE/33/2019/REV/1 *OJ L 295,* 14.11.2019, p. 1-131.

ards set down in the Paris Principles and acts as the Secretariat of the International Coordinating Committee of National Institutions for the promotion and protection of Human Rights and its Sub-Committee on Accreditation. Each year, the Office assists the ICC Sub-Committee on Accreditation to review compliance of a number of NHRIs with the Paris Principles. This supra-EU system of monitoring and assessing the independence of NHRIs is very important to the assurance of their independence and suitability to carry out monitoring. The highest grade in the monitoring process is an A, highly prized by European NHRIs.[60]

A third type of monitoring body is the National Preventive Mechanism established under the Optional Protocol of the UN Convention against Torture, Inhuman and Degrading Treatment and Punishment. These are established as independent state authorities with a primary concern to prevent acts contrary to the convention. NPMs have been very active in many Member States in the monitoring places of detention of migrants and expulsion action with a focus on the prevention of human rights violations. This system of monitoring is particular important to border violence. The legal authority of NPMs, mandated by a UN convention provides them with a clear and specific mandate authorised by signatory states through an international treaty. Thus any interference for the independence of NPMs is also a breach of the treaty obligation of the state.

The three types of state monitors are not exclusive and it is not uncommon that the same body is appointed to carry out more than one role, possibly all three. The differences and their importance among the options is set out in the main report to which this is an annex. Suffice it to note here that all of these bodies are created by the state and enjoy the privileges of being state bodies. Nonetheless, one of the constant concerns regarding these body's ability and capacity to undertake border monitoring is their independence.

Finally, the issue of transparency is key to successful monitoring of use of force by border police irrespective of the institution carrying out the monitoring. Regular, complete and detailed public reports need to be published so that the public is aware of what is happening.

[60] See OHCHR status report: https://www.ohchr.org/Documents/Countries/NHRI/StatusAccreditationChartNHRIs.pdf (accessed 12 October 2021).

8. Relationship with Prosecutors, NGOs and the Press

In some countries, ombudspersons and NHRI have a legal obligation to notify the local prosecutor whenever in the conduct of their mandate they uncover or come across crimes (eg Spain). For the purposes of combating border violence which may constitute criminal acts this is very important. Incidents of use of force against migrants at borders following a successful prosecution of a border police officer for such a crime apparently drops. The need for monitors (whether ombudspersons, NHRIs or NPMs) to have lines of communication with prosecutors and the requirement that prosecutors give priority to crimes reported by ombudspersons, NHRIs or NPMs is evident. This cannot happen without encouragement both political and legislative.

Many of the complaints of unlawful use of force by border police against migrants are facilitated by NGOs. NGOs are often among the most active parts of civil society seeking to protect migrants from harm. Successful state monitoring bodies need to have good relationships with NGOs which are carrying out this work but always with the proviso that NGOs do not share the same state responsibilities as state bodies. The differentiation between official monitoring bodies and NGOs must be maintained notwithstanding the need for them to work together. Similarly, press reporters are often among the first to disseminate information about unlawful use of force by border police. In the case study at the start, it was through the media that the details of the incident came to light. Again, as in the case of NGOs, it is critical that official monitoring bodies have good relations with those members of the press who have specialised in the subject but always in the knowledge that the interests of the two, while they may converge in some areas, will also diverge in others. Both are required to have the highest standards of independence but their roles are different and that difference must be respected.

9. Conclusions

There are a range of problems regarding identifying and investigating the unlawful use of force by border police at EU external borders. One the one hand there are multiple press and NGOs reports which raised very serious issues, on the other hand there is the almost unanimous denial by national border police and Frontex officials that any un-

lawful use of force has occurred. In order to resolve this extremely problematic conundrum, effective and independent monitoring by state authorities is a prerequisite. The establishment of the facts and the collection of evidence is necessary. However, while monitoring and the establishing of the facts is critical, it needs also to be accompanied by effective law enforcement where criminal action is revealed. This requires the engagement of the prosecutorial services of states which have a responsibility to investigate criminal activity and where the evidence is sufficient to pursue criminal prosecutions.

The pressing question before the EU in August 2022 is whether in light of the OLAF report and prosecutions will be brought against those responsible within Frontex for carrying out unlawful pushbacks and violence against migrants. In light of the fact that the violence is transborder in nature, involves more than one Member State (Frontex operations not only include border police of the state where the action is taking place but also seconded border police from other Member States) if crimes have been committed these are transnational in nature. EU criminal law which is designed to resolve problems of criminal procedure among Member States may be an important component of this question. Further, the European Public Prosecutors' Office which commenced operation on 1 June 2021 has within its mandate investigating, prosecuting and bringing to judgment crimes against the financial interests of the EU.[61] If prosecutors in Member States are unwilling or unable to pursue actions from crimes investigated by OLAF, perhaps the EPPO has a responsibility to do so.

[61] https://www.eppo.europa.eu/fr/node/9 (accessed 4 August 2022).

THE BLUE DIMENSION IN THE REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM

GABRIELA A. OANTA*

1. Introduction

On 23 September 2020, the European Commission unveiled the New Pact on Migration and Asylum of the European Union (EU),[1] as well as a set of legal instruments amending the current Common European Asylum System (CEAS),[2] through which the Union is undertaking

* University of A Coruña.

All cited websites were last accessed on 31 July 2022.

[1] COM(2020) 609 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, Brussels, 23.09.2020. For an analysis of this document, see: A. del Valle Gálvez, "Inmigración, derechos humanos y modelo europeo de fronteras. Propuestas conceptuales sobre "extraterritorialidad", "desterritorialidad" y "externalización" de controles y flujos migratorios", *Revista de Estudios Jurídicos y Criminológicos*, 2, 2020, pp. 152-154; T. Gazi, "The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups", *European Papers*, 6 (1), 2021, pp. 167-175; F. Manchón, "El Pacto sobre Migración y Asilo, ¿una nueva oportunidad para Europa?", *IEEE Opinion Paper* 152, 2020; J. M. Porras Ramírez, "Un Pacto sobre inmigración y asilo en la Unión Europea", in José María Porras Ramírez (coord.), *Migraciones y asilo en la Unión Europea*, Thomson Reuters-Aranzadi, Cizur, 2020, pp. 155-171; and R. Zapata-Barrero et al., "The new EU Pact and its impact on Mediterranean Migration Governance: Continuity or rupture?", *EuroMedMig Policy Paper Series*, 3, 2021.

[2] COM (2020) 610 final, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], Brussels, 23.09.2020; COM(2020) 611 final, Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Brussels, 23.09.2020; COM(2020) 612 final, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, Brussels, 23.09.2020; COM(2020) 613 final, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, Brussels, 23.09.2020; COM (2020) 614 final, Amended proposal for a Regulation of the European Parliament

a strategic and coherent rethink in the fields of immigration and asylum. In so doing, it is putting into place a new migration strategy, based on the conviction that "[s]aving lives at sea is not optional".[3]

The New Pact on Migration and Asylum and the accompanying package of measures have a clear blue dimension. In the author's view, this approach is in line with what Ursula von der Leyen highlighted in 2019 in the Political Guidelines to be taken into account by the European Commission during her term (2019-2024). In that document, she emphasised the need to relaunch the reform of the Dublin System, modernise the CEAS, reinforce the European Border and Coast Guard Agency (Frontex) and strengthen cooperation with the third countries from which people seeking a better future in Europe set out so as ultimately to ensure that the Union would have "a more sustainable approach to search and rescue".[4]

and of the Council on the establishment of "Eurodac" for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818; Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint) (OJ L 317, 1.10.2020, p. 26); Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways (OJ L 317, 1.10.2020, p. 13); Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities (OJ L 317, 1.10.2020, p. 23); Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (OJ C 323, 1.10.2020, p. 1); SWD (2020) 207 final, Commission Staff Working Document accompanying the document Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund], Brussels, 23.09.2020.

[3] "Building the world we want to live in: A Union of vitality in a world of fragility. State of the Union Address by President von der Leyen at the European Parliament Plenary", Brussels, 16 September 2020; available at: <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655> See also: COM(2020) 609 final, cit., p. 1.

[4] "Political Guidelines for the next European Commission 2019-2024: A Union that strives for more. My agenda for Europe", by candidate for President of the European Commission Ursula von der Leyen, p. 16.

This approach was again apparent, albeit this time implicitly, in the Commission President's 2020 State of the Union address, when she said that migration was a European challenge with regard to which "all of Europe must do its part".[5] As this chapter will show, in implementing this approach, the Commission is providing Member States with guidelines, for example, not to criminalise rescue at sea and to cooperate on search and rescue operations carried out by vessels owned or operated by private entities.

The sea is undeniably a major economic and environmental resource for Europe, a genuine maritime peninsula with a surface area that is more sea than land. At the same time, it is a key factor in the situation of vulnerability that the Union has experienced at its sea borders, which are considerably longer than the EU Member States' external land borders. The maritime zones under these states' sovereignty or jurisdiction, including the outermost regions, are the largest in the world, and, at nearly 70,000 km long, the Union's coastline is twice as long as the Russian Federation's and three times as long as that of the United States.[6]

The serious humanitarian crisis triggered by the large migration flows in the Eastern and Central Mediterranean in 2015 and 2016[7] – which, after a relative lull due to the COVID-19 pandemic, have worsened again in recent years in the Atlantic Ocean and the waters around the Canary Island Archipelago – provided more than enough evidence that the problem of migration by sea remains a challenge for the EU, which the Union must continue to address as a whole if it is to efficiently and effectively manage it.

According to data from the United Nations and the International Maritime Organization, in 2015, more than one million migrants and refugees entered the EU irregularly by sea, five times more than in the

[5] "Building the world we want to live in: A Union of vitality in a world of fragility", cit.

[6] J. M. Sobrino Heredia et al., "Prólogo", in José Manuel Sobrino Heredia and Gabriela A. Oanta (coords.), *La construcción jurídica de un espacio marítimo común europeo*, Bosch Editor, Barcelona, 2020, pp. 29-30.

[7] On this point, see, among others: M. Bossuyt, "The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Interests", *Journal européen des droits de l'homme*, 5, 2015, pp. 587-605; and F. Munari, "Migrations by Sea in the Mediterranean: An Improvement of EU law is Urgently Needed", *Ocean Yearbook*, 32, 2018, pp. 118-158.

previous year.[8] The most recent data show that migratory pressure declined in the following years; in 2019, 141,700 illegal border crossings were registered, three quarters of which were carried out by sea,[9] although the numbers have been climbing again since September 2020. Today, refugees account for around 0.6% of the EU's total population, including many who have entered the Union by sea in the last five years.[10]

In light of these considerations, this chapter will focus on the proposals for the reform of the current legal framework for immigration and asylum in the EU, paying special attention to their maritime implications. To this end, *Part One* will review the path taken by the Union from the creation of the CEAS to the legislative package proposed by the Commission on 23 September 2020 in the field of immigration and asylum *(2)*, while *Part Two* will analyse the actions the EU has been taking to implement the New Pact on Migration and Asylum and the accompanying package of measures, as well as the extent to which these actions impact EU Member States' sea borders *(3)*.

2. The New Pact on Migration and Asylum: Challenges and Opportunities

For years now, there has been a feeling in the EU that the CEAS needs to be modified and adapted to the new challenges posed by migration. This need for revision was clearly on display during the migratory and humanitarian crisis in the Mediterranean Sea in 2015 and 2016, which has also put great pressure on the asylum structures of all the Union's Member States. An undoubtedly complex crisis whose impact is still being felt in the EU, it exposed major shortcomings in the CEAS, as well as significant differences in how the various EU Member States address the challenges posed by irregular immigration, including by sea.

[8] Italy, Greece, Spain, Cyprus and Malta suffered the greatest pressure. Data available at: https://www.iom.int/news/eu-migrant-refugee-arrivals-land-and-sea-approach-one-million-2015.

[9] For example, an estimated 61,500 illegal border crossings were registered from January to August 2020, 13% fewer than in the same period in 2019. Data available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#developmentsin20192018.

[10] See: https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en#developmentsin20192018.

In this regard, in addition to the Dublin III Regulation,[11] for the purposes of this chapter, the CEAS will also be considered to comprise: the Asylum Procedures Directive,[12] the Reception Conditions Directive laying down the standards for the reception of applicants for international protection,[13] the Return Directive,[14] the Qualification Directive laying down the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection,[15] and the Eurodac system for the comparison of fingerprints for the effective application of the Dublin system.[16]

[11] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180, 29.06.2013, p. 31. This Regulation - known as the *Dublin III Regulation* - entered into force on 1 January 2014 replacing the 2003 Dublin II Regulation, which, in turn, had replaced the Dublin Convention of 15 June 1990. For an extensive analysis of the Dublin III Regulation, see: J. Abrisketa Uriarte, *Rescate en el mar y asilo en la Unión Europea. Límites del Reglamento de Dublín III*, Thomson Reuters-Aranzadi, Cizur, 2020, pp. 43-144; and S. Morgades Gil, *De refugiados a rechazados: El Sistema de Dublín y el derecho a buscar asilo en la Unión Europea*, Tirant lo Blanch, Valencia, 2021, pp. 217-376.

[12] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.06.2013, p. 60.

[13] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.06.2013, p. 96.

[14] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98.

[15] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011, p. 9.

[16] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the

This legislative review, prompted by the gaps and shortcomings in the CEAS identified in recent years, would seem to be fully supported by the provisions of EU primary law. Under Article 3(2) of the Treaty on European Union (TEU), in the area of freedom, security and justice, the free movement of persons shall be ensured "in conjunction with appropriate measures with respect to external border controls, asylum [and] immigration".[17] To this end, Article 67(2) of the Treaty on the Functioning of the European Union (TFEU) provides that the Union "shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals". This provision is bolstered by Article 79(1) TFEU, whereby "[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings". In the author's view, with this revision, the EU would much better meet the objectives set out in its primary law in this area, while also improving the system for the protection of human rights at sea.

The first steps taken by the EU to reform the CEAS date back to 13 May 2015, when the Commission published its Communication "A European Agenda on Migration".[18] This was followed, one year later, by the proposal to reform the Dublin System.[19] Through this reform, the

operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.06.2013, p. 1.

[17] For a joint overview of the EU's common policy on border control, asylum and immigration, as well as some of the challenges the Commission faces in this area, see: J. C. Fernández Rozas, "Control de fronteras, asilo e inmigración en la Unión Europea", in José María Porras Ramírez (coord.), *Migraciones y asilo en la Unión Europea*, Thomson Reuters-Aranzadi, Cizur, 2020, pp. 73-114.

[18] COM(2015) 240 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on "A European Agenda on Migration", Brussels, 13.05.2015.

[19] COM(2016) 197 final, Communication from the Commission to the European Parliament and the Council, "Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe", Brussels, 6.04.2016. For an overview of the path taken by the EU from the Dublin II Regulation to the Dublin IV Regulation, see: Morgades Gil, *De refugiados a rechazados*, cit., pp. 377-410. For a study of the proposed reform from 2016, see also: Abrisketa Uriarte, *Rescate en el mar y asilo en la Unión Europea*, cit., pp. 145-176; and V. Faggiani, "Propuestas de reforma del Sistema

EU hoped to find a response to the need to react rapidly and decisively to the human tragedy unfolding in the Mediterranean Sea at the time. The European Council Statement of 23 April 2015[20] and European Parliament Resolution of 27 April 2015 on the tragedies then taking place in the Mediterranean[21] likewise bore witness to the consensus in favour of rapid measures to save human lives and step up the EU's action. This rapid response was also to serve as a model for the EU's response to future crises, regardless of which part of the common external border is under pressure, from east to west, and from north to south. After the period of relative calm at the start of the COVID-19 pandemic, today the humanitarian crisis is gradually heating up again, and migratory pressure is increasing on the Western Mediterranean route.

The challenges posed by irregular migration by sea to the EU in 2015 were also reflected in the difficulty surrounding the adoption and subsequent transposition and implementation of two Council Decisions adopted in September 2015 establishing provisional measures in the area of international protection for the benefit of those Member States considered most affected by the massive arrival of immigrants to their coasts (Italy and Greece), namely, Council Decision (EU) 2015/1523[22] and Council Decision (EU) 2015/1601.[23] These Decisions which were adopted in accordance with the letter and spirit of Article 78(3) TFEU, which provides, "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member

Europeo Común de Asilo", in José María Porras Ramírez (coord.), *Migraciones y asilo en la Unión Europea*, Thomson Reuters-Aranzadi, Cizur, 2020, pp. 195-227.

[20] "Special meeting of the European Council", European Council, 23.04.2015; available at: https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement.

[21] "European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies", 2015/2660(RSP), 27.4.2015; available at: <https://www.europarl.europa.eu/doceo/document/B-8-2015-0379_EN.html>

[22] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.09.2015, p. 146.

[23] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.09.2015, p. 80. This regulatory instrument was subsequently amended by Council Decision (EU) 2016/1754 of 29 September 2016, OJ L 268, 1.10.2016, p. 82.

State(s) concerned. It shall act after consulting the European Parliament".

In accordance with these Decisions, the Commission sought to relocate to other Member States, in the first case, 40,000 and, in the second, 120,000 people in clear need of international protection. Both regulatory instruments were subject to appeals filed with the Court of Justice of the European Union (CJEU), which have revealed that the backdrop to all this was the need to relocate thousands of people who had accessed the EU by sea and whose fundamental rights were threatened during the sea crossing, their arrival to the coast and, also, their tortuous relocation.

Specifically, the CJEU addressed Decisions (EU) 2015/1523 and 2015/1601 in the joined cases *Commission v Poland* (C-715/17), *Commission v Hungary* (C-718/17) and *Commission v Czech Republic* (C-719/17), resulting from the lodging by the European Commission of three actions for failure to fulfil obligations stemming from Article 258 TFEU against those three countries. The Commission considered these three states to have failed to fulfil, first, their obligations under Article 5(2) of Decision (EU) 2015/1523 and Article 5(2) of Decision (EU) 2015/1601 to indicate at regular intervals, and at least every three months, "the number of applicants who can be relocated swiftly to their territory and any other relevant information" and, second, their subsequent relocation obligations under Articles 5(4) to (11) of both Decisions. In its judgment of 2 April 2020, the CJEU found that the aforementioned Member States had failed to fulfil their obligations to relocate applicants for international protection who had entered Greek and Italian territory by sea, which, under Decisions (EU) 2015/1523 and 2015/1601, were binding on them throughout their period of application (from 25 September 2015 to 26 September 2017).[24]

Decision (EU) 2015/1601 was also challenged before the CJEU by Slovakia and Hungary through separate actions for annulment. These are the joined cases *Slovakia v Council* (C-643/15) and *Hungary v Council* (C-647/15). In its judgment of 6 September 2017,[25] the Court

[24] Judgment of the CJEU of 2 April 2020, *Commission v Poland, Commission v Hungary* and *Commission v Czech Republic*, joined cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, para. 189. For a brief commentary on this judgment, see: J. Ferrer Lloret, "La Unión Europea ante el derecho de asilo: a propósito de la Sentencia Comisión/Hungría (acogida de solicitantes de protección internacional)", Revista de Derecho Comunitario Europeo, 68, 2021, pp. 42-43.

[25] EU:C:2017:631.

dismissed in their entirety the actions brought by Slovakia and Hungary against the temporary binding mechanism for the relocation of asylum seekers, holding that the mechanism contributed effectively and proportionally to enabling Greece and Italy to cope with the consequences of the 2015 migration crisis.

The 2016 proposal to revise the CEAS overlapped with certain steps to reform the European Frontex Agency[26] that are of particular relevance to the control and surveillance of immigration by sea. This agency changed its name in 2016 to the European Border and Coast Guard Agency.[27]

In this context, in 2016, the European Commission launched a process to reform the EU's legal framework for asylum within the limits set by EU primary law, with the aim of further harmonising the procedures and rules applicable to asylum and implementing a fair and sustainable mechanism to prevent the same EU Member States from suffering migratory pressure in the absence of real solidarity in this area between the Union's members. Notwithstanding these efforts, it took the EU about five years to take matters into its own hands in a more decisive manner and introduce various innovations to strengthen the legal framework applicable to its Member States' maritime zones in order to provide real

[26] The European Agency for the Management of Operational Cooperation at the External Borders of Member States of the European Union, commonly known as Frontex, was established in 2004 under Council Regulation No 2007/2004 (OJ L 349, 25.11.2004, p. 1). This Regulation was amended several times through: Regulation (EC) No 863/2007 (OJ L 199, 31.07.2007, p. 30), Regulation (EU) No 1168/2011 (OJ L 304, 22.11.2011, p. 1), Regulation (EU) No 1052/2013 (OJ L 295, 6.11.2013, p. 11), and Regulation (EU) No 656/2014 (OJ L 189, 27.06.2014, p. 93).

[27] Regulation (EU) 2016/1624 (OJ L 251, 16.09.2016, p. 1) established the European Border and Coast Guard Agency, which has continued to be known as "Frontex". The agency is currently governed by the provisions of Regulation (EU) No 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) No 2016/1624 (OJ L 295, 14.11.2019, p. 1). For a joint overview of this agency and the successive regulatory amendments, see, among others: M. A. Acosta Sánchez, "La Agencia Europea de Guardia de Fronteras y Costas (FRONTEX) y la crisis migratoria: algunos apuntes sobre Derecho del mar y derechos humanos", in Gabriela A. Oanta (coord.). *El Derecho del Mar y las personas y grupos vulnerables*, Bosch Editor, Barcelona, 2018, pp. 69-98; and P. De Bruycker, "La nouvelle Agence européenne de garde-frontières et de garde-côtes: un modèle neuf bâti sur une logique dépassée", in Josiane Auvret-Finck and Anne-Sophie Millet-Devalle (dirs.), *Crise des refugiés, crise de l'Union européenne?*, Pedone, Paris, 2017, pp. 115-126.

responses to the challenges posed by migration by sea. Specifically, as noted above, on 23 September 2020, the European Commission published the New Pact on Migration and Asylum, which is based on two fundamental principles for the entire process of European integration that have been called into question in recent years in matters of migration by sea, namely: that no Member State should shoulder a disproportionate responsibility and that all EU Member States should contribute to solidarity.

In this regard, the New Pact on Migration and Asylum is based on a series of principles, such as: cooperation between the Member States, as well as coordination between them and with those European institutions with jurisdiction in migration matters, solidarity between Member States to ensure that migratory pressure is not borne primarily by only a small number of them, and a comprehensive and integrated approach to EU policy in the fields of migration, asylum, integration and border management.

The Commission also identified seven key areas of this new strategy included in the New Pact on Migration and Asylum: (1) a common European framework for migration and asylum management;[28] (2) a robust crisis preparedness and response system;[29] (3) integrated border management; (4) reinforcing the fight against migrant smuggling;[30] (5)

[28] In this regard, it identifies the need for: new procedures to establish status swiftly on arrival; a common framework for solidarity and responsibility sharing; mutual trust through robust governance and implementation monitoring; supporting children and the vulnerable; an effective and common EU system for returns; and a new common asylum and migration database. For more information, see: COM(2020) 609 final, cit., pp. 3-11; COM (2020) 609 final Annex, Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, "Roadmap to Implement the New Pact on Migration and Asylum", Brussels, 23.9.2020, p. 2.

[29] To this end, the New Pact on Migration and Asylum refers to two instruments proposed by the European Commission the same day it published this Pact, which are part of the package of accompanying measures. See: "Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (Migration Preparedness and Crisis Blueprint", C(2020) 6469, 23 September 2020; and "Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum", COM(2020) 613, 23 September 2020. The publication of these two proposals had also been included in the roadmap to implement the New Pact; see: COM(2020) 609 final, cit., pp. 2-3.

[30] In this regard, the Commission considered that it had to take the following key

working with the EU's international partners;[31] (6) attracting skills and talent to the EU;[32] and (7) supporting integration for more inclusive societies.[33]

Of these areas, integrated border management is the most important one with regard to irregular migration by sea and has the greatest impact on the asylum applications that can be made in an EU Member State by persons who have reached the coasts irregularly. This is not only because integrated border management is an indispensable element to protecting the EU's external borders and safeguarding the integrity and functioning of the Schengen area, but also because it is an essential component of the cooperation on integrated asylum and return policies.

In this regard, the New Pact on Migration and Asylum highlights the need to: first, step up the effectiveness of the EU's external borders; second, reach full interoperability of IT systems; third, adopt a common

actions: first, present a new EU Action Plan against Migrant Smuggling for 2021-2025; second, assess how to strengthen the effectiveness of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168, 30.06.2009, p. 24); and, third, build action against migrant smuggling into partnerships with third countries. See also: COM (2020) 609 final Annex, cit., p. 3.

[31] In this regard, the Commission considers it necessary to maximise the impact of the EU's international partnerships (multilateral, regional and bilateral), protect those in need and support host countries, build economic opportunity and address root causes of irregular migration, create partnerships to strengthen migration governance and management, foster cooperation on readmission and reintegration, and develop legal pathways to facilitate legal migration and mobility towards Europe. For more information, see: COM(2020) 609 final, cit., pp. 19-28; COM(2020) 609 final, cit., pp. 3-4.

[32] To this end, the Commission proposes: revising Directive 2003/109/EC on long-term residents in the EU (OJ L 16, 23.01.2004, p. 44), as well as Directive 2011/98/EU on the single permit for third-country nationals to reside and work in the territory of a Member State and establishing a common set of rights for third-country workers legally residing in a Member State (OJ L 343, 23.12.2011, p. 1). It also considers that it would be useful to have an EU talent pool in the future for third-country skilled workers, who would be included in an EU-wide platform for international recruitment. For more detailed information, see: COM(2020) 609 final, cit., pp. 28-30; and COM(2020) 609 final Annex, cit., p. 4.

[33] To this end, the Commission announces its intention to adopt a comprehensive Action Plan on integration and inclusion for the 2021-2024 period and stresses the need to implement the new European Partnership for Integration with social and economic partners. To achieve this, it proposes exploring the possibility of expanding the future cooperation framework to include the area of labour migration. See: COM(2020) 609 final, cit., pp. 31-32; and COM(2020) 609 final Annex, cit., p. 4.

European approach to search and rescue operations; and fourth, ensure a well-functioning Schengen area.

To achieve these objectives, the Commission set out the measures that it will propose in the coming years,[34] some of which are key to the phenomenon of irregular migration by sea, such as: the adoption of a Recommendation on cooperation between Member States concerning private entities' rescue activities; the presentation of guidance to Member States to make clear that rescues at sea cannot be criminalised; and the launching of a new European group of experts on search and rescue. The Commission also considers that its collaboration with the Member States and the European Border and Coast Guard Agency (Frontex) will be essential to ensure both the implementation of the Agency's 2019 Regulation[35] and the implementation and interoperability of all large-scale IT systems by 2023. All of these issues will be addressed in the following section.

3. The Blue Dimension of the New Pact on Migration and Asylum

The New Pact on Migration and Asylum has a clear blue dimension. It is inconceivable to speak of overhauling the CEAS and equipping the EU with valuable new tools for dealing with migration, so as to ensure that the fundamental values on which the process of European integration is based are not undermined, without taking into account the realities and peculiarities of migration by sea. Aware of this reality, along with the New Pact on Migration and Asylum, the Commission published several documents addressing precisely the challenges posed by the arrival of thousands of immigrants to the coasts of the EU's Member States, giving the New Pact on Migration and Asylum a decidedly blue cast. These documents include, in particular, the Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities *(3.1)* and the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence *(3.2)*, although blue-tinged ref-

[34] This information is set out in detail in: COM(2020) 609 final, cit., p. 17; and COM(2020) 609 final Annex, cit., p. 3.

[35] Namely, the aforementioned Regulation (EU) No 2019/1896.

erences can also be found in other documents accompanying the New Pact on Migration and Asylum *(3.3)*.

3.1. The Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities

The European Commission adopted Recommendation (EU) 2020/1365 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities on 23 September 2020[36] with a view to reducing the number of people who perish at sea during their sea crossing in search of a better life in the EU. This desideratum must be achieved while maintaining safety of navigation and ensuring effective migration management in compliance with the relevant legal obligations assumed by the EU itself.

To this end, it should be recalled that both the EU and its Member States are parties to the United Nations Convention on the Law of the Sea (UNCLOS).[37] This international treaty is thus an integral part of EU law and its provisions are binding on the EU and on its Member States under Article 216(2) TFEU. Consequently, all EU secondary law must be interpreted in the light of the articles of this Convention, since, as a treaty concluded by the EU, it takes precedence over the Union's legislative acts.[38] In contrast, the EU is not a party to either the International Convention for the Safety of Life at Sea (SOLAS Convention)[39] or the

[36] OJ L 317, 1.10.2020, p. 23.

[37] Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179, 23.06.1998, p. 1. For Spain, see: "Instrumento de ratificación de la Convención de las Naciones Unidas sobre el Derecho del Mar, hecho en Montego Bay el 10 de diciembre de 1982", Spanish Official Gazette (*BOE*) No. 39, 14 February 1997, p. 4966.

[38] See, among others: Judgment of the CJEU of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, para. 50.

[39] International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974), London, 1 November 1974 and entry into force on 25 May 1980. For Spain, see: Instrumento de ratificación de 16 de agosto de 1978 del Convenio internacional para la seguridad de la vida humana en el mar, hecho en Londres el 1 de noviembre de 1974, *BOE* No. 144, 16 June 1980, p. 13380.

International Convention on Maritime Search and Rescue (SAR Convention),[40] unlike the vast majority of its Member States, which have ratified both.[41]

Recommendation (EU) 2020/1365 contains a recommendation for each and every one of the Member States to cooperate with each other, a recommendation to cooperate with each other and with the Commission, and, also, to liaise with all relevant stakeholders, and a recommendation to provide the Commission with any relevant information on the implementation of this legal instrument at least once a year.

With regard to the requirement for Member States to cooperate with each other in relation to operations carried out by privately owned or operated vessels for the purpose of search and rescue activities, the Commission recommends that flag and coastal Member States "exchange information, on a regular and timely basis, on the vessels involved in particular rescue operations and the entities that operate or own them, in accordance with international and Union law, including the EU Charter of Fundamental Rights and the protection of personal data".[42]

In this regard, the issue of non-governmental organisations (NGOs) headquartered in different EU Member States that engage in humanitarian rescue activities in the Mediterranean and bear unquestionable witness to the vulnerable situation in which thousands of irregular migrants by sea find themselves is a sensitive one for the EU and the national authorities of its Member States. The issue has already been the subject of scrutiny by the CJEU.

On 8 January 2021, two requests for preliminary rulings were lodged by the Regional Administrative Court for Sicily in relation to

[40] International Convention on Maritime Search and Rescue, 1979, as amended (SAR 1979), Hamburg, 27 April 1979 and entry into force on 22 June 1985. For Spain, see: Instrumento de Adhesión de España al Convenio Internacional sobre Búsqueda y Salvamento Marítimo 1979, hecho en Hamburgo el 27 de abril de 1979, *BOE* No. 103, 30 April 1993, p. 12869.

[41] All EU Member States except Austria, the Czech Republic and Hungary have ratified the SOLAS Convention. Likewise, all but Austria, Slovakia and the Czech Republic have ratified the SAR Convention. See: "Status of IMO Treaties: Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions", International Maritime Organization, 2 March 2021.

[42] Recommendation (EU) 2020/1365, cit., point 1.

two cases between Sea Watch and, on the one hand, the Italian Ministry of Infrastructure and Transport and the Port of Palermo Harbour Master's Office and, on the other, the Italian Ministry of Infrastructure and Transport and the Port of Porto Empedocle Harbour Master's Office.[43] Sea Watch is a non-governmental organisation (NGO), headquartered in Germany, that carries out humanitarian rescue activities in the Mediterranean. In the two referrals, the CJEU was asked to interpret, through the expedited procedure provided for under Article 105 of its Rules of Procedure, Directive 2009/16/EC on port state control of vessels, as well as the SOLAS Convention.

On 25 February 2021, the Court rejected, by means of an Order of the President of the Court, the Regional Administrative Court for Sicily's request to process the two joined cases under the expedited procedure.[44] And on 22 February 2022, the Advocate General appointed for the case, Athanasios Rantos, delivered his Opinion.[45]

While an Advocate General's opinion is not legally binding on the CJEU, it is of great value for the decision taken by the judges, which is subsequently be reflected in the judgment. According to Advocate General Rantos, Directive 2009/16/EC, "applies to vessels that, although classified and certified as "multipurpose cargo ships" by the flag state, exclusively carry out search and rescue activities at sea and, in that regard, it is incumbent on the referring court to draw any consequences arising from the interpretation and implementation of the national legislation transposing that Directive", which gives the port state the right to indicate the legal basis for the requirements or prescriptions found to have been infringed and the corrections or rectifications needed to ensure compliance with that legal framework. The Advocate General's statement that the aforementioned Directive "should be interpreted in the sense that the mere fact that a ship systematically engages in search and rescue at sea does not exempt that ship from complying with the requirements applicable to it under international or EU law and does not preclude that ship from being subject to detention measures when it infringes those rules, without prejudice to the obligation to rescue at sea"[46] likewise seems significant.

[43] C-14/21 and C-15/21.
[44] ECLI:EU:C:2021:149.
[45] ECLI:EU:C:2022:104.
[46] *Ibid.*, para. 66.

On 1 August 2022, the CJEU delivered its judgment in these joint cases, which we estimate to be highly innovative in relation to the interpretation of various provisions of the Directive 2009/16/EC.[47] Thus, the Court considers that this act

> "*must be interpreted as meaning that, in the event that it is established that ships which are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea, despite having been classified and certified as cargo ships by a Member State which is the flag State, have been operated in a manner posing a danger to persons, property or the environment, the Member State which is the port State may not make the non-detention of those ships or the lifting of such a detention subject to the condition that those ships hold certificates appropriate to those activities and comply with all the corresponding requirements. By contrast, that State may impose predetermined corrective measures relating to safety, pollution prevention and onboard living and working conditions, provided that those corrective measures are justified by the presence of deficiencies which are clearly hazardous to safety, health or the environment and which make it impossible for a ship to sail under conditions capable of ensuring safety at sea. Such corrective measures must, in addition, be suitable, necessary, and proportionate to that end. Furthermore, the adoption and implementation of those measures by the port State must be the result of sincere cooperation between that State and the flag State, having due regard to the respective powers of those two States*".[48]

It is worth mentioning that both references for preliminary rulings have come at a time in which several Member State administrative and judicial bodies have already heard cases involving some 30 NGO vessels that have participated in various SAR operations in the Mediterranean[49] for which legal actions have been brought against them, many of

[47] ECLI:EU:C:2022:604.

[48] *Ibid.*, para. 159.

[49] Such as: Mare Jonio (flying the Italian flag), Mare Liberum (flying the German flag), Open Arms (flying the Spanish flag), Alan Kurdi (flying the German flag), Moonbird (flying the Swiss flag), Sea-Watch 3 and Sea-Watch 4 (flying the German flag), Aita Mari (flying the Spanish flag), Ocean Viking (flying the Norwegian flag), Alex

which are still pending.[50] In the author's view, the Luxembourg Court's position could mark a turning point in relation to applications for asylum or refugee status from persons who have reached the shore of an EU Member State or entered its territory with the help of an NGO operating at sea, or in application of the principle of non-refoulement. Furthermore, all of this is taking place at the same time as the development of the New Pact on Migration and Asylum, which proposes, as will be seen below, decriminalising rescue at sea activities carried out by NGOs.

As for the Commission's recommendation that Member States co-operate with each other and, also, with it, in particular through its Contact Group, this European institution stresses the need for Member States to coordinate with private entities owning or operating vessels for the purpose of carrying out search and rescue activities.[51] With this recommendation, the Commission aims to identify best practices and take any necessary actions to ensure, first, increased safety at sea, and, second, the availability to the competent authorities of all information needed for them to monitor and verify compliance with the standards for safety at sea and the relevant rules on managing migration by sea.

Finally, Recommendation (EU) 2020/1365 sets 31 March as the annual deadline for each EU Member State to provide the Commission with any relevant information on its implementation.[52]

In short, in the author's view, with these Recommendations the Commission expects EU Member States to comply with their internationally agreed commitments concerning search and rescue operations in emergency situations at sea and the eradication of migrant smuggling by sea and, also, to act in line with the United Nations Global Compact on

Mediterranea (flying the Italian flag), Lifeline (flying the Dutch flag), Sea Bird (flying the Swiss flag), etc. Some of the vessels involved in these types of activities do not fly any flag, although the country or countries in which the NGO is registered are known. See, for example: the Aquarius, Seefuchs, Sea Eye, Vos Hestia, Vos Prudence, Golfo Azzurro, Phoenix, Sea Watch 2, etc. For more information, see: "December 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them", European Union Agency for Fundamental Rights, December 2020; available at: https://fra.europa.eu.

[50] For more detailed information on this topic, see: "Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea", June 2022; available at: https://fra.europa.eu/en/publication/2022/june-2022-update-ngo-ships-sar-activities#publication-tab-1.

[51] Recommendation (EU) 2020/1365, cit., point 2.

[52] *Ibid.*, point 3.

Refugees[53] and the 1951 United Nations Convention Relating to the Status of Refugees.[54] Although the EU is not a party to this international treaty, its provisions are binding on European institutions under Article 78(1) TFEU (under which the EU's asylum policy must be in accordance with the 1951 Convention and its 1967 Protocol) and Article 18 of the EU Charter of Fundamental Rights (which provides that the right to asylum shall be guaranteed with due respect for the rules of this Convention).

3.2. The Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence

The Guidance issued by the Commission on 23 September 2020 on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence[55] is of clear relevance to the phenomenon of irregular immigration to the Union by sea. It is intrinsically related to the provisions of Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, known as the "Facilitation Directive".[56]

Thus, under Article 1 of the Facilitation Directive, EU Member States have the obligation to adopt sanctions on any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State, unless the aim of the behaviour is to provide humanitarian assistance to the person concerned, as well as on any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State.

[53] Approved by the United Nations General Assembly on 17 December 2018 through Resolution 73/151 on the Office of the United Nations High Commissioner for Refugees (published on 10 January 2019), which affirms the Global Compact on Refugees (see: A/73/12 (Part II)).

[54] Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 23 April 1954, U.N.T.S., vol. 189, p. 150. For Spain, see: Instrumento de Adhesión de España a la Convención sobre el Estatuto de los Refugiados, hecha en Ginebra el 28 de julio de 1951, y al Protocolo sobre el Estatuto de los Refugiados, hecho en Nueva York el 31 de enero de 1967, *BOE* No. 252, 21 October 1978, p. 24310.

[55] OJ C 323, 1.10.2020, p. 1.

[56] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, p. 17.

In this regard, the Guidance accompanying the New Pact on Migration and Asylum stresses that the humanitarian assistance required under Article 1 of the Facilitation Directive "cannot and must not be criminalised" (point 4.i)[57] and that whether an act falls within the concept of such assistance should be assessed "on a case-by-case basis, taking into account all relevant circumstances" so as to prevent an act mandated by law from being criminalised (point 4.iii).

The Guidance also decriminalises the actions of NGOs (or any other non-state actor) carrying out search and rescue operations at sea while complying with the relevant legal framework under international law (point 4.ii). In this context, the distinction that states must make between, on the one hand, the activities of NGOs carried out for the purposes of rendering humanitarian assistance, which should not be penalised, and, on the other, actions by NGOs seeking to facilitate irregular entry (including by sea) or movement is of particular importance. The Guidance makes it clear that actions undertaken for the purpose of rendering assistance should be decriminalised in the EU. It is undoubtedly a very important clarification with regard to the issues addressed in this paper, and one that is highly anticipated by the EU as a whole.

3.3. Other "blue" provisions of the New Pact on Migration and Asylum and the Common European Asylum System reform package

The recommendations and guidance issued by the Commission on 20 September 2020 referred to in the previous two sections of this part of the chapter are accompanied by several specific proposals for the reform of the CEAS of great significance for migration by sea.

In this regard, the Amended Proposal for a Regulation on the establishment of the Eurodac system,[58] which reflects the EU's intention to

[57] On the phenomenon of the criminalisation in the EU of migration by sea, see: E. Cusumano, "The sea as humanitarian space: Non-governmental Search and Rescue dilemmas on the Central Mediterranean migratory route", *Mediterranean Politics*, 23 (3), 2018, pp. 387-394; V. Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, Springer, Cham, 2015; and A. Sánchez Legido, "¿Héroes o villanos? Las ONG de rescate y las políticas europeas de lucha contra la inmigración irregular (a propósito del caso Open Arms)", *Revista General de Derecho Europeo*, 46, 2018.

[58] COM(2020) 614 final, cit.

implement a new category of persons disembarked in an EU Member State following a search and rescue operation, is particularly important. This category would consist of persons seeking international protection who have been disembarked in an EU Member State following a search and rescue operation, who, with this legislative reform, would no longer be considered to have entered the EU irregularly. Clearly, the same rules should not apply to such persons as to those who have crossed the border irregularly by land or air,[59] given the specific features of the circumstances surrounding their arrival in the EU.

This approach would also be in line with the Opinion delivered on 20 June 2017 by Advocate General Eleanor Sharpston in the *Mengesteab*[60] case, which stated that a distinction should be drawn between, on the one hand, persons disembarking in an EU Member State safely and undetected after a sea crossing and then, at some later stage, appearing before the authorities of that Member State or another to apply for international protection and, on the other, those who have been rescued on the high seas or in the territorial waters of a Member State from a sinking inflatable boat in unseaworthy condition and were later disembarked in an EU Member State. In the first case, the persons can be presumed to have crossed the border of the first Member State "irregularly", whereas in the second case, the legal situation would be different.[61] In the author's view, the proposed amendment of the Eurodac Regulation would finally provide legal cover for this third category of persons who might arrive in the EU by sea, more in keeping with their situation.

This idea of creating a third category of persons arriving in the EU by sea is likewise reflected in the Proposal for a Regulation introducing a screening of third-country nationals at the external borders.[62] Article 1 of this future Regulation provides for the establishment of screening at the external borders (including sea borders) of the Member States of both third-country nationals who have crossed the external border in an unauthorised manner and of those who have applied for international protection during border checks without fulfilling the entry conditions.

[59] For a detailed overview of these issues, see: COM(2020) 614 final, cit., pp. 13-14.

[60] C-670/16, EU:C:2017:480.

[61] *Ibid.*, para. 51.

[62] COM(2020) 612 final, cit.

The Regulation supplements these two groups with another, namely, third-country nationals disembarked in the Union after a search and rescue operation, before they are referred to the appropriate procedure.

Finally, it should be noted that all these proposed changes for the reform of the CEAS and the New Pact on Migration and Asylum are supported by various sources of funding, mainly channelled through the Asylum and Migration Fund,[63] covering the various types of migration by sea referred to in this chapter.

4. Conclusions

The Union's commitment to greater European solidarity also calls for a new migration strategy that responds to the challenges posed by the migration flows entering the EU by sea.

This strategy is outlined in the revision of the CEAS, which currently consists mainly of the Dublin III Regulation, the Asylum Procedures Directive, the Reception Conditions Directive laying down the standards for the reception of applicants for international protection, the Return Directive, the Qualification Directive laying down the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, and the Eurodac system for the comparison of finger prints for the effective application of the Dublin system.

This revision builds on the unsuccessful reform launched in 2016 in relation to the EU's migration and asylum policy, which essentially consisted of harmonising the procedures and rules applicable to asylum and implementing a fair and sustainable mechanism to prevent the same EU Member States from suffering migratory pressure without there being real solidarity in this area among all the Union's members. With the New Pact on Migration and Asylum and the set of accompanying documents, this approach has again been taken up, only this time it has been taken further and endowed with a clear blue dimension arising from the concerns that arrivals by sea to Member State coasts have caused for the EU in recent years.

In this context, Commission Recommendation (EU) 2020/1365 on cooperation among Member States concerning operations carried out by

[63] COM(2020) 610 final, cit.; and SWD(2020) 207 final, cit.

vessels owned or operated by private entities for the purpose of search and rescue activities, the Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, the amended proposal for a Regulation on the establishment of the Eurodac system, and the creation of a specific Asylum and Migration Fund are emerging as the main tools, to date, made available to the EU to respond to the challenges posed by immigration by sea and to asylum seekers and applicants for asylum and international protection who have entered or wish to enter the Union by sea.

MIGRANTS' AND REFUGEES' RIGHT TO PUBLIC HEALTH ACCESS ALONG TRANSIT ROUTES: A FEW CONSIDERATIONS

MAJA SAVIĆ-BOJANIĆ*

1. Introduction

The United Nations (UN) Summit held in September 2016 saw the signing of the New York Declaration, which, among its many points, highlighted several references relating to addressing the health care needs of people on the move, including refugees (paragraphs 30-33, 59, 80 and 83 and paragraphs 5c, 7b and 13b of the annex "Comprehensive Refugee Response Framework"[1]. More specifically, the Declaration encouraged states to support these groups' access to HIV prevention and treatment, combatting gender-based and sexual violence, providing access to basic and reproductive health care services, establish policies which would allow for equal access to health care with a special focus on unaccompanied minors and assistance to refugees in terms of allowing them basic health care. However, the responsibility for the introduction of such policies rested solely on states and more than six years later, the propositions stressed in the Declaration remain vaguely, if at all, implemented. This is especially true for those strained along transit routes where fluctuating waves of migrants and refugees create only short-term reactions focused primarily on emergency response services. What remains largely ignored is the complex and diverse background of life-trajectories which impact migrant and refugee health from the moment of departure from home. One of the unremitting challenges are environmental effects on health, caused by fluctuating weather patterns and leading to malnutrition, poor hygienic conditions, but also violent conflict, all push factors which prompt people to leave their homes, but also result in an increased number of people travelling in very poor health

* Sarajevo School of Science and Technology.

[1] New York Declaration for Refugees and Migrants. Resolution adopted by the General Assembly on 19 September, 2016. New York: United Nations. Available at: https://www.ohchr.org/en/migration/new-york-declaration-refugees-and-migrants. [Accessed 12 October, 2022].

conditions.[2] Rechel et al. argue that "…health needs of migrants are poorly understood, communication between health care providers and migrant clients remains poor, and health systems are not prepared to respond adequality."[3] The problem outlined here is two-faceted – (a) migrants are little, if at all, aware of their right to access health care during their journeys and (b) states do very little to raise awareness on health care provision among migrants and refugees while transiting. Thus, states are dealing with an unprecedented global health crisis all the while ignoring the health needs of people on the move and notably so the undocumented who have very little access to formal health services. In order to address these gaps, a World Health Assembly Resolution was passed in May 2017 entitled "Promoting the health of refugees and migrants" with the aim of prompting states to collect evidence-based data, best practices and lessons learned in order to improve access to public health care for migrants and refugees. It is against this backdrop that this short paper will address the urgency for reliable, evidence-based policies which would aim at providing health care and assuring access to such services for people on the move stranded along the transit routes.

2. Understanding the Need Behind Comprehensive Public Health Policies towards Migrants and Refugees

Migration is not a unidirectional and isolated process. Rather, it occurs over long periods of time, and thus, contexts and conditions which impact the migratory path of each individual will vary. Due to such nature of the migration process, the international agreements mentioned above specify that the responsibility for ensuring adequate health care for migrants and refugees rests primarily on individual states. This implies the need for suitable national policies. However, the responsibility of relevant international organizations, such as the IOM or the United Nations High Commissioner for Refugees (UNHCR), as well as numer-

[2] M. Savić-Bojanić, "Understanding an unremitting challenge: Environmental migration in the Mediterranean region", in G. Oanta, and B. Sanchez Ramos (eds.), *Irregular migrations in European: Perspective from the sea basins,* 2022, Napoli: Editoriale Scientifica.

[3] B. Rechel, P. Mladovsky et al. Eds., *Migration and health in the European Union,* 2011, Maidenhead: Open University Press.

ous NGOs cannot be disregarded, particularly in transit states where national health policies tend to be weak and poorly designed to cater the needs of people on the move. What is more, health policies as relating to migration are often viewed as a threat to public health (e.g., possibility of communicating extracted diseases, importing new diseases, such as tropical illnesses, etc.). or in terms of rights-based issue. The latter often creates the danger where a complete absence of national-level health support to refugees or the undocumented is present, unless they are facing a major health-hazard. Although the rights-based perspective is still problematic along transit routes, the approach is grounded in medical ethics (Matlin et al.)[4]. This perspective has enabled many successful state-responses whereby countries are starting to place importance on "universal access and culturally competent health care services". What is more, with the help of relevant international organizations, there is an increased awareness by national governments regarding specific circumstances which surround the migration experience of each individual. This has resulted, not necessarily in a well-rounded health policy, but cognizance of displacement's many faces – from environmental push factors to conflict and persecution. Here, the focus is on "migration as an adaptation strategy for survival"[5]. Yet, this approach has been primarily discussed in relations to the impact of climate change on migration. What is evident, thus, is an unequal policy implication. Migrants and refugees do not have an equal status under international law, and push factors often decide whether health care treatment options will available and/or provided. Diaz et al.[6] speak of the importance of migrant and refugee healthcare in terms of (a) *human rights perceptive and ethical implications*, (b) *social cohesion perspective*, whereby providing health care to migrants and refugees is imperative for maintaining a high degree of social cohesion, notably in societies with a high number of immigrants and (c) *economic investment perspective*, which focuses on linking health and economic well-being of the entire population over a long-term.

Despite of this, countries have not been able to adopt an all-encompassing strategy of health care access and provision for migrants

[4] S. Matlin et al., "Migrants' and refugees' health: towards and agenda of solutions", *Public Health Reviews.* 39:27, 2018.

[5] *Ibid*, p. 14.

[6] E. Diaz et al., "Shifting migrant health care away from an agenda of conflicts and problems toward solutions", *Scandinavian Journal of Primary Health Care*. 34 (3), 2016.

and refugees. What is more, countries situated along transit routes have often relied mostly on the help of the international actors in the field to avoid investments and legal battles. Often politically unstable themselves, these countries do work closely with international organizations, but lack coherence when it comes to national health care policies towards migrants and refugees. The responses, thus, remain limited on immigration services, temporary shelter and other receiving units and international aid (Zimmerman et al.).[7] This has resulted in an often-uneven approach to individual health issues as impacted by the migration process, an aspect which will be further unpacked.

3. The Importance of "Before, During and After" Health Conditions for an Integrative Migrant and Refugee Health Policy

The migration background, or the reasons to migrate, are not isolated events in a life of a migrant or a refugee. Push factors vary in scope and severity, adding to the argument that all states, transit and destination alike, must develop and implement a comprehensive public health policy inclusive of migrants and refugees. Such policies, resting on the knowledge that contexts influence the health status of each individual on the move, must be broad, inclusive and adopted to cater to the needs of those requiring more than basic health care assistance. In order for this to occur, the following must be considered:

(a) Individual's health before, during and after the migration journey;

(b) The background: that is the socio-economic, cultural and environmental conditions;

(c) Individual circumstances – such as lifestyle, age and gender.

We shall consider each of these variables separately in order to make sense of their importance for tailoring adequate and inclusive public health policies.

Health issues occur throughout individual's lifetime. When a migrant or a refugee leaves his/her homeplace, health risks arise during the journey. What remains ignored by public health policies and notably so along transit routes, is that many migrants and refugees, especially those belonging to vulnerable groups (children, women and the elderly), may

[7] C. Zimmerman, "Migration and health: a framework for 21st century policy-making", PLOS Med, 2011.

leave their homes with an existing health issue. Such issues often correspond to local conditions and while endemic to specific geographic reasons, the onset of the journey may result in a severe lack of knowledge by health professionals along transit routes who may have not had contact with certain illnesses. Furthermore, malnutrition and maternal-health problems, may occur during the journey for the more vulnerable. Yet, health care offered to people on the move who are transiting often remains basic and without much regard to person's mental health, which often become a battle during the journey itself. Harsh traveling conditions, hunger, pushbacks or broken social and family ties, often lead to acute mental health disorders, including anxiety and depression. Furthermore, consequences of different events that occur during the journey and different treatment options along many transit states, lead to a situation in which acquired conditions (e.g., mental health issues, injuries or infectious diseases) may become acute only at the end of the migration journey (arrival to destination state).

What is especially difficult in terms of available health care for migrants and refugees during their journeys is access to mental health professionals. Often disregarded, mental health represents one of the major fluctuating health issues during a migrant's journey, mostly because of rapidly altering life conditions, traumatic events and underlying fears of deportation, separation, isolation and loneliness. Domnich et al.[8] refer to the so called "healthy immigrant effect" which relates to the fact that immigrants who arrive to their destination countries are often healthier than the local population. This is primarily due to the fact that most migrants are young healthy males. However, due to the longevity and ruthlessness of their journeys, as well as different lifestyles in the host states, their health tends to deteriorate over time. The same authors note that the "healthy migrant syndrome" may not apply to refugees, which have significantly different displacement and migration conditions.

This is why it is crucial for states, especially those along transit routes which observe migration as a temporary and fluctuating phenomenon, and, as a result, often do not have adequate migrant and refugee health care policy, to consider the following:

i. Adequate coping health care mechanisms during periods of high influx. This includes emergency health care at the border crossing,

[8] A. Domnich et al., "The "healthy immigrant" effect: does it exist in Europe today?", *Italian Journal of Public Health.* 9 (3), 2012.

screening and triage for communicable diseases before reaching reception camps. Programmes should also include planned and optional vaccination plans especially during global pandemics, such as Covid-19.

ii. Provision of long-term access to local health-care facilities not only for primary health care, but also prevention plans and long-term treatment options.

iii. Competence transfer to national authorities - this mechanism would ensure for an effective, long-term health care policy for migrants and refugees in transit and would alleviate dependency on international organizations and NGOs whose teams lack sufficient resources for provision of secondary and tertiary care.

The above considerations require, however, political and legal measures in order to be sufficiently implemented. Such measures are needed in order to set up clear definitional basis and implementation frameworks which would include clear guidelines on how to provide sanitation at reception centres and shelters, clean water and food supplies, access to maternal and paediatric health care, vaccinations and mental health support. Political (and legal) support is vital to the third point – competence transfer to national authorities – notably in terms of removing legal barriers to health care access for the undocumented and refugees, as well as those groups who fall "in between" (e.g. asylum seekers). Yet, before all three considerations are implemented, relevant authorities, both domestic and international, must consider the ethical concerns which deeply penetrate the policy realm relating to public health care access of migrants and refugees.

4. Access to Public Health Care for Migrants and Refugees: The Ethical Dilemmas

The ethical impasse surrounding public health provision to migrants and refugees is best observed through the human rights prism, focusing on equal right to access health care services, with a special protection focus on vulnerable groups (Tulchinsky and Flahault).[9] Several policy issues are directly related to medical ethics as applied to health of migrants and refugees:

i. Where does the responsibility for health provision to migrants and refugees come from?

[9] T. Tulchinsky and A. Flahault, "Editorial: Why a theme issue on public health ethics?", *Public Health Review*. 34(1), 2012.

ii. How to best ensure for an equal treatment with a full respect to an individual's dignity and human rights?

The above questions are notably relevant to the principle of competence transfer, whereby the responsibility rests solely on individual states to decide upon the standard of health care offered to migrants and refugees. This issue narrows down to values and there is a potential danger of unequal political support for an inclusive policy, especially for the undocumented or asylum seekers. Marshall et al. (1998) discuss four factors related to the ethical concern of migrants:

1. Cultural backgrounds and the importance of beliefs and values during medical treatment.
2. Language interpretation through the use of interpreters.
3. Discrimination and political oppression.
4. Ethical issues related to clinical research, particularly the understanding of informed consent and data protection (e.g. problem of different interpretation of confidential data in different cultures).

Going back to transit routes, the third and fourth points are especially problematic, mostly because the first two ethical issues are taken care of by international organizations and NGOs. However, most states which serve only as a transit zone, will experience problems with the legal framework governing refugee and asylum seekers rights. For example, states along the Balkan Route have experienced major setbacks in providing adequate care for the undocumented patients, especially those requiring tertiary care. This is why it is essential that during the competence transfer process from international to domestic actors, all involved stakeholders are aware of the importance of a strong national standard in public health provision for migrants and refugees. The removal of legal barriers when it comes to health care of migrants and refugees should be based on the sole principle of equality, and not be linked to the immigration status of the individual seeking treatment.

Furthermore, non-EU member states which strive towards integration, and which are situated along transit routes, should immediately be cognizant of different migration journey process of each individual. This especially concerns unaccompanied minors which have applied for international protection. Article 25 of the 2013 Directive of the European Parliament and the European Council state that medical examinations may be used if an applicant's age cannot be discerned. However, if a minor refuses to be examined, their decision cannot form a ground for rejection (Matlin et al., 2018). Hence, it is obvious that the immigration

status and migration background comprise an ethical concern for all the involved stakeholders in the area of public health care access for migrants and refugees. The decision to provide health care and treat an individual with full respect to his/her dignity and human rights is an ethical question which cannot be ignored by public health authorities or decision-makers along transit routes.

5. A Few Concluding Remarks

Clearly, states along transit routes, just like the destination countries, face numerous challenges when it comes to providing migrant and refugee access to public health care services. Reflecting on the issues discussed in this short paper, states along transit routes should improve the implementation of existing policies and adopt them in such a way as to allow for an easy and effective way of identifying the health needs of individual migrants and refugees. Special attention in this regard should be placed on an individual's background and type of the migration journey regardless of the immigration status. On the other hand, mental health of migrants and refugees should be approached as part of the initial access to national health care services, as poor mental health conditions not only influence their ongoing migration journey, but also inability to efficiently interact with national institutions due to fear, anxiety or depression caused by potential trauma or violent event during their journey. In order to effectively overtake the competence from the international actors, states along transit routes must assure for a solid and expert-based cultural competence training for all health care workers who are involved with migrant and refugee populations. This will allow not only for an efficient health need assessment but will be grounded in ethical and culturally sensitive practices in approaching patients from different socio-cultural backgrounds and with sensitivity to cultural differences, especially when it comes to women and unaccompanied minors. Lastly, such an integrated and well-rounded, ethical approach will be invaluable in assessing and addressing the mental health issues of migrants and refugees, notably child migrants.

PART II

Migrants and Asylum Seekers

The National Experiences

ANTIMIGRATION RHETORIC AND XENOPHOBIA TOWARDS MIGRANTS IN NORTH MACEDONIA

OLGA KOSHEVALISKA*, ANA NIKODINOVSKA KRSTEVSKA**
AND ELENA MAKSIMOVA***

1. Introduction to xenophobia against migrants

Xenophobia is most commonly defined as 'fear of the stranger'.[1] It can also be defined in a broader manner as "attitudes, prejudices and behavior that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity."[2] Xenophobia basically is presented as irrational hatred towards foreigners and all their values, customs and habits. Xenophobia develops revolt and hatred of everything that is foreign and unknown, and can be aimed at someone's faith, habits, anthropological or facial features and it is followed by hostile behavior, with a series of gestures, usually expressed through hate speech, hate crime, refusing foreigners to socially integrate in the new society, sharing xenophobic content in the media.[3]

According to Bashkurti (2020), all definitions for xenophobia rotate

* University Goce Delcev – Stip.
** University Goce Delcev – Stip.
*** University Goce Delcev – Stip.

[1] See M. Peterie & D. Neil , "Xenophobia towards asylum seekers: A survey of social theories, Special issue – Asylum Seekers in the Global Context of Xenophobia", *Journal of Sociology* 2020, Vol. 56(1) 23-35.

[2] S. Deardorff Miller: "Xenophobia toward Refugees and Other Forced Migrants", *World Refugee Council Research Paper* No. 5 — September 2018, p.5.; also, O. Yakushko: "Xenophobia: Understanding the Roots and Consequences of Negative Attitudes toward Immigrants" Educational Psychology Papers and Publications, 1-2009, University of Nebraska-Lincoln. http://digitalcommons.unl.edu/edpsychpapers/90/, and ILO, IOM and OHCHR. 2001. "International Migration, Racism, Discrimination and Xenophobia." Discussion Paper prepared by the ILO, IOM and OHCHR for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, www2.ohchr.org/english/issues/migration/taskforce/docs/wcar.pdf.

[3] See A. Cvetanovska, "Current challenges for the integration of refugees, migrants and asylum seekers followed by discrimination, xenophobia and hate crimes", Macedonian Young Lawyer Association, 2020.

around the consideration of xenophobia as a set of "emotional, psychological and ideological conditions that include hatred, fear and enmity between different ethno-cultural, national, political, religious, racial groups that together contribute to the deterioration of relations between people, religious communities, ethnic and cultural minorities, different social categories, interest groups, families, neighbors, and even ordinary individuals of different origins."

U.N. Secretary-General Ban Ki-moon in 2016 said in the report to the United Nations General Assembly:

> "*Xenophobic and racist responses to refugees and migrants seem to be reaching new levels of stridency, frequency and public acceptance*."[4]

Article 2.1 of the Additional Protocol to the Convention on Cybercrime,[5] states that "*racist and xenophobic material*" means any written material, any image or any other representation of ideas or theories, which advocates, promotes, or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, color, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

As Miller (2020) says *"those who study forced migration and those who advocate for solutions to forced migration spend little time studying xenophobia"* and therefore the purpose of this paper is to fill in that gap.

This paper thus first explores the definition of xenophobia in the context of migration of asylum in the Balkans with special emphasis on North Macedonia, and then examines its phenomenology by analyze the abuse of the migrant crisis in North Macedonia, the creation of the so-called anti-migration rhetoric, xenophobic outbursts of individuals,

[4] E. Wulfhorst, U.N. to campaign against xenophobia, racism in dealing with refugees, Thomson Reuters Foundation, available at https://www.reuters.com/article/us-un-refugees-responsibility-idUSKCN0Y109X [accessed on 17.08.2022], also in United Nations General Assembly 2016. In safety and dignity: addressing large movements of refugees and migrants: Report of the Secretary-General. A/70/59, April 21. https://refugeesmigrants.un.org/sites/default/files/in_safety_and_dignity__addressing_large_movements_of_refugees_and_migrants.pdf.

[5] Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm.

groups, and even formal movements. Will give a short preview of the criminal legal framework and the state's punitive policy for such impermissible behavior. At the end, we will also consider the initiatives carried out to combat or prevent xenophobia in North Macedonia and provide some lessons and recommendations that emerge from the research on xenophobia.

2. Xenophobia in the Balkans, an old – new phenomenon

The solidarity is not new for the Balkans, especially after the collapse of Yugoslavia and the "*welcoming"* of refugees from states "*in war*". There is a general opinion that public displays of openly xenophobic and racist rhetoric started from this period. Somehow, patriotism and nationalism started to be used in order to legitimize intolerant xenophobic and racist rhetoric, intoxicated narrative for nationalism and beliefs that one's own nation-state or group is superior to others. If racism was typical for the previous century, then can xenophobia be the 'hallmark' for this one? One may ask: is xenophobia the new racism?

In the Balkans, the phenomenon of xenophobia has been present on different grounds. In the '90s for Bosnia-Hercegovina and the Serb community in Republika Srpska there was typical ethno-xenophobia which can also be seen in the case of the Serbs in Croatia; in Montenegro xenophobia was/is based on religion and the church dispute with Serbia,[6] xenophobia can be felt between Serbia and Kosovo in the xenophobic political narrative, etc. and thus can pose new dangers if it is not considered and treated with the apparent attention and care.[7] According to Bashkurti,

> *'the Balkans are still suffering from problematic relations between the states. When these relations are compounded by historical recurrences, inferiority complex or superiority, from mixed and*

[6] See Samir Kajosevic, Serbian Church, Montenegro Govt to Discuss Disputed Religion Law, available at https://balkaninsight.com/2020/03/10/serbian-church-montenegro-govt-to-discuss-disputed-religion-law/ [last accessed on 18.08.2022].

[7] Dea Bashkurti, The Balkans: Old Xenophobia, New Threats, in Eurasia Review, available at https://www.eurasiareview.com/07112020-the-balkans-old-xenophobia-new-threats-oped/ [last accessed on 18.08.2022].

complex prejudices they take the form of state xenophobia. This form of xenophobia causes states to feel complex fears, hatred, and pathological hostility between them. This xenophobia originates primarily from xenophobia between peoples, is transmitted to state levels, is transmitted between states, and re-emerges widely as a deteriorating relationship between peoples."[8]

In Slovenia, in the 1990s, during the war in Bosnia and Hercegovina, the position of the Slovenian public notably changed from initial welcoming mood of solidarity to growing dissatisfaction in the society. According to Bajt&Pajnik "Stirred by ill-informed, intolerant, and biased media reports, it was not long before the prevalent xenophobic rhetoric began cautioning the Slovenes against the 'refugee tide'. Analyses of public rhetoric in the early 1990s hence showed that the refugees were reduced to "a problem" and a threat to the Slovene society."[9]

Xenophobic displays continued to be a part of the public discourse in the Balkans, especially with the start of the migrant crisis and were directed towards migrants, refugees, and asylum seekers from more distant places. The reason for the escalation of the intolerant public attitudes and xenophobic media discourse was the identification of migrants, refugees, and asylum seekers as criminalized "*illegals*", since the media reports had focused on undocumented migrants, refugees and asylum seekers "*caught*" crossing the border without documents or caught during a police action of interception of smuggling migrants or so on. But later the media started to move in a very dangerous direction presenting the migrants, refugees, and asylum seekers as the next criminals at large – bullies, terrorist, sexual offenders, painting a picture that societies with large number of migrants, refugees and asylum seekers will be the next in line for threats to the public safety, national security, national identity, violence etc.[10]

[8] For this phenomenon see the article Ethnic Hate Speech and Narratives of Divide in the Western Balkans form the Media Diversity Institute, available at https://www.media-diversity.org/ethnic-hate-speech-and-narratives-of-divide-in-the-western-balkans/ [last accessed on 17.08.2022].

[9] See V. Bajt, M. Pajnik, "Current challenges to migrant integration: Xenophobia and racism The case of Slovenia, a project brief in Prospects for Integration of Migrants from »Third countries« and their Labour Market Situations: Towards Policies and Act", 2010, p. 2.

[10] See the article on the portal 'justice.rs' with the headline 'Explosions, rape, and

Xenophobia in the context of the migrant's crisis was not typical only for the Balkans, it was also present in the other EU countries, especially when preparing integration plans for migrants, refugees, and asylum seekers in the countries along the route. For instance, in Romania the spread of xenophobia started in the same manner as in Balkan countries – by frightening the natives with the introduction of quotas for construction of camps for migrants and refugees. Even though the number of migrants, refugees and asylum seekers in Romania is low, still the public opinion toward migrants is extremely negative. It is argued that migrants, refugees, and asylum seekers going to take jobs from the native population, depress wages and put pressure on public services. State aid to migrants, refugees and asylum seekers is considered as unfair towards the native population because of the generous aid allowance that each asylum seeker receives per year.[11]

In Italy,[12] the xenophobic content is mainly regarding the future employment of the migrants, refugees and asylum seekers and the opinion that it is unfair to give migrants, refugees and asylum seekers an advantage over the local population.[13] In Greece, with the emergence of Golden Dawn

killings – migrants hevean on the north of Europe, available at https://pravda.rs/2015/8/21/eksplozije-silovanja-ubistva-ovo-je-migrantski-raj-na-severu-evrope-video/ {last accessed on 19.08.2022]

[11] See the report: Legal framework, societal responses, and good practices to counter online hate speech against migrants and refugees comparative report. The report provides the most recent data and trends from 7 EU Member States (Bulgaria, Croatia, Czech Republic, Greece, Italy, Romania, UK-before Brexit), hereafter *Comparative Report for the legal framework, societal responses, and good practices to counter online hate speech against migrants and refugees*. Based on the national studies and reports, the current report draws meaningful correlations between incidents of hate speech and developments on national and EU level. It looks at the scope and effectiveness of the existing legislative framework and related regulations such as media codes of ethics. Download available at https://ec.europa.eu/migrant-integration/library-document/legal-framework-societal-responses-and-good-practices-counter-online-hate-speech_en [last accessed on 18.08.2022]

[12] According to the *Comparative Report for the legal framework, societal responses, and good practices to counter online hate speech against migrants and refugees* [see footnote no.11], 'the social, economic, political and cultural public scene of recent years has been strongly characterized by xenophobic and racist manifestations. Various factors account for this situation; they range from underlying ideological, cultural or political concepts (idea of superiority of race, territorial invasion or otherwise) to causality connections, linked to economic factors.' p. 20.

[13] See the *Comparative Report for the legal framework, societal responses, and good practices to counter online hate speech against migrants and refugees.*

(far-right/neo-Nazi) political party, started the aggravation of the problem of racism, xenophobia and hate speech especially towards migrants, refugees and asylum seekers. In Bulgaria, a person who called himself a self-proclaimed "*hunter of migrants*", even bought two tanks - armored vehicles[14] in order to hunt down migrants and patrol the inaccessible areas around his home city - Yambol near the border with Turkey.[15] This individual on several occasions had open calls for violence towards migrants. The Helsinki Committee in Bulgaria,[16] repeatedly reported about this issue and condemned this person's actions.[17]

Intolerant discourse in the media or from politicians can lead to increased racist sentiments towards migrants, refugees and asylum seekers and other minorities, including in the form of scapegoating in times of economic crisis. ODIHR's annual reporting on hate crime in the OSCE area[18] has demonstrated that racist attacks can take a range of forms, targeting people from diverse groups across the region. Violent attacks by groups of perpetrators against migrants and ethnic minorities, as well as damage to businesses and property owned by or associated with established ethnic communities are common features of xenophobic hate crime.

3. Xenophobic hate crime towards migrants, refugees, and asylum seekers – case of North Macedonia

North Macedonia is a multi-ethnic society where people belonging

[14] See news report "Bulgarian bought two tanks to hunt down migrants, on Kanal 5 available at https://kanal5.com.mk/bugarin-kupil-tenk-da-lovi-migranti-niz-bugarija/a256687 [last accessed on 07.08.2022].

[15] See news report 'Bulgaria's vigilante migrant 'hunter' on BBC available https://www.bbc.com/news/magazine-35919068 [last accessed on 19.08.2022].

[16] See Bulgarian Helsinki Committee of the Bulgarian Helsinki Committee Concerning Bulgaria for Consideration by the United Nations Committee on the Elimination of Racial Discrimination at its 92nd Session, p.7. available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/BGR/INT_CERD_NGO_BGR_27032_E.pdf [last accessed on 20.08.2022].

[17] The Helsinki Committee has asked prosecutors to investigate Valev, pointing out that he bragged on national television about committing half a dozen crimes: assault and battery, making death threats, unlawful detention, inciting ethnic hatred and inciting ethnic violence.

[18] See OSCE, ODIHR reports by states and years available at https://hatecrime.osce.org/racist-and-xenophobic-hate-crime.

to different religions and ethnicities live, with a rich multicultural, multi-religious and multilingual heritage and as such, it should have an extraordinary capacity for tolerance and coexistence between different nationalities and ethnicities. This was typical for North Macedonia during the few refugee crises, back in the '90s.[19]

In fact, in North Macedonia, multi-ethnic coexistence of different ethnics such as Albanians, Bosnians, Roma population, Serbs, Turks etc. have been living with ethnic Macedonians for decades. But after the war in Kosovo and the great refugee crisis that overwhelmed Macedonia with the temporary housing of over 350,000 refugees from Kosovo, as well as the migrant crisis from 2015 onwards, this multi-ethnicity began to generate problems, mainly related to intolerance towards different ethnicities, which led to a paradoxical situation – a multiethnic society being xenophobic at the same time. And especially, in times of war, when every state must show solidarity for innocent civilians, intolerance is the least needed.

In events like this, the media plays an extremely important role. They can appear as promoters and protectors of human rights and controllers of the government's actions in the compliance of the obligations undertaken in accordance with international agreements, or as promoters of xenophobia and hatred. A very widespread way of sowing fear is to disseminate and spread stories in which what is written is given as 'the holy truth' or certainty even though it can neither be verified nor proven. The feeling of danger is first emphasized by uncritical transmission of statements and contents different from what is their essence.[20]

With the beginning of the migrant crisis, many sensationalist headlines and claims have appeared that only aim to cause fear in the population and encourage the spread of hate speech, hate crime, encouragement of racial, religious, and other discrimination, xenophobia on social networks towards migrants, refugees and asylum seekers who transit through the country. The migrant crisis was and still is being used as a tool to shift blame, score political points in elections or in a

[19] See O. Kosevaliska, and A. Nikodinovska Krstevska, *Migration and Asylum Policy System: the case of Republic of Macedonia.* In: Migration and asylum policies systems. Challenges and perspectives, Editoriale Scientifica, Napoli, 2020, pp. 109-129.

[20] See M. Najcevska report "Refugees, Migrants and xenophobia in Macedonian media' available at https://www.radiomof.mk/begalci-migranti-i-ksenofobija-vo-makedonskite-mediumi/ [last accessed on 20.08.2022].

campaign, create conspiracy theories which of course leads to causing racial, religious, and other discrimination - conducts that are incriminated with the Criminal Code.[21]

4. Xenophobia camouflaged as journalism

Right after the big peak of migrants, refugees and asylum seekers transiting through North Macedonia in 2015, the sensationalist headlines started, which were supposed to cause fear and trembling among the local population and inflame tension that leads to non-acceptance of the migrants, refugees, and potential asylum seekers. Initially, journalistic texts began, behind which there was no journalistic research, but mere downloading of questionable content from even more questionable sources.[22] This behavior continued with tense status posts in the social media (Facebook, Twitter etc.) that were shared and comment in the same manner, by big number of supporters.[23] In most of the media there were headlines in which xenophobia and especially islamophobia was directly encouraged. In this context headlines titled as "Migrants showed their teeth: 'Instead of churches, there will be mosques here,' 'Ahmed from Libya who arrived in Serbia: Instead of churches in Europe, minarets will be seen. That will be our revenge!", "Photo: Is this the real picture of the migrants from Syria." A step further was made by placing the migrants directly in the context of terrorism. In this sense, headlines like "Terrorists among migrants: ISIS commander entered Greece, transiting through Macedonia as a migrant!", "Terrorism is the most serious threat in the world - Macedonia is ready". The article "4,000 terrorists used the refugee routes" on one portal ends with a direct threat to the migrants, refugees and asylum seekers or a

[21] See Article 418 from the Criminal Code of North Macedonia, Official Gazette, No.

[22] See Jugoslava Dukovska review on the text 'Explosions, rape, murder, these are the peaceful migrants in the heaven for migrants Malmö, Sweden' written for the project Vistinomer – check of facts, [Proekt na USAID za zajaknuvanje na mediumite vo Makedonija- Komponenta Servis za proverka na fakti od mediumite implementirana od Metamorfozis.]

[23] See reported status on Facebook by one university professor in Law available on https://www.govornaomraza.mk/reports/view/943 online site for reporting hate speech.

direct call for an active attack by the citizens[24] which crosses the line from xenophobic hate speech to xenophobic hate crime.

Such articles were leading to mislead conclusions that namely showed that the rate of crime is increasing in places were migrants, refugees and asylum seekers have settled, and that their settlement represents a serious security risk not only for the local population, but also for the national security in general. As such an example we single out the headline for Malmö, Sweden, for which there was a news report entitled '*Explosions, Rapes, Murders these are the "peaceful" migrants in the migrant haven Malmö, Sweden*.' The first sentence of the article is "video report of Russia Today (RT) in just three minutes will capture the situation in the migrants haven of Malmö, Sweden, where explosions, robberies, Kalashnikov shootings, rapes and hand grenades have become daily activities after the arrival of migrants from Syria." The text continues with seriously terrifying misleading content in which it is said that "this will happen trough out whole Europe, if the settlement of migrants doesn't stop immediately". [25] The further frightening of the local population was with the sensationalistic headlines about building camps for migrants, refugees and asylum seekers that escalated with unlawful organizing referendum in several municipalities.

5. Building refugees camps

On the eve of the 2017 local elections in North Macedonia, in order to create a tense atmosphere, the opposition party VMRO-DPMNE accused the ruling party of building refugee camps and housing as many as from 150 to 200,000 migrants, refugees and asylum seekers."[26] In

[24] See M. Najcevska research on Refugees, migrants and xenophobia in mass media in Macedonia, available at https://www.radiomof.mk/begalci-migranti-i-ksenofobija-vo-makedonskite-mediumi/. Conducted within the USAID Project for strengthening the media in Macedonia, Service for check of facts in media.

[25] See the portal Justice.rs and the news report 'Explosions, Rapes, Murders in the migrant haven Malmö, Sweden available at https://pravda.rs/2015/8/21/eksplozije-silovanja-ubistva-ovo-je-migrantski-raj-na-severu-evrope-video/ but also broadcasted and shared by many Macedonian online portals including national news agencies and websites on official TV channels.

[26] See the interview with the former Minister of labor and social affairs, Mila

several municipalities, a procedure was started for a referendum in which citizens were supposed to declare that they are against accepting migrants, refugees and asylum seekers and building refugee camps. The referendums should have taken places on the same date, time, and place together with the local elections, that clearly showed that the migrant crisis was misused for political purposes. The "Budenje" [Awakening] movement was the main organizer of this referendum in Bitola and Prilep, and in the membership of this informal group there were even representatives from the municipality, from the opposition party.[27] After the local elections, this myth of settlement of migrants, refugees and asylum seekers was dispelled, but it showed how easy it is to polarize the population to show xenophobia and how much the migrant crisis is misused for political points and goals. Referendums against the settlement of migrants, refugees and asylum seekers were considered as a dirty election campaign,[28] and the Constitutional Court passed decisions in which the legality of the decisions to call a referendum made by the Council of the Municipality of Radovish, Negotino, Gjorce Petrov, Veles, Gazi Baba, Bitola, Kavadarci, Karposh, Prilep, Ohrid, Kochani and Shtip was considered as unlawful.[29]

Carovska available at: https://sdk.mk/index.php/dopisna-mrezha/vmro-dpmne-lazhe-shiri-ksenofobija-reche-tsarovska-koja-nenajavena-dojde-vo-bitolskiot-sovet-srede-raspravata-za-referendum-protiv-begaltsi/ [last accessed on 19.08.2022].

[27] See Xenophobic and antirefugee initiative is collecting signatures in Bitola and Prilep, available at https://glasnik.mk/ksenofobicna-i-antibegalska-inicijativa-sobira-potpisi-vo-bitola-i-vo-prilep/.

[28] See Civil Media article 'Referendum – a dirty prelection campaign available at https://civilmedia.mk/referendumite-protiv-begalcite-valkana-predizborna-kampanja/.

[29] The reason for making such a decision is Article 22 of the Law on Local Self-Government that does not give authority to the municipalities to decide on issues related to migrants and their settlement. See decisions of the Constitutional court У.бр.118/2017-1, У.бр.126/2017-1, У.бр.131/2017-1 У.бр.120/2017-1, У.бр.128/2017, У.бр.102/2017-1 и У.бр.121/2017-1, У.бр.124/2017-1, У.бр.119/2017-1, У.бр.122/2017-1, У.бр.125/2017-1, У.бр.127/2017-1, У.бр.130/2017-1, У.бр.123/2017-1, У.бр.129/2017-1. Also see news report 'There will be no referendum for the migrants on the day of the local elections, Radio Slobodna Evropa, available at https://www.slobodnaevropa.mk/a/28751192.htm [last accessed on 20.08.2022].

6. Strategy for the integration of refugees and migrants for the period 2017-2027

At that time, the draft of the Proposal for the Strategy for the Integration of Refugees and Migrants in the Republic of Macedonia 2017-2027 [30] was presented and caused a storm of xenophobic statements and hate speech, that culminated with the start of the aforementioned organization of referendum against the settlement of these persons in several municipalities in the country. The Strategy provides the migrants, refugees and asylum seekers should be welcomed in the host country without giving up their own cultural identity, social differences, as well as human rights and human dignity. The promotion of fundamental rights, non-discrimination, and equal opportunities for all are the key to a successful integration process, it is stated in the Strategy. The responsible institutions considered that local integration would be a long-term solution that refers to permanent accommodation of migrants, refugees, and asylum seekers in host communities in countries of asylum. But the Proposal of the Strategy was not 'welcomed' in many of the municipalities. According to the Macedonian Young Lawyers Association (hereafter MYLA), [31] an NGOs that provides free legal aid for refugees and asylums seekers, 'the statements of most of the municipalities are "on the line of xenophobia". Most of the municipalities have identical, that is, negative attitudes about the proposal, and as arguments they stated that '*Macedonia should stay transit country for migrants and that the municipalities do not have spatial, financial, and infrastructural conditions to respond to the measures provided in the Strategy*.'

7. The temporary accommodation of Afghans in North Macedonia

The humanitarian crisis in Afghanistan and the Macedonian government's announcement of temporary acceptance of refugees from

[30] Strategy for integration of migrants and refugees in Macedonia for the period of 2017-2027, Ministry of labor and social policy of Macedonia available at http:// www.mtsp.gov.mk/content/pdf/strategii.

[31] MYLA official web site https://myla.org.mk/en/home-english/.

this country was also followed by hate speech and attempts to spread xenophobia among citizens.[32] After the announcement that North Macedonia will accept refugees from Afghanistan who worked for international organizations, the xenophobic outbursts of both citizens and supporters or members of certain political parties, again started with xenophobic content on social media. Instead of "welcome" to the people of Afghanistan, they sent messages like

> "*Macedonia is one of the poorest countries in Europe, in a situation like this, it is good to see an example of solidarity from richer countries than our Macedonia, they should be the example for showing values, accepting refugees from Afghanistan, and not by patting them on the back. Then let's think about whether and who will pay for this…*"[33]

But the lesson was already learned, so the statements in the press started to be more subtle, precautious, discreet, since the Helsinki Committee, NGO's and Public Prosecutions Office started reporting and investigating such behavior. Since the start the of the punitive response of the competent authorities regarding xenophobia, discrimination, hate speech etc. the open calls for hatred, unacceptance, violence towards migrants, refugees, asylum seekers started to decrease.[34]

8. Xenophobic content about refugees from Ukraine

A Facebook post (which at the time of writing of this article has been removed) shared an informative text about the decisions taken by the Macedonian Government to help Ukraine, but with a xenophobic

[32] See Aleksandar NIkolik Pisarev article 'It is unnatural and shameful for Macedonian society to show xenophobia' for Civil Media available at https://civilmedia.mk/neprirodno-e-i-sramno-e-makedonskoto-opshtestvo-da-pokazhuva-ksenofobija/ [last accessed on 18.08.2022].

[33] Facebook Statement of Hristijan Mickovski, the leader of the political party VPRO-DPMNE, available at https://www.slobodnaevropa.mk/.

[34] Such and example was the prosecution of one journalist for hate speech and xenophobia on national grounds towards Greece population. See the article 'Journalist charged with hate speech and xenophobia' available at https://kanal5.com.mk/novinar-so-obvinenie-za-govor-na-omraza-i-ksenofobija/a352625 [last accessed on 20.08.2022]

and sensationalist headline for which it is uncertain how it was made and for which there is no real support with evidence and represents spread of xenophobia and intolerance. The post claimed that the Albanians in North Macedonia are in fear because the country will receive Orthodox refugees[35] is beyond any logic and the only purpose of such claims is to cause discord in society and spread panic on social networks.[36] A post with this title has anti-immigrant rhetoric and incites ethnic and religious intolerance. At the same time, the text itself says absolutely nothing of what is claimed in the title, nor is there any confirmation that the Albanians are really in fear.

9. Criminal legislation for preventing and punishing xenophobic hate crime

North Macedonia amended its Criminal Code, introducing the hate crime as a separate crime, in order to bring its national law closer to EU law, to clarify the provisions on hate crimes and expand the grounds for protection in practice. Since, 2018 hate crime has been defined with the amendments of the Code in 2018 as follows:

> "*Crime of hate explicitly foreseen by the provisions of this Code, shall be considered the crime against a natural person or a legal entity and associated persons thereto or a property which is committed wholly or partially due to a real or speculative (imaginary, assumptive) characteristic or association of the person and relates to the race, skin color, nationality, ethnic origin, religion or conviction, mental or bodily disability, sex, gender identity, sexual orientation and political conviction*".[37]

The OSCE (Office for Democratic Institutions и Human Rights,

[35] See news report available at https://mkdpress.site/archives/ [last accessed on 20.08.2022].

[36] See portal Vistinomer https://vistinomer.mk/.

[37] Article 122, ph.42 in Criminal Code ("Official Gazette of the Republic of Macedonia" no. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 97/2017 and 248/18.

ODIHR) indicates the following motivations (biases) for committing hate crime:[38] racism and xenophobia, prejudice against Roma and Sinti, anti-Semitism, Islamophobia, prejudice against Christians and members of other religions (Hinduism, Jehovah witnesses, Buddhism, Baha'i, etc.), as well as members of other groups (women, transgender people etc.). The motivation to perform a crime is subjective and therefore it is difficult to be sure and prove that the crime was committed with hatred. Therefore, it is necessary to prove the presence of objective factors, which would lead a reasonable person to think that the crime is motivated by prejudice.[39]

Furthermore, the bias motive of hatred is provided in over 20 incriminations such as murder, rape, (severe) bodily injury, coercion, unlawful deprivation of liberty, approving or justifying genocide, crimes against humanity or war crime, causing hatred, discord, or intolerance on national, racial, religious or any other discriminatory grounds etc.

As for xenophobia, racism, discrimination – these acts have been incriminated for longer period but with the amendments in 2018 they finally have the content that is in line with the ratified international instruments. In this manner, according to Article 394-d from the Criminal Code, the incrimination 'Spreading racist and xenophobic material via information system' prescribes that:

> *"(1) Whosoever via a computer system spreads in the public racist and xenophobic written material, photo or other representation of an idea or theory helping, promoting or stimulating hatred, discrimination or violence, regardless against which person or group, based on sex, race, skin color, class, membership in a marginalized group, ethnic background, language, nationality, social background, religious belief, other types of beliefs, education, political affiliation, personal or social condition, mental or physical disability, age, family or marital status, property status, health condition, or any other ground foreseen by law or ratified international agreement, shall be sentenced to imprisonment of one to five years.*
>
> *(2) The sentence referred to in paragraph (1) of this Article shall be also imposed against whosoever commits the crime via other public information means.*

[38] See Jasmina Dimitrieva, Decisions of the ECHR with commentary: hate speech and hate crime, OSCE, available at https://www.osce.org/files/f/documents/d/f/337176.pdf.

[39] *Ibid.*

(3) Whosoever commits the crime from paragraphs (1) and (2) of this Article by abusing his position or authorization or if those crimes resulted in disorder and violence against people or in property damage of greater extent, he shall be sentenced to imprisonment of one to ten year.

From the beginning of the migrant crisis there have been".

In Article 417 of the Criminal Code defines the Racial or other discrimination in the following manner:

"(1) Whosoever based on the difference in sex, race, skin color, class, membership in a marginalized group, ethnic background, language, nationality, social background, religious belief, other types of beliefs, education, political affiliation, personal or social condition, mental or physical disability, age, family or marital status, property status, health condition, or any other ground foreseen by law or ratified international agreement, violates the basic human rights and freedoms acknowledged by the international community, shall be sentenced to imprisonment of six months to five years.

(2) The sentence referred to in paragraph 1 shall also be imposed to whosoever prosecutes organizations or individuals because of their efforts for equality of the people.

(3) Whosoever spreads ideas about the superiority of one race over another, or who advocates racial hate, or instigates racial discrimination, shall be sentenced to imprisonment of six months to three years".

"Causing hatred, discord, or intolerance on national, racial, religious or any other discriminatory grounds" is also a special incrimination in the Criminal code,[40] and the bias motivation of the perpetrator could involve status of a foreigner (different nationality, ethnics, religion, social background, etc.).

Xenophobic hate crime against refugees, migrants and asylum seekers is widespread and we believe that they are often victims of hate crimes and especially xenophobia. Due to the lack of information, or the lack of reporting xenophobia from migrants, refuges, asylum seekers, and above all fear and mistrust in the institutions we believe that there

[40] Article 319 from the Criminal Code of North Macedonia.

are far too many cases than the official ones, which contributes to the deepening of the problem and failure to undertake meaningful actions by state institutions. According to the reported data form the police for 2020, there are only 13 cases of racists and xenophobic hate crime in 2020, 23 in 2019 and 33 in 2018. The presented data for racists and xenophobic hate crime is for all victims and not exceptional for migrants, refugees, and asylum seekers as victims since there is no data for the victim's foreign status.

Report data for year	Bias Motivation	Type of Crime	Recorded by Police
2020	Racist and xenophobic hate crime	Incitement to violence	1
2020	Racist and xenophobic hate crime	Damage to property	1
2020	Racist and xenophobic hate crime	Unspecified	11
2019	Racist and xenophobic hate crime	Incitement to violence	2
2019	Racist and xenophobic hate crime	Unspecified	21
2018	Unspecified	Unspecified	33
2017	No available data	No available data	
2016	Unspecified	Unspecified	2
2015	Unspecified	Unspecified	5

Table no. 1 Racist and xenophobic hate crime in North Macedonia, reported by the police for 2015-2020, Source of data: OSCE available data on https://hatecrime.osce.org/north-macedonia.

According to other sources[41] that collect data for racism and xenophobic hate crime, for 2020 there are 86 cases of racism and xenophobic hate crime, 134 for 2019 and 71 for 2018, 33 for 2017, 16 for 2016 and 32 for 2015. From the comparison of Table no.1 and 2 we can see a great disproportion in the numbers of reported cases by the police, on one hand, and by the other sources, on the other.[42]

[41] Macedonian Helsinki Committee for Human Rights (MHC), OSCE Mission to Skopje, Macedonian-Bulgarian Friendship (MBP), Balkanski Horizonti, etc.

[42] There are reports, analyzes and other publications available that give preview in num-

Reported by other sources: Macedonian Helsinki Committee for Human Rights (MHC), OSCE Mission to Skopje, Macedonian-Bulgarian Friendship (MBP), Balkanski Horizonti, UNHCR.							
Bias Motivation	Type of Crime	2020	2019	2018	2017	2016	2015
Racist and xenophobic hate crime	Violent attacks against people	75	121	62	27	13	31
Racist and xenophobic hate crime	Damage to property	3	5	9	5	3	1
Racist and xenophobic hate crime	Treats	9	8		1	/	/

Table no. 2 Racist and xenophobic hate crime in North Macedonia, reported by the police for 2015-2020, Source of data: OSCE available data on https://hatecrime.osce.org/north-macedonia.

The victims do not believe that the police can protect them or even that the police are willing to protect them, so in the absence of any institutional support and faith that the perpetrators will be punished, they just seek for safe transit throughout the country. The European Commission's 2019 Country Progress Report stated: "The collection of data on hate speech is not carried out in a systematic way, and an increase in cases of hate crimes has been observed in the database of civil society organizations".[43]

bers concerning hate speech and hate crime in North Macedonia such as Helsinki Committee for Human Rights, Hate Crimes in the Republic of Macedonia in 2013, available at: http://shorturl.at/fhATY, Helsinki Committee for Human Rights, Hate Crimes in the Republic of Macedonia in 2014, available at http://shorturl.at/mnqL1 Helsinki Committee for Human Rights, Hate Crimes in the Republic of Macedonia in 2015, available at http://shorturl.at/ATZ Helsinki Committee for Human Rights, Hate Crimes in the Republic of Macedonia in 2016, available at http://shorturl.at/tvBC4 Helsinki Committee for Human Rights, Hate Crimes in the Republic of Macedonia in 2017, available at http://shorturl.at/qN169, Helsinki Committee for Human Rights, Hate Crimes in the Republic of Macedonia in 2018, available at http://shorturl.at/dwyIW. Helsinki Committee for Human Rights, Hate Crimes in the Republic of North Macedonia in 2019, available at http://shorturl.at/dlyP8. Also, see Pol Iganski Research on the victimization from hate crimes, OSCE Mission in Skopje, 2019. https://www.osce.org/files/f/documents/6/5/424199.pdf.

[43] European Commission, North Macedonia Report 2019, Brussels, p. 30.

However, there are some positive aspects of the work in the field of preventing xenophobic hate crime like: in 2015-2016 more than 2,000 police officers have completed training to recognize hate crime; in 2015 'The OSCE Mission to Skopje'[44] and the 'Academy for Judges and Public Prosecutors' trained a total of 80 judges and prosecutors on identification, processing, and adjudicating hate crimes; improvement of the public prosecutor's office and the judiciary databases by adding an additional option for reporting cases of hate crimes; the forementioned amendments and additions to the Criminal Code adopted in December 2018; improvement in the national collection of data on hate crimes by Ministry of Internal Affairs. A step forward are also the two successful tolls for reporting hate speech and hate crime - the online platforms that facilitate reporting hate speech [https://www.govornaomraza.mk/main] and hate crime [https://zlostorstvaodomraza.com/incidenti/], on which migrants, refugees, asylum seekers as well as any other victim or person of interest can report hate crime and hate speech.[45] Still, the general conclusion is that the appropriate and timely recognition and registration of xenophobic hate crimes by police and judicial authorities remain at an unsatisfactory level.

In this context, there is no official data on the filed reports, charges / inditements, and judicial decisions for criminal acts: 'Spreading racist and xenophobic material via information system'[46] and 'Racial or other discrimination'[47] and 'Causing hatred, discord or intolerance on national, racial, religious or any other discriminatory grounds' because the State Statistical Office does not keep a separate registration for these crimes and they are listed in the group "other crimes against public order and peace", so a clear separation of exact figures is not possible, and that is a serious gap in the official statistical data system.[48]

[44] The OSCE Mission commissioned an expert analysis on "Mapping of obstacles to processing hate crimes", which presented a comprehensive perspective on the barriers to the effective identification, investigation, prosecution and adjudication of hate crimes, in order to help prosecutors and judges in successful processing hate crimes.

[45] See reported hate crimes towards migrants and refugees at https://zlostorstvaodomraza.com.

[46] Article 394-d from the Criminal Code of North Macedonia.

[47] Article 417 from the Criminal Code of North Macedonia.

[48] See MakSTat base of the State Statistical Office for further information http://makstat.stat.gov.mk/.

10. Conclusion

Xenophobic rhetoric in the public discourse can pose a very dangerous threat to democracy and rule of law. As already aforementioned in this paper, xenophobia basically is presented as irrational hatred towards foreigners and all their values, customs, and habits. Any perception of migrants, refugees and asylum seekers as outsiders or foreigners to the community, society, or national identity, or even worse – as a potential terrorist, can and will lead to eventual violation of basic human rights. From the theoretical analysis that we have conducted in this paper we can confirm, without any doubt, the U.N. Secretary-General Ban Ki-moon in 2016 statement "Xenophobic and racist responses to refugees and migrants seem to be reaching new levels of stridency, frequency and public acceptance" is shown to be very accurate in the context of the migrant crisis in the Balkans. In this paper we have tried to define xenophobia in the context of migration and asylum in the Balkans with special emphasis on North Macedonia. We also analyzed the phenomenology of xenophobia and the creation of the so-called antimigration rhetoric, the xenophobic outbursts of individuals, groups, and even formal movements. From the quantitative analyses that we have conducted for the purpose of this paper, due to the lack of information, or the lack of reporting xenophobia from migrants, refuges, asylum seekers, and above all fear and mistrust in the institutions, we believe that there are far too many cases than the official reported ones, which contributes to the deepening of the problem and failure to undertake meaningful actions by state institutions. We are of the opinion that xenophobia and hate crime towards migrants, refugees, and asylum seekers are not at all isolated cases,[49] and therefore, the State's punitive policy for such impermissible behavior should be more severe in order to show that such xenophobic crimes and rhetoric would not be tolerated at all.

[49] This can be seen from the online platforms that facilitate reporting hate speech [https://www.govornaomraza.mk/main] and hate crime [https://zlostorstvaodomraza.com/incidenti/].

AUSTRIAN ASYLUM AND MIGRATION LAW

PETER HILPOLD*, FRANZISKA LECHNER**

1. Introduction: The Austrian situation in an international context

One may ask why Austrian migration and asylum law deserves specific consideration in the context of an international analysis of this matter - after all, Austria is neither a particularly large EU country nor is it one of the most preferred destinations of asylum seekers: Not only geographically, but also practically, Austria proves to be a typical transit country between the North and the South or the East and the West.[1] Nevertheless, this special status is justified for the following reasons:

- In many aspects, the developments in Austrian migration and asylum law are exemplary (defined in a value-neutral way) for corresponding tendencies in the international, European context of prosperous nations. The growing resistance to increasing migration movements - no matter how well-justified the reasons for refugee movements may be - is a phenomenon that can be observed throughout Europe.
- In recent times, since the great mass flight[2] of 2015/2016, Austria has repeatedly elevated itself to the position of an opinion leader for the European efforts to seal off the country,[3] the proponent of a reinterpretation of the international right for asylum in a restrictive sense, of course regularly with the addition that the abuse of the right for asy-

* University of Innsbruck.

** University of Innsbruck.

This contribution is mainly based on Peter Hilpold, Das österreichische Fremden- und Asylrecht, in: Stephan Breitenmoser/Peter Uebersax/Peter Hilpold (eds.), Schengen und Dublin in der Praxis, 2022, pp. 179-194.

[1] See P. Hilpold, "Ringen um europäische Werte", in P. Hilpold, A. Raffeiner and W. Steinmair (eds.), *Rechtsstaatlichkeit, Grundrechte und Solidarität in Österreich und in Europa* - Festgabe zum 85. Geburtstag von Professor Heinrich Neisser, einem europäischen Humanisten, Facultas, 2021, pp. 262-298.

[2] For solutions to mass flight phenomena, see the seminal work of M. Ineli-Ciger, e.g., "Temporary Protection in International Law", 2018.

[3] Frequently cited and symbolic of the "Fortress Europe" slogan issued in 2016 by then Interior Minister Mikl-Leitner. See https://www.diepresse.com/4950279/mikl-leitner-sind-gerade-dabei-festung-europa-zu-bauen.

lum is to be prevented. The Austrian federal government has openly claimed to be the European leader in this matter.[4]

- And Austria has indeed at times performed above average by international standards: in 2018, for example, Austria accepted the highest number of asylum seekers - as a percentage of its population (2,345 asylum seekers per million inhabitants).[5] At 44%, the recognition rate was above the EU-wide average of 37%.[6] Although the total number of applications decreased over the years, Austria still had the second highest number of applications in the European Union, with 447 applications per 100,000 inhabitants.[7]
- Austria has firmly rejected the first comprehensive international instrument to regulate global migration, the Global Compact for Migration, which was due for adoption at the UN level at the end of 2018 and which expresses a fundamentally positive perspective on migration, thus once again taking a determined stand.[8]
- If efforts are now underway to reform European and international migration and asylum law, situations such as those in Austria in particular must be taken into account if these efforts should be successful.

In many aspects, the situation in Austria can be seen as a seismograph of corresponding tendencies at the international level.

[4] Austrian Chancellor Sebastian Kurz has repeatedly made this claim. In fact, decisive steps to this end were taken as a result of the Vienna Western Balkans Conference in February 2016. According to migration expert and chairman of the European Stability Initiative (ESI) Gerald Knaus, the subsequent sharp decline in the influx of refugees is primarily due to the EU's agreement with Turkey, which took effect at the same time. See the related analysis in the "Kurier" f. 9.10.2017, https://kurier.at/politik/inland/wahl/faktencheck-wer-hat-die-balkanroute-geschlossen/274.540.009.

[5] In absolute terms, however, Germany, Italy and France were the frontrunners. See Kleine Zeitung f. April 25, 2019, referring to Eurostat data, https://www.kleinezeitung.at/politik/aussenpolitik/5618258/.

[6] *Ibid.*

[7] See C. Filzwieser and L. Kasper, "Analyse der (rechtlichen) Entwicklungen im österreichischen Asyl- und Fremdenwesen von Mitte 2021 bis Mai 2022", in Asyl-und Fremdenrecht – Jahrbuch 22, NWV, 2022, pp. 7-22 (7).

[8] On the level of legal theory, however, Austrian skepticism was entirely justified. See Peter Hilpold, Opening up a new chapter of law-making in international law: The 2018 Global compacts on Migration and Refugees, in: 27 European Law Journal 1/2021, pp. 1-20, eulj.12376?af=R.

2. The development of Austrian migration and asylum law

Austrian migration and asylum law today presents itself as a dense network of regulations, many of which lack transparency and coherence and are visibly affected by rapid, often poorly coordinated growth. The language used is sometimes harsh. Both the non-transparent setting of standards and the authoritarian tone of the language do not necessarily reflect a lack of ability but can also be seen as intentional to a certain extent.[9] In recent years, there have also been increased efforts to build up Austrian scholarship on migration and asylum law, which can now evidence remarkable results.[10]

[9] Regarding the high degree of complexity of the relevant standards, Bernd-Christian Funk and Joachim Stern write: "Eine wichtige strategische Option und Folge zugleich bildet die Schwächung der Steuerungskraft des Rechts durch eine systematische Erhöhung des Grades an kodifikatorischer Komplexität zur Schaffung von redundanten und funktionsäquivalenten Eingriffspotenzialen. Auf diese Weise entsteht ein dichtes, für Betroffene kaum mehr überschaubares und für etatistische Zwecke bestens nutzbares Netzwerk an rechtlich legitimierten Herrschaftsinstrumenten." See B. C. Funk/J. Stern, "Die österreichische Einwanderungs- und Asylpolitik: völkerrechtliche, europarechtliche und verfassungsrechtliche Aspekte", in P. Hilpold/C. Perathoner (eds.), *Immigration und Integration*, 2010, pp. 237-259 (259).

On the other hand, as far as the language used in aliens and asylum law is concerned, it can also be assumed that there was conscious harshness as an attempt at discouragement. A particularly conspicuous case was that of renaming the "initial reception centers" as "departure centers," which led to national and international protests and was withdrawn again as a consequence of the "Ibiza" scandal followed by a change of government. See https://www.derstandard.at/story/2000098647513/warum-kickl-aus-aufnahmestellen-ausreisezentren-macht. See as well Gerhard Oberkofler, Was hat Flüchtlingspolitik mit Antisemitismus zu tun?, in: Zeitung der Arbeit f. 29. April 2021, https://zeitungderarbeit.at/feuilleton/was-hat-fluechtlingspolitik-mit-antisemitismus-zu-tun/.

[10] In this context, the following media can be cited as examples:

- Migralex – Zeitschrift für Fremden- und Minderheitenrecht (Facultas Verlag)
- Jahrbuch für Asyl- und Fremdenrecht (NWV)
- FABL – Fremden- und Asylrechtliche Blätter (Jan Sramek)
- Europa Ethnica (Facultas Verlag)
- Muzak/Pinter (Hrsg.), Fremden- und Asylrecht, Loseblatt, Verlag Österreich
- Kodex Asyl-/Fremdenrecht (Linde Verlag)

Current information is provided by the Federal Office for Immigration and Asylum (https://www.bfa.gv.at/).

2.1. The relevant provisions

The following national regulations are particulary relevant:

- the Asylum Act 2005 (*Asylgesetz 2005*) as amended including the Implementing Regulation 2005 (*Asylgesetz-Durchverordnung 2005*)
- This act's focus is to regulate the granting and revocation of asylum status as well as the status of subsidiary protection, the granting of residence permits for reasons worthy of considerations.[11]
- Basic Services Act - Federal Government 2005 (*Grundversorgungsgesetz – Bund 2005;* GVG-B)
- The GVG-B regulates the care of asylum seekers in federal care facilities.
- Basic Service Agreement due to article 15a Austrian Constitution (*Grundversorgungsvereinbarung Art. 15a B-VG (Bund-Länder)*)
- The agreement regulates the division of competence between the Federal Government and the states.
- Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz*; NAG)
- The NAG regulates immigration (migration) to Austria[12] via the issuance, refusal and withdrawal of residence titles of foreigners who reside or intend to reside in the federal territory for more than six months, as well as the documentation of the right of residence under Union law and the residence of third-country nationals with a residence title "ICT" of another Member State.[13]
- Foreign Police Act (*Fremdenpolizeigesetz*; FPG)
- The FPG regulates the exercise of the foreign police force, the issuance of entry titles, rejection, the issuance of measures terminating residence, deportation, toleration, the enforcement of repatriation decisions of EEA states and the issuance of documents for foreigners.[14]
- Federal Act on the Establishment and Organization of the Federal Office for Immigration and Asylum 2012 (*Bundesgesetz über die Einrichtung und Organisation des Bundesamtes für Fremdenwesen und Asyl 2012*; BFA-Einrichtungsgesetz – BFA-G)

[11] See § 1 AsylG.

[12] See R. Feik, Fremdenrecht, in Susanne Bachmann et al., *Besonderes Verwaltungsrecht*, 2020, pp. 151-211 (161).

[13] See § 1 NAG.

[14] See § 1 FPG

- The Federal Office for Immigration and Asylum started its activities on January 1, 2014. The BFA is an authority with nationwide jurisdiction, which is directly subordinate to the Minister of the Interior and which has a regional directorate in each federal state.
- The BFA is responsible for conducting asylum procedures, granting and withdrawing international protection for recognized refugees and beneficiaries of subsidiary protection, adopting measures to terminate residence, and issuing humanitarian residence titles (residence titles for reasons worthy of consideration and issuing the Residence Permit, the Residence Permit Plus and the Residence Permit Special Protection).

The density of these regulations is in particular the result of recent developments, namely due to massive changes in the socio-political basis of the underlying migration phenomena in the broad sense. Despite a variety of terminological uncertainties in the relevant literature and legislation, these legislative endeavours can be interpreted as an attempt to control the phenomenon of migration in the widest sense.[15] In this context, states traditionally adopt an ambivalent position, which can lead to - at first glance - contradictory measures over time or even simultaneously: While labor immigration may be desired or resisted, depending on a variety of factors, the admission of (political) refugees is an act of humanitarian solidarity, which experience has shown to have limits at the practical, though not the legal,[16] level. In the case of Austria, immigration is seen as a threat to high living standards, foreigners are both welcome and unwanted, while there is a strong humanitarian feeling in favour of protecting those in need.[17]

2.2. Developments in the early years until the end of the East-West conflict

Since the 1950s, Austria's economic and sociopolitical reality has

[15] See on this topic in general M. Kotzur et al. (eds.), *The External Dimension of EU Migration and Asylum Policies*, 2020.

[16] The thesis put forward in Austria a few years ago that a quota system would be compatible with international refugee law obligations is - as will be shown - clearly mistaken.

[17] See P. Hilpold/F. Lechner, "Asylum and migration law in Austria", in G. Cataldi, A. Del Guercio & A. Liguori (eds.), *Migration and asylum policies systems – challenges and perspectives*, 2020, pp. 81-100.

undergone fundamental changes, which find reflection in the corresponding legal framework, sometimes with time delays. In many cases, these reforms reflected domestic political controversies, and the results in turn came into conflict with the international human rights obligations assumed, especially with regard to the 1951 Refugee Convention, the 1950 ECHR, and later the Common European Asylum System of the European Union, which has been under construction since 1999.

Different epochs can be identified:

a) The refugee flows of the war and immediate post-war period

The expulsion of millions of Germans from Central and Eastern Europe at the end of the Second World War and in the immediate post-war period did not lead in Austria to any major rejection of refugees, despite the generally difficult food supply situation. In many cases, Austria was only a transit country - even the Sudeten Germans' past membership in the imperial and royal monarchy[18] was no longer relevant during this period. The displaced people who remained in Austria, on the other hand, were ultimately integrated willingly and quickly, as they provided valuable and, in some cases, highly qualified workers for reconstruction.[19]

b) In the 1950s and the early 1960s, the issue of immigration and asylum law was fundamentally different from that of today: Austria was participating in the Western European "economic miracle" and urgently needed workers. Immigration - understood as temporary - primarily from Southern Europe, and later also from Turkey, was encouraged. Only relatively few political refugees made it across the "Iron Curtain" - and these were welcomed with open arms, also as confirmation of the superiority of the Western democratic and economic model.

c) In 1955, the Geneva Convention on Refugees came into force. In the first years, this Convention was applied directly, "de facto", in Austria. It was not until 1968 that Austria enacted its first asylum law, which contained only rudimentary regulations on the adoption of asy-

[18] See G. Gornig, "Österreich, die Tschechoslowakei und das Schicksal des Sudetenlandes bis heute. Auch ein Beitrag zur Entstehung von Staaten", in G. Gilbert, M. Adrianna A. (eds.), *Der Erste Weltkrieg und seine Folgen für das Zusammenleben der Völker in Mittel- und Ostmitteleuropa*, Teil 2. Staats- und völkerrechtliche Abhandlungen der Studiengruppe für Politik und Völkerrecht, vol. 33, 2019, pp. 89 - 133.

[19] Nevertheless, even this - ultimately successful - process was not without conflict. Thus, politics officially demanded the "quickest possible removal". See Peter Schreiner, Aspekte einer Ablehnung Österreich und die sudetendeutschen Vertriebenen 1945-1948, Thesis, Vienna 2007, https://core.ac.uk/download/pdf/11581828.pdf.

lum decisions.[20] In formal terms, thereby a formal procedure based on the rule of law was created and a "fundamental right to asylum" was introduced.[21] Although his promise remained without concrete consequences, it can also be remarked that this law already expressed the fundamental conflict between authoritarian isolation and human rights solidarity that underlies much of the regulation of migration and asylum law.[22] Nevertheless, asylum and migration law remained easily controllable for Austria in the years that followed, especially since the borders to the East remained closed and Western integration excluded the free movement of workers. The Austrian federal government was at least able to adopt a cyclical stop-and-go policy with regard to economic immigration, while the influx of asylum seekers remained a manageable phenomenon: there were on average no more than 3,000 asylum applications per year.[23] In fact, the Austrian government also managed to significantly reduce the number of foreign guest workers in the period from the outbreak of the oil crisis onward, although at the same time the proportion of foreigners still increased due to family reunifications (especially women from Yugoslavia and Turkey).[24]

d) The large-scale refugee flows resulting from the suppression of the Hungarian national uprising in 1956/1957 and the violent ending of the "Prague Spring" in 1968 confirmed Austria's situation as a "transit country for refugees", even if they came from neighboring countries and even if there were close historical ties to these countries from the time of the imperial and royal monarchy. Of the 180,000 Hungarian refugees, only 20,000 remained in Austria; of the 162,000 Czechs and Slovaks who fled to Austria in 1968, only 12,000 Czechoslovak citizens settled permanently in Austria.[25] The same is true with regard to the 120,000

[20] See G. Muzak, "Das Asylrecht und seine Wechselwirkungen mit dem Aufenthalts-, Fremdenpolizei- und Grenzkontrollrecht", in F. Merli and M. Pöschl (eds.), *Das Asylrecht als Experimentierfeld – Eine Analyse seiner Besonderheiten aus vergleichender Sicht*, 2017, pp. 27-39 (29).

[21] F. Merli, "Das Asylrecht als Experimentierfeld: Einführung", in F. Merli and M. Pöschl (eds.), (note 20), pp. 1-11 (1).

[22] *Ibid.*

[23] See H. Fassmann and U. Reeger, "Austria: From guest worker migration to a country of immigration", *IDEA Working Papers* No. 1, December 2008, p. 15.

[24] *Ibid.*, p. 11.

[25] See Werner Thomas Bauer, Zuwanderung nach Österreich, Österreichische Gesellschaft für Politikberatung und Politikentwicklung – ÖGPP, Januar 2008, p. 8.

Poles who came to Austria in 1981 and 1982 after the suppression of the Solidarnosc movement: the majority of them remained in Austria only for a short time and then emigrated to the USA, Canada or Australia.[26] The reception of refugees thus remained a temporary phenomenon: solidarity had to be shown only for a short time, it had no lasting effects on social reality and especially not on the labor market and on the social security system.[27] On this basis, tightening of asylum law was not necessary and was not even demanded.

e) The situation changed fundamentally with the collapse of the communist regimes in Central and Eastern Europe and the resulting removal of the "Iron Curtain. With the outbreak of the Yugoslav civil war, forced emigration changed from an individual phenomenon to a mass phenomenon; the greater openness of borders also facilitated economic immigration. From this point on, the above-described, at least formal balance of migration and asylum law between sovereignty-emphasizing immigration defense and human rights-based immigration facilitation got lost to the disadvantage of the second component: migration and asylum law now clearly became a restrictive immigration regulator.[28] This was already very clearly expressed in the Asylum Act of 1991, which replaced the Asylum Act of 1986. And the government bill for this new Act made no secret of this fact when it pointed out that the "new geopolitical situation of Austria" had to be taken into account due to the "sudden increase in unsubstantiated asylum applications".[29] Access to the asylum procedure was already restricted in advance: the concept of "third-country security" was introduced[30], a fast track procedure

[26] *Ibid.*

[27] See also G. Biffl, "Migration als Leitthema des Wandel", in P. Bußjäger and C. Gsodam (Eds.), *Migration und Europäische Union: Multi-Level-Governance als Lösungsansatz, NAV*: 2020, pp. 97-125 (119 f.)

[28] This led to a lasting change in attitudes toward immigration from Eastern Europe, often in ignorance of the actual situation and the valuable contribution immigrants make to the domestic labor market. The background was fear of a new "mass migration" from Eastern Europe. See H. Fassmann and R. Münz (ed.), Ost-West-Wanderungen in Europa - Rückblick und Ausblick, Böhlau: Vienna 2000.

[29] See Merli (note 21), p. 2.

[30] See now § 4 para. 2 AslyG 2005:

"Schutz im sicheren Drittstaat besteht, wenn einem Drittstaatsangehörigen in einem Staat, in dem er nicht gemäß § 8 Abs. 1 bedroht ist, ein Verfahren zur Einräumung der Rechtsstellung eines Flüchtlings nach der Genfer Flüchtlingskonvention offen steht oder über einen sonstigen Drittstaat gesichert ist (Asylverfahren), er während dieses Verfah-

was created for "obviously unfounded asylum applications" and the right of temporary residence was restricted.[31] The right of asylum was moved into the sphere of foreigners' police law.[32]

2.3. EU accession and further tightening of asylum law

EU accession in 1995 again created new circumstances that were intended to further facilitate immigration, only to lead - with a certain time delay - to further restrictions. As a member of the EU, Austria suddenly found itself in a situation where immigration could no longer be controlled nationally for large parts of the country: The right of free movement of EU citizens[33] led to a situation in which immigration for work purposes - and beyond[34] - from the EU (and, via the EEA Treaty and the bilateral treaties with Switzerland, from other European countries as well) could hardly be restricted. Additionally, family reunification played a noticeably more important role. Despite the end of active labor recruitment, especially in Turkey and Yugoslavia, in the 1970s, the predominantly male workers who remained in Austria were able to bring their families - especially from Yugoslavia and the former Yugoslavia and Turkey. The application of the EU's extended family reunification rules - influenced also by the case law of the ECtHR - further facilitated this process.[35]

rens in diesem Staat zum Aufenthalt berechtigt ist und er dort Schutz vor Abschiebung in den Herkunftsstaat hat, sofern er in diesem gemäß § 8 Abs. 1 bedroht ist. Dasselbe gilt bei gleichem Schutz vor Zurückweisung, Zurückschiebung oder Abschiebung für Staaten, die in einem Verfahren zur Einräumung der Rechtsstellung eines Flüchtlings nach der Genfer Flüchtlingskonvention bereits eine Entscheidung getroffen haben."

[31] See W. T. Bauer, 2008, p. 6. On the Asylum Act 1991 see in detail J. Rohrböck, Das Aslygesetz 1991, Völkerrechtliche, Verfassungs- und verfahrensrechtliche Probleme, 1994.

[32] See G. Muzak, *Das Asylrecht und seine Wechselwirkungen*, 2017, p. 30.

[33] For more details see P. Hilpold, "Nichtdiskriminierung und Unionsbürgerschaft", in M. Niedobitek (eds.), *Europarecht*, 2020, pp. 805-886.

[34] By way of employment-independent freedom of movement - freedom of movement as the "fifth freedom". *Ibid.*

[35] See R. Münz, P. Zuser and J. Kytir, "Grenzüberschreitende Wanderungen und ausländische Wohnbevölkerung: Struktur und Entwicklung", in H. Fassmann and I. Stacher (eds.), Österreichischer Migrations- und Integrationsbericht. Demographische Entwicklungen – sozio-ökonomische Strukturen – rechtliche Rahmenbedingungen, Vienna 2003 as well H. Fassmann and U. Reeger, (note 23), p. 15.

Among all immigrants, asylum seekers remained the only group whose influx could be controlled, at least to a limited extent. Although the 1951 Geneva Convention on Refugees and the ECHR limited the scope for action also in this field, these international legal rules were seen as less restrictive in practice than those of EU law. It is true that work on a Common European Asylum System has been underway since 1999.[36] However, this system is not only incomplete, but also still characterized by many unclear aspects and shortcomings. Measures against "undesired immigration" could therefore primarily be applied here, and this area thus became the playing field of political competition: In view of growing social cuts, fears of foreign infiltration and increasing difficulties on the labor market for the low-skilled, warnings about "asylum abuse," "economic immigration" and "criminal foreigners" were increasingly heard of.

The origin of refugees changed: until 1999, refugees were predominantly from European countries, but from 1999 onwards, this situation became a different one. From then on applications from Afghanistan, India and Iraq were at the top of the list.[37]

According to the 2001 census, 12.5% of Austria's resident population was born abroad: Austria thus had a higher proportion of foreigners than the United States![38]

The Asylum Act 2005 was characterized on the one hand by efforts to bring Austrian asylum law into line with the relevant Union law,[39] and on the other hand, to bring it even closer to security law and make it more restrictive. After single provisions of the proposed Asylum Act had been strongly criticized, on July 7, 2005, a revised text, without some of these provisions, was adopted by the National Council with a large majority. The fact that ÖVP, BZÖ and SPÖ voted in favor illustrates

[36] See this development process S. Breitenmoser and R. Weyeneth, Europarecht – Unter Einbezug des Verhältnisses Schweiz – EU, Dike: Zurich 2021, pp. 323 ff. and also S. Progin-Theuerkauf, Article 78 TFEU, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, Vol. 2, 7th ed. 2015.

[37] See Werner Thomas Bauer, 2008, p. 7. However, as shown elsewhere, being close to suffering and distress is an essential factor in generating empathy and solidarity. See P. Hilpold, "Schutzverantwortung und humanitäre Intervention in historischer Perspektive", in P. Hilpold (eds.), *Die Schutzverantwortung* (R2P), 2013, pp. 59-122 (100).

[38] *Ibid.*, p. 8.

[39] Particularly worthy of mention are the "reception directive" (RL 2003/9/EG), the "status directive" (RL 2004/83/EG) and the "procedures directive" (RL 2005/85/EG).

the broad political consensus on the need for further restrictions.[40] Time limits were tightened and the rigorous provisions on detention pending deportation and the possibility of deporting traumatized refugees were maintained.[41]

The maximum duration of detention pending deportation was subsequently extended repeatedly: first to 10 months and currently to 18 months. The grounds for detention pending deportation were also extended. It may even be imposed on foreigners who are legally residing in the federal territory if it can be assumed on the basis of certain facts that they could evade the proceedings.[42] It has been pointed out in literature that on this basis detention pending deportation has developed into a form of procedural detention that is in constant conflict with the fundamental right to protection of personal freedom, respect for one's private and family life and the principle of proportionality.[43] Austria has been repeatedly criticised for this by international institutions[44], including in the 2019 report of the Commissioner for Human Rights.[45] Moreover, the legal regulations of police detention apply to detention pending deportation, which is neither designed for the duration of detention pending deportation, nor does it offer the same legal remedies as detention in prison.

In 2008, an Asylum Court was established, which operated until the end of 2013 and took the place of the Independent Federal Asylum Tribunal. In 2014, the Asylum Court was merged into the Federal Administrative Court. The Asylum Court was criticised for excluding the right

[40] See K. Plank, Das österreichische Asylgesetz 2005 – Auf dem Weg in Richtung gemeinsame Asylpolitik, thesis, University of Vienna, 2009, p. 68.

[41] *Ibid.*, p. 70.

[42] § 76 para. 2 cif 4 FPG.

[43] See B. C. Funk and J. Stern, "Die österreichische Einwanderungs- und Asylpolitik: völkerrechtliche, europarechtliche und verfassungsrechtliche Aspekte", in P. Hilpold and C. Perathoner (eds.), *Immigration und Integration*, 2010, pp. 237-259 (238).

[44] *Ibid.*

[45] One of the criticisms was that the "palliative measures", which should be prioritised, are being used less and less. Furthermore, it was pointed out that pregnant and breastfeeding women, victims of torture and trauma, as well as migrants with special physical and psychological needs, LGBTI persons and other vulnerable persons should not be held in detention pending deportation. See "Der Kurier" f. 9.5.2019, https://kurier.at/politik/inland/uno-bericht-oesterreich-verletzt-menschenrechte-im-asylbereich/400489123.

of appeal to the Supreme Administrative Court (VwGH)[46], which considerably restricted legal protection in asylum proceedings. The proceedings were relatively speedy, but their quality came under considerable criticism.[47]

3. The refugee movements of 2015/2016

From 2006 onwards, the situation seemed to improve: One reason was to be found in the fact that the international refugee situation seemed to become less tense. Furthermore, EU integration in particular was supposed to have a positive effect on the asylum and refugee situation in Austria in the following respect: The Dublin system with the procedural responsibility of the first country of entry and the eastward enlargement meant that Austria was only responsible for asylum procedures in exceptional cases.[48] However, this changed with the outbreak of the civil war in Syria from 2011 onwards. From then on, in many cases states at the external borders of the EU no longer had been exercising their responsibilities under Dublin law: The era of "waving through" began. In 2015, the number of applications reached a peak of 88,340. As a result, further tightening of the asylum law was considered and partly implemented.

In 2015, at the height of the refugee crisis, a 5th section "Special provisions for the maintenance of public order and the protection of internal security during the implementation of border controls" was added to the Asylum Act. This section authorised the federal government to determine by decree that the maintenance of public order and the protection of internal security were endangered and, on this basis, to arrange for controls of people on border crossings and to set an "upper limit" with regard to applications for international protection.[49] Although this

[46] Only in the case of a "fundamental decision", when the Asylum Court saw a fundamentally new situation, could the matter be referred to the Supreme Administrative Court.

[47] See S. Schumacher, J. Peyrl and T. Neugschwendtner, *Fremdenrecht*, 2012, p. 254.

[48] See N. Merhaut and V. Stern, "Asylum Policies and Protests in Austria", in S. Rosenberger et al. (eds.), *Protest Movements in Asylum and Deportation*, 2018, pp. 29-47 (36).

[49] Vgl. § 36 AsylG 2005.

regulation - which has never been implemented in practice - has been approved by parts of the Austrian academic community, it clearly violates Austria's international obligations under asylum law.[50]

4. The Current Situation - Developments relevant for practice

In Austria, the current situation has been met with massive criticism. Over years, the (Austrian) Yearbooks on Asylum and Migration Law, for example, have been repeating the same criticism pointing to a confusing legal situation with, in part, contradictory and restrictive case law of the highest courts,[51] unclear rules on refoulement,[52] quality deficiencies and inefficient processes in the administration, insufficient staffing of the Federal Administrative Court, which was not conceived as an asylum court[53] and the general structural challenges associated with such a high number of appeal proceedings, which do not always seem to have been solved in an optimal manner[54].

In 2019, it was decided to establish a "Federal Agency for Care and Support Services" (*Bundesamt für Fremdenwesen und Asyl (BFA)*), formally a limited liability company, which would provide care for foreigners in need of assistance and protection on a central basis, as well as the provision of independent and objective legal counselling, high-quality return counselling and the guarantee of comprehensive translation and interpreting services.[55] In the past, these services had mainly been provided by social welfare associations (especially Caritas, ARGE[56] and the Red Cross) against reimbursement of costs by the federal government. This reform met with massive criticism, as numerous institutional and task-related conflicts of interest were identified.[57]

[50] See P. Hilpold, "Unilateralism in Refugee law - Austria's Quota Approach Under Scrutiny", in: 18 *Human Rights Review* 2017, pp. 305-319, https://link.springer.com/article/10.1007/s12142-017-0463-5.

[51] See, for example, Christian Filzwieser, Asyl- und Fremdenrecht, Jahrbuch 2020, p. 7-12 (8).

[52] *Ibid.*, p. 9.

[53] *Ibid.*, p. 8.

[54] *Ibid.*, p. 8.

[55] BGBl I 2019/53.

[56] Consisting of Diakonie Flüchtlingsdienst and Volkshilfe.

[57] See for example Lukas Gahleitner-Gertz, BBU: Vergiftetes Erbe, Asylkoordination:

The BFA is repeatedly criticised for the high error rate of its decisions - with subsequent annulment by the Federal Administrative Court.[58] While the BFA became known for its high error rate, the court was blamed for the long duration of proceedings and the high number of pending cases. 2021 was the first year in three years in which fewer cases were pending at the Federal Administrative Court than at the BFA.[59] Of course, it must be taken into account that more than twice as many asylum applications were filed in 2021 than in the previous year, yet the reduction in pending cases at the BVwG is significant.

Developments in the area of work permits for asylum seekers were particularly significant. After it became successively more difficult for asylum seekers to take up employment during the procedure since 2004,[60] the decrees responsible for this were repealed in the summer of 2021.[61] This shows once again that there is little political willingness to integrate people in the asylum procedure in the labour market, ultimately requiring the intervention of the Constitutional Court.

"Die Beendigung der gesetzlichen Rechtsberatung durch NGOs war zweifellos die Hauptmotivation für die Verstaatlichung. Die Beziehung zwischen ARGE und BMI war stets konfliktiv. Während die durch Betroffene geäußerte Kritik an der oft mangelhaften Qualität der Beratung des VMÖ nie abriss, fiel die hohe Erfolgsquote der Beschwerden durch die ARGE gegen Bescheide des Bundesamtes für Fremdenwesen und Asyl (BFA) auf […]". https://asyl.at/support/info/news/bundesagenturfuerbetreuungs-ununterstuetzungsleistungen/ (5.3.2021). In the text Lukas Gahleitner-Gertz explains that it was probably a political motivation to change from social welfare organisations to BBU, because of the high success rate, in particular of ARGE. Not only in substantive complaint procedures but also in proceedings against detention pending deportation.

At the end of 2022 is has become known that the Austrian Constitutional Court is examining the constitutional conformity of the BFA. For a first commentary on this proceeding (still ongoing at the moment of writing) see Reyhani, Adel-Naim: *Das Ende verstaatlichter Asylrechtsberatung in Österreich?, VerfBlog,* 2022/12/23, https://verfassungsblog.de/das-ende-verstaatlichter-asylrechtsberatung-in-osterreich/, DOI: 10.17176/20221223-121654-0.

[58] See C. Lahner, Die absurd hohe Fehlerquote des Amtes für Fremdenwesen und Asyl, in Der Standard, 10.12.2020, https://www.derstandard.at/story/2000122205034/die-absurd-hohe-fehlerquote-desbundesamts-fuer-fremdenwesen-und-asyl(28.2.2021).

[59] For example: 2021 19,529 cases pending at the BFA; 8,351 pending before the court; 2020 it have been 5,853 cases at the BFA and 14,886 cases before the court; BMI, Asyl-Statistik 2021, https://www.bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Jahresstatistik_2021_v2.pdf.

[60] Introduction of the EU Enlargement Adjustment Act and the implementing decree of Labour Minister Bartenstein.

[61] VfGH 23.06.2021, V 95-96/2021 and VfGH 25.06.2021, E 2420/2020.

For a long time, Austria took a very restrictive stance against asylum applications by refugees from Afghanistan. Until the takeover of Kabul by the Taliban, applications were rejected and deportations were still carried out until shortly before the fall of Kabul.[62] In 2021 alone, about 35% of the cases were rejected, in the year before it had even been 43%; in comparison, only 5% (2021) and 9% (2020) of applications by asylum seekers with Syrian nationality were decided in the negative.[63] Particularly serious is the fact that in the months and years before the Taliban takeover, a strict denial policy was in place and many lost their subsidiary protection due to a "positive" change in the safety situation in Afghanistan. Austria has the second largest Afghan community per 100,000 inhabitants in the EU,[64] yet one gets the impression that refugees from Afghanistan are not particularly welcome.[65]

5. The Interplay between Communitarianism and Cosmopolitanism

Internationally, the Austrian government is making its mark by speaking out in favour of a more rigid admission policy, and in doing so it is definitely striking the predominant tone in Europe and also internationally. The rejection of the UN Global Compact for Migration in 2018 has earned Austria much criticism. However, the legal justification that this pact cannot simply be dismissed as "soft law", but is quite suitable in the long term to create "hard law" obligations, cannot simply be di-

[62] See a blog about deportation from Austria: https://deportationwatch.noblogs.org/charterfluge-2021/.

[63] BFA Statistics from 2020 and 2021, for details see https://www.bmi.gv.at/301/Statistiken/.

[64] See P. Stöckl, 26.08.2021, https://zur-sache.at/europa-aussenpolitik/vergleich-beweist-oesterreich-hat-bereits-zweitgroesste-afghanen-community-europas/.

[65] In particular, the current Federal Chancellor and former Minister of the Interior has spoken out against the admission of refugees from Afghanistan, saying that they are particularly prone to delinquency. See https://www.dw.com/de/wenig-aufnahmebereitschaft-f%C3%BCr-afghanistan-fl%C3%BCchtlinge/a-58900262; https://www.rnd.de/politik/oesterreich-keine-fluechtlinge-aus-afghanistan-straffaellige-asylbewerber-TUM4EQ5SBWTDJI3DEEY35Y74CY.html.

On the developments in Afghanistan see recently P. Hilpold, The Responsibility to Rebuild, Transitional Justice, and Afghanistan: A Debacle as a Consequence of the Denial of Ownership, in: 21 Chinese Journal of International Law 2022, pp. 411-437.

smissed dogmatically as misguided, but has substance.[66] The EU Commission's current proposal for a "migration pact", which has probably turned out disappointing for many, basically only gives expression to a general attitude in Europe and far beyond, according to which the willingness of states to accept immigrants is declining and broad sections of the population are in favour of a more restrictive immigration policy.[67]

As shown before, Austria's Asylum and Migration Law has numerous shortcomings and problematic legal aspects. As stated in a very solid study in 2010, Austria's immigration and asylum policy places prohibitive and restrictive budgetary interests above humanitarian objectives.[68] In some cases, legally unjustifiable restriction options have even been approved by experts.[69] As far as these tendencies are concerned, the Austrian situation is in many regards only in line with Europe-wide, international developments, which are currently giving refugees and asylum seekers a hard time. Refugee movements are increasing, but the willingness of wealthy countries to accept refugees is decreasing. At the same time, the attitude of broad sections of the population that rejects further immigration cannot be dismissed as cold-blooded egoism or xenophobia.[70] The low-skilled social classes in particular are not entirely

[66] See P. Hilpold, "Opening up a new chapter of law-making in international law: The 2018 Global compacts on Migration and Refugees", in: 27 *European Law Journal* 1/2021, pp. 1-20, Link: eulj.12376?af=R.

[67] See for further discussion the informative contribution from Constantin Hruschka, Verwaltungsmonster zur Abwehr von Flüchtlingen, LTO, 4.5.2018, https://www.lto.de/recht/hintergruende/h/plaene-reform-gemeinsames-europaeisches-asylsystem-verteilung-sichere-herkunftslaender-fluechtlinge/.

[68] See B.C. Funk and J. Stern (note 43).

[69] Thus with regard to a possible "quota system" for refugees - while neither the Geneva Refugee Convention nor the CEAS allow for such restrictions. See in detail P. Hilpold, "Quotas as an Instrument of Burden-Sharing in International Refugee Law – The Many Facets of an Instrument Still in the Making", *International Journal of Constitutional Law* 15, 2017, 4/2017, pp. 1188–1205 and ders., Unilateralism in Refugee law—Austria's Quota Approach Under Scrutiny", *Human Rights Review* 18, 2017, pp. 305-319, https://link.springer.com/article/10.1007/s12142-017-0463-5; Ders., Die Genfer Flüchtlingskonvention 1951 – Reformbedarf angesichts der Flüchtlingskrise?, in: 14 Migralex 1/2016, pp. 2-7.

The incompatibility of quota regulations with the current system of refugee and asylum law is very clearly elaborated by S. Breitenmoser, "Migrationssteuerung im Mehrebenensystem", *VVDS*, vol. 56, 2017, pp. 9-48 (39).

[70] See as well C. Gsodam, "Migration und Europäische Union: Multi-Level-

unjustified in their fear of keener competition in the labour market; the socially disadvantaged are afraid of tougher competition for limited social benefits. The political parties react accordingly in the struggle for votes. "Conservative" groupings that want to pursue a restrictive admission policy are on the rise on this basis.[71] This problem is further intensified by the fact that European states are unequally burdened. The system of the Refugee Convention and also the CEAS have remained incomplete in the sense that these regulations do not provide for a redistribution mechanism and, as a consequence, the states at the external borders of the EU are no longer willing to accept the excessive burden due to the first country of entry principle. If the enormous civilisational progress achieved by the Geneva Refugee Convention is to be saved, efforts will have to be made to activate genuine procedures and mechanisms of international solidarity, and to do so on a universal level. As has now been very clearly pointed out in the leading international legal literature, the deficits in international refugee law are also due to the fact that it has been overlooked that the population in the host countries also has rights which they are entitled to defend.[72] If Austria is internationally criticised for its strict position, it must be taken into account that in the meantime a number of European states have adopted a similar policy. Therefore, there is the danger that although formally very generously formulated regulations are upheld, they are de facto not observed or deliberately counteracted. Hopes are created that cannot be fulfilled - with a wide gap between formal promises and their actual fulfilment. Ultimately, this also reduces trust in international regulatory systems as a whole.

The migration debate in Europe[73] – and on a smaller scale in Austria - is ultimately an expression of a much broader discussion that finds its expression on a higher level of abstraction in the dispute between com-

Governance als Lösungsansatz – Einführung", in P. Bußjäger/C. Gsodam (eds.), *Migration und Europäische Union: Multi-Level-Governance als Lösungsansatz* 2020, pp. 3-45.

[71] See O. Gruber, *Campaigning in radical right heartland. The politicization of immigration and ethnic relations in Austrian general elections 1971-2013*, Vienna, 2014. This development, described by Gruber 2014 as rather isolated and related to Austria and Switzerland, has now taken on a much broader dimension.

[72] See for this S. Singh Juss (eds.), *Research Handbook on International Refugee Law Preview*, Edward Elgar: Cheltenham 2019.

[73] See extensively S. Breitenmoser, loc. cit. (note 69)

munitarian and cosmopolitan positions. This dispute may be more familiar in the academic environment, but it nevertheless reflects real conflicts quite well. While representatives of cosmopolitan approaches aim for a "world society" in which state borders no longer exist and deny the right of states to carry out border controls,[74] supporters of the communitarian position believe that human dignity can best be defended within sovereign states, which also implies the continued existence of borders.[75]

More intense universal efforts - including the introduction of comprehensive solidarity mechanisms[76] - will be needed to reduce fears at the national level and to be able to effectively take into account the concern for protection that was so visionarily formulated in 1951 in the International Refugee Convention and to which, in the sense of the great progress in civilisation that is connected with it,[77] it is absolutely necessary to adhere.[78]

6. Conclusion

Overall, it can be said that Austria's position on questions of migration and asylum law in recent years has been characterized by numerous

[74] See for example J. Caren, *The Ethics of Immigration*, New York 2013, p. 10 and chapter 11.

[75] See J. Rawls, "The Law of People, 1999 or Michael Ignatieff, The Return of Sovereignty", *The New Republic*, 16. Februar 2012, p. 28. From an economic perspective P. Collier, *Exodus: How Migration Is Changing Our World*, 2013, p. 61. These positions are described in detail in the contribution by Mark R. Amstutz, "Political Theory, Christianity, and Immigration: The Role of Cosmopolitanism and Communitarism", in S. Mückl (eds.), *Migration und Solidarität – Migration and Solidarity*, 2020, pp. 11-24.

[76] See for that thematic P. Hilpold, "Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union", *Yearbook of European Law* 34, 2015, pp. 257-285.

[77] See as well G. Gornig, "Refugees, including UNHCR", in W. Rüdiger (ed.), United Nations: Law, Policies and Practice, 1995, pp. 1025-1039. See idem, "Das ´non-refoulement´-Prinzip, ein Menschenrecht ´in statu nascendi´. Also a contribution to Art. 3 Torture Convention, *Europäische Grundrechte-Zeitschrift* (EuGRZ) 18, 1986, pp. 521-529.

[78] See also the apt comment by Z. Bauman: "I don´t believe there is a shortcut solution to the current refugee problem. Humanity is in crisis – and there is no exit from that crisis other than the solidarity of humans". See Z. Bauman, "The refugee crisis is humanity´s crisis", *New York Times* f. 2.5.2016, cited after Jason Hart, "Humanitarianism in principle and practice", in E. Carmel et al. (eds.), *Handbook on the Governance and Politics of Migration*, 2021, pp. 98-109 (107).

positions that should be questioned and that have also led to considerable international criticism.[79] At the same time, it would be wrong to reprimand primarily Austria, because in many respects these positions also reflect the complexity and ambivalence of the underlying problems. They are also a reflection of the fact that the European Union itself has not yet found a convincing and, above all, unified position on this issue. Valuable suggestions for the re-drafting of migration and asylum law or for the re-thinking of established positions in this area repeatedly also come from Austria.[80] The final report presented in July 2021 by the Child Welfare Commission established in spring 2021 under the chairmanship of Irmgard Griss was critical, but contains many suggestions - especially in the area of asylum and Migration Law - some of which have already been implemented and have also set international standards. However, the Ministry of the Interior in their own report on child welfare shows a different picture of the situation than the Child Welfare Commission.[81]

The number of applications for international protection is again rising rapidly[82]; the events in Afghanistan[83] and Ukraine are the main reasons for this, but they are not the only ones.[84] It is increasingly obvious that solutions to these challenges require the acceptance of global responsibility while taking into account the interests of one's own population. This difficult balancing act must be attempted nationally and demanded internationally.

[79] See recently, the well-documented contribution by M. Ammer and L. Kirchmair, "The Restriction of Refugee Rights during the ÖVP-FPÖ Coalition 2017-2019 in Austria", in V. Stoyanova and S. Smet (eds.), Consequences, Legacy and Potential for Future Resilience against Populism, 2022.

[80] See recently the report of K. Stephanie, "Safe third countries for asylumseekers", European Council, Parliamentary Assembly, Doc. 15592 f. 7. Juli 2022.

[81] See B. Irene, "Kindeswohl in Asylverfahren: Kampf der Berichte", 13.07.2021, https://www.derstandard.at/story/2000128168191/kindeswohl-in-asylverfahren-kampf-der-berichte.

[82] See Filzwieser, Christian/Kasper, Lioba, Analyse der (rechtlichen) Entwicklungen im österreichischen Asyl- und Fremdenwesen von Mitte 2021 bis Mai 2022, in: Asyl-und Fremdenrecht – Jahrbuch 22, NWV, 2022, pp. 7-22 (7).

[83] See P. Hilpold, "The Responsibility to Rebuild, Transitional Justice, and Afghanistan – A debacle as a consequence of the denial of ownership" (forthcoming).

[84] For instance, consider the climate crisis, which is also leading to further international movements.

THE EVOLUTION OF POLICIES AND A NEW PHASE OF CLOSURE AND CONTROL FOR MIGRANTS IN FRANCE

FRANÇOIS FÉRAL*

1. Introduction

I would like to take advantage of my statute as a "non-specialist" in the law of immigration to deepen the intervention of Professor Hathaway in yesterday: he showed us that our legal idealism is today the best way to support political realism! It seems to me that the question of the legal framework for refugees is a perfect illustration of the dialectical approach to the law by the social production of the rule of law. There are socio-historical conditions that generate this situation and, in comparison with the state of opinion and socio-political balances of the post-war period, law appears to us as "an abstraction", an intellectual construction whose content depends on social forces. The whole of "natural law", that seemed universal during the postwar, appears today as an ideal construction and this is what may explain our pessimism with regard to the difficulties of asylum and immigration. In this disenchanted context France has special issues with its borders and has also ambiguous representation of foreign peoples in relation with its history.

In the UE context, France illustrating the difficulties of the governments in front of the scrape of xenophobia in public opinion, we can highlight these new legal policies; it's a new organization of the reception and control of migrants from outside the European Union; it's also the codification of the immigration and asylum status and new laws.

2. Borders issues in France

France's geography and history are the foundation of its postures towards the question of its borders and foreigners, as well as the law that this country applies to them. The context of the European Union has

* Emeritus Professor, Université de Perpignan *Via Domitia,* and Honorarium Director Studies, Ecole Pratique des Hautes Etudes.

made this question more complex in a poisonous atmosphere of xenophobia and in a dangerous international environment.

2.1. Foreigners and colonial France's history: principles of openness and xenophobic practices

Because of its history and its socio-political posture, France maintains ambiguous policies and discourses with regard to immigration and contradictory action to the population victims of the wars of the Middle Orient or sub-Saharan crises. This is the origin of important population's flows in relation to French colonial history (especially coming from Africa Francophony, Maghreb sub-Saharan Africa) and overseas France. But also, appears the question of the extent of these flows coming from France to these same countries. It's specially to do business and maintain France's influence.

2.1.1. The tradition of foreigners' hospitality established by French Revolution

During French Revolution was established the principle of "*open door nationality*" to foreigners Revolution's friends.

In 1791, the first constitution article 4

> "*Any man born and domiciled in France, aged twenty-one years; - Any foreigner aged twenty-one years who, having been domiciled in France for one year - lives there from work - Or acquires property - Or marries a French woman - Or adopts a child - Or feeds an old man; - Finally, any foreigner who will be judged by the Legislative Body to have well deserved humanity - Is admitted to the exercise of the Rights of French citizen*".[1]

Other example is written in the 120th article in 1793 Constitution: *"[France] gives asylum to foreigners banished from their homeland for the cause of freedom. (...)) He refuses it to tyrants"*.[2]

[1] Cf. https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-de-1791.

[2] Cf. https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-du-24-juin-1793.

The constitution of 5 fructidor Year III (22 august 1795) in its articles 8 to 10 preserves the same liberal principles of naturalization and integration of foreigners and confers them the citizenship. The principles of *total equality of individuals* without distinction of nationality, race or religion

And the first law on abolition of slavery (the emblematic fight of deputy l'Abbé Grégoire).

By opposition to" *law of the blood"* to define the nationality, the Revolution establishes the *"Law of the soil",* which is still quasi constitutional principle today. It's a marvelous principle… with vicious implementations.

2.1.2. France has regular outbreaks of xenophobia

At the same time the nobility opposed to the Revolution was persecuted and the "emigrants" who led to the European monarchies were stigmatized. The so-called "Terror" period illustrates this double attitude. Thus also the reestablishment of slavery by Napoleon, colonization and indigenous status during the 19° century, restrictions and xenophobia in 1930 and 1938 before the Second World War are in contradiction with the principles of Revolution.

During 1880/90, xenophobia against people coming from southern and eastern Europe, social racism against poor workers (Italians, Belgians, Germans, and Spaniards), sometimes professional sectors (road workers, miners, metallurgists...) or sometimes even "ethnic" groups or perceived as such (the anti-Gypsies xenophobia).[3]

In 1931 economic crisis and colonial exposure rise of xenophobia, then anti-Semitism and anti-Polish (flow of persecuted people by Nazi Reich coming from the East Europe), where developed by nationalist ideology and French public opinion.

2.2. France at the Crossroads in Europe

Now included in the borders of the European Union, France no longer has control over immigration flows. A significant part of his

[3] Cf, L. Dornel, "*La France hostile. Histoire de la xénophobie en France au XIX^e siècle*, Thèse de doctorat en histoire", *Revue d'histoire du XIXe siècle* [En ligne], 24 | 2002, mis en ligne le 28 juin 2005, consulté le 25 juillet 2022. URL: http://journals.openedition.org/rh19/405; DOI: https://doi.org/10.4000/rh19.405

opinion develops an anti-European resentment in relation to a strong anti-Muslim xenophobia. The European Union is seen as responsible for the difficulties of the fight against Islamic terrorism.

2.2.1. France in its European borders

France appears as one of the main crossroads of European migration. It's a Europe's maritime borders in a part of Atlantic Ocean and Mediterranean Sea. It is in second line of immigration flows in Europe: Italy, Spain, Northern and Eastern Europe and an UE's Carrefour migrations through the country. France is also main border with the United Kingdom under particulate conditions.

The flow of migrant populations driven by the wars and unrest in the Maghreb and the Middle East, the economic crises in Sahel are shaking up the principles of free movement internal to the European Union. Demands for the re-establishment of borders are supported by a large part of public opinion and an important part of the political class.

2.2.2. A new page of xenophobia today

A new page of xenophobia is opened today in a new international context. This crisis pits economic and political elites against a large part of public opinion. The establishment is more open to globalization and the free movement of people while populist movements have a strong resentment of identity and "emissary goat".

In connection with political crisis in Algeria, the Islamist attacks of the mid-90s marked the beginning of the anti-Muslim xenophobia in France. This crisis was aggravated by the Islamic attacks in Toulouse 2012, Paris 2015 and 2016, Nice 14th July 2016… and regular other attacks in the country.[4]

Today there is growth of Islamophobia with a particular attention to African origin immigrants and their families. It's a double feeling of fear and rejection of otherness because these immigrants are perceived as a threat to the native French identity, dangerous for security and in-

[4] Since 2012 attacks claiming to be Islamic in France have left 280 dead and 1200 wounded but the first attacks were perpetrated as the early 1990s https://www.dgsi.interieur.gouv.fr/la-dgsi-a-vos-cotes/lutte-contre-terrorisme/sinformer/letat-de-la-menace-terroriste-en-france.

fringing on social rights in competition with French workers and accepting cuts in wages and working conditions.[5]

Unfortunately, this xenophobic sentiment is co-opted by the largest part of the political class for electoral reasons and this representation of the migration issue is only growing in public opinion in France.

3. The xenophobic evolution of the legal framework for asylum and immigration

As we indicated in the introduction, the circumstantial legal framework is a good indicator of moral and societal crises. The evolution of asylum administration and legislation reflects our distress. New laws and the strengthening of the French administrative apparatus illustrate these xenophobic tensions that have been manifesting themselves since the beginning of the century. The strengthening administrative means of reception and control of migrants' codification work and the content of laws in this area deserve to be exposed to illustrate this evolution.

They are also expressed in the political field with electoral nationalism. France's conceptions of hospitality have been shaken up on the occasion of the Islamic attacks beginning in 1990s. Border tensions have opposed France to UK during the management of "Jungle in Calais".

Similarly, media interventions on the border of Spanish Catalonia, in the presence of the President of the Republic, showed the difference between practices and discourse.

3.1. The evolution of French administrative apparatus of refugee flows

The recent evolution of the international migration and the new scale of immigration and asylum applications have transformed the administrative apparatus and the legal framework for the reception of migrant populations. We observe the reinforcement as well as the change in the nature of the migrants' administration and jurisdiction.

[5] Cf Developments in theories of demographic replacement of populations of Christian origin:, R. Camus "Le grand remplacement" La Nouvelle Librairie Paris 2021 and the the threat of the muslim invasion of african and middle eastern origin: J.Y Le Gallou «L'invasion de l'Europe» Via Romana Paris 2020.

The codification of numerous texts that regularly thicken the status of migrants and asylum seekers and of the many adaptation options for measures to manage migrant flows is taking place in the context of the police administration and the Ministry of the Interior taking charge of this issue.

3.1.1. OFPRA, an administrative establishment in charge of application of Geneva Convention

OFPRA (Office for the Protection of Refugees and Stateless Persons) is a *public administrative establishment* created by the law of 25 July 1952 which is in charge of the application of the Geneva Convention of 28 July 1951. It *decides* on applications for asylum and statelessness submitted to it.

The National Court of Asylum, which is competent to hear decisions on asylum applications, is a specialized *administrative court* ruling at first and last instance on appeals against decisions of the French Office for the Protection of Refugees and Stateless Persons (OFPRA).

L'OFPRA was initially placed under the administrative supervision of the Ministry of Foreign Affairs until 2007. This public institution then comprised two entities: an administrative entity, OFPRA and a "judicial entity", the Refugee Appeals Commission (CRR).

Since 2010, OFPRA has been under the supervision of the Ministry of the Interior. In theory, it's only a financial and administrative supervision and this supervision would not influence the Office's independence: "*The Office shall carry out its tasks impartially (...) and does not receive, in their performance, any instruction*".[6] But this supervision is accompanied by a "contract of objectives and performance" (COP) due to the size of the number of asylum applications and the processing times. During the period of instruction, the asylum seeker can remain on the territory but with infernal social constraints. But this administrative framework influences efficiency in the processing of applicants' files. Some NGO lawyers speak of *"expeditious decisions*" and botched examinations of applications.

The several OFPRA's missions[7]

- A mission *to investigate applications* for international protec-

[6] CF. article 7 of Law 2015-925 of 29 July 2015 (Article L. 721-2 of CESEDA,).

[7] Cf. https://www.ofpra.gouv.fr/fr/l-ofpra/nos-publications/rapports-d-activite.

tion on the basis of the Geneva Conventions of 28 July 1951 and the New York Convention of 28 September 1954 and CESEDA.

- A mission *of legal and administrative protection* with regard to statutory refugees, statutory stateless persons and beneficiaries of subsidiary protection.
- An *advisory mission* in the context of the asylum procedure at the border. It delivers an opinion to the Minister of the Interior on the manifestly founded or unfounded nature of an application for authorization to enter French territory on the basis of asylum.

The OFPRA's administrative decisions

The Director General of OFPRA *by a unilateral administrative act* grants or refuses the refugee status to the applicant after instruction by his services.

He took more than 110,000 asylum applications in 2019.

In 2020, 89,774 decisions that was taken by OFPRA on asylum applications in instance down 25.6% because Covid19.

3.1.2. The CNDA: a specialized administrative jurisdiction[8]

Evolution of the jurisdictional frame of OFPRA's decisions

The *Refugee Appeals Commission* held its first meeting on 30 July 1953. Until 1979, its activity remained stable, with the average number of decisions rendered approaching 300 per year. From the 80s, with the multiplication of conflicts in the world and the tightening of immigration conditions, the number of cases registered before the commission increased considerably to 16,515 cases in 1989… 46 000 in 2021. The first administrative court specialized in the number of cases tried, this court, which has become the National Court of Asylum, has been attached to the Council of State for its management since 1 January 2009.

CNDA's missions

Its job is to examine appeals against the deposition of refusal of protection of the Director General of OFPRA. This court, placed under the cassation control of the Council of State, has national jurisdiction; it is a court of full litigation, recognized by the Council of State since its decision Aldana Barrena of 8 January 1982.[9]

This means that the asylum judge does not confine himself to *annulling the decision taken by the Director General* of OFPRA but *substi-*

[8] Cf. http://www.cnda.fr/La-CNDA/Donnees-chiffrees-et-bilans.

[9] Cf. https://www.revuegeneraledudroit.eu/blog/decisions/conseil-detat-section-8-janvier-1982-aldana-barrena-requete-numero-24948-publie-au-recueil/.

tutes his own decision for the latter by ruling himself on the applicant's right to refugee status or subsidiary protection.

CNDA's activity in 2021

Cases and decisions 46,043 new cases; 42,025 decisions; 4,137 hearings; 10,254 protection orders of which 60% recognize as refugees and 40% granting subsidiary protection;

Protection rate: 24.4% Average time observed 8 months and 8 days.

Actual means: 27 magistrates, 617 agents; 432 asylum judges "assistant" (without titular status) 580 interpreters 160 languages spoken.

3.1.3. Code on the Entry and Residence of Foreigners and the Right of Asylum (CESEDA)

The immigration laws codification was instituted by the Ordinance[10] of 24 November 2004 incorporating in particular the provisions of the Ordinance of 2 November 1945 relating to *"the conditions of entry and residence of foreigners in France*" as well as the provisions of the Law of 25 July 1952 on the asylum rights. It entered into force on 1 March 2005. The regulatory part is published on 15 November 2006.

Why codification? What is the scope of this legislative work?

The codification under constant law constitutes a break in the texts, but not in the positive law. The previous texts are expressly repealed but their content is included in the code, with the exception of obsolete texts (which had been repealed only implicitly) so that positive law remains: this is the current French practice[11]

Under the pressure of xenophobic opinion, a huge work of re-codification was carried out at the initiative of President Macron. It is by ordinance, and not by law that this grooming of the code was carried out to achieve the "Code of entry and residence of foreigners and the right of asylum (CESEDA)[12] by Ordinance No. 2020-1733 of 16 December 2020 Entry into force of the new code on May 1, 2021.

Codification consists in the hierarchical organization of legal texts

[10] The ordinances are acts taken by the government in the field of parliamentary law with the authorization of parliament; in this case it was on the initiative of Prime Minister Dominique de Villepin.

[11] Cf. https://www.savoir-juridique.com/limportance-de-la-codification-dans-le-droit-francais/.

[12] Code d'Entrée et de Séjour des Etranger et des Demandeurs d'Asile https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070158/.

relating to a political or social field and a presentation by numbered articles divided by themes;

This definition gives strength to the idea of a functional work, allowing the updating of texts and their practical access for citizens[13] … In reality, codification expresses the cross-cutting complexity of legal regimes, their hyper specialization and their incessant changes.

In addition, codification accompanies the unstable and regulatory production of the administrative power of the Ministry of the Interior.

Today this code is a document of 700 articles of legislative value (laws and ordinances) and 850 regulatory articles taken directly by the government.

3.2. Two new emblematic laws and multiplication of migration crises at the France's borders

The criminalization of migrants in two recent texts illustrates the xenophobic evolution of France in its realizations with the populations of the countries of the South or countries at war. Despite these numerous texts and the strengthening of the administrative apparatus, migration crises have multiplied in recent years. They have degraded our relations with our European neighbours and with our partners in the South and the Middle East.

3.2.1. Two new emblematic French laws of this historical and political breeding ground, mixed with xenophobic rises

a. An integrationist conception of the migrant

In relation to the conception of citizenship and legal personality in France: Law No. 2006-911 of 24 July 2006 on Immigration and Integration, and the decision of Constitutional Council in 2006 Validation of law about "immigration and integrations" [14]

"Family reunification may be refused when the applicant does not respect the "fundamental principles recognized by the laws of the Republic". This expression must be understood as referring to the principles which govern a "normal family life in France": "*monogamy, equality of men and women, respect for the physical integrity of children*

[13] Cf. https://www.vie-publique.fr/fiches/38055-quest-ce-que-la-codification-des-lois.
[14] Cf. https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000266495/.

and adolescents, respect for the freedom of marriage, school attendance, respect for ethnic and religious difference, and acceptance of the rule that France is a secular Republic".

So, as provided in article 47, the residence permit issued to the spouse, on the basis of family reunification, may be withdrawn in the event of a breakdown of cohabitation within three years of its issue. This special familial statute is an important difficulty for French secularism in front of the discrimination, equality and human rights.

b. An administrative apparatus to contrary the immigrates rights including the asylum rights

My Lyon III colleague presented yesterday the content of law No. 2018-778 September 10, 2018: "*Controlled Immigration*, *Effective Right of Asylum* and *Successful Integration*"[15]. I would like to give a rapid commentary on the form of this text and its socio-political significance.

My first point (that has already been made here) is the *criminalization* of immigrants. If being in an irregular situation is not an offence, many or obligations put the migrant in a situation where he becomes an offender. The criminalization of the migrants is illustrated in articles 20 to 27 or articles 35 to 61.

My second remark is to highlight the *dehumanized vocabulary* of these new texts, produced by the administrative technocracy that recalls the management of people during the crises of the Roaring Twenties. The evolution of the legal content is in relation with the words used in this sector: flow, waves, stocks, sorting…

A third point is related to the "talent people immigration", "chosen immigration" "the good choice" for immigration. For the first time appears in French law a *utilitarian conception* of immigration and therefore discrimination against people on the basis of their qualification, level of education and social class or human condition.

3.2.2. Crisis on UK, Italian and Spain borders… and overseas

To accompany this more severe legislative production for asylum, immigration and residence of foreigners, communication operations are organized by the executive power.

[15] Cf. https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037381808/.

Indicating the will to control the illegal immigration coming from Spain, the President of the Republic himself came to accompany a closing operation of a Pyrenean road open for decades with Catalan Spain. The measure infuriates the Catalan inhabitants on both sides of the border, forced to make a detour of several dozen kilometers[16].

At the Italian border, the cooperation between the French and Italian Polices is shown to be a great bureaucratic success, beyond the control of a judge of freedoms.[17] However during several months President Macron and the Italian Interior Minister exchanged invective and threats; it was because of a very repressive French stance towards migrants from the southern and eastern Mediterranean.[18] France organizes their systematic "push back" to Italy because of a very repressive stance towards migrants and their brutal return to Italy.[19]

It is probably in city of Calais, in the frame of the *Le Touquet* agreements with the United Kingdom,[20] where the unease is most perceptible. Within the framework of these agreements, the British border is moved to the continent and it is up to the French administration and courts to manage migration flows to England. The treaty amounts to moving the British border to the point of embarkation for potential refugees. In the "Calais Jungle", a lawless space has become encysted for several thousand illegal migrants. A village of tents and precarious housing is being reconstituted despite regular destruction by the borders

[16] « Le chef de l'État se rend ce jeudi au col du Perthus, dans les Pyrénées-Orientales, à quelques kilomètres de la frontière espagnole. L'Espagne est l'une des principales portes d'entrée des immigrés clandestins en France. » Le Figaro 05/11/2020.

[17] A. Mottot « La France et l'Italie ont créé une unité de police pour gagner en efficacité dans la surveillance des frontières. Face à la forte hausse du nombre de migrants illégaux et à l'impunité des passeurs, cette brigade peut intervenir de chaque côté de la frontière et obtient des résultats prometteurs » France bleue Azur 16/09/21.

[18]« Matteo Salvini, ministre de l'Intérieur italien, a exigé des réponses des autorités françaises après que des gendarmes français ont reconduit sur le territoire italien des migrants. Les autorités françaises parlent d'un « incident » mais le gouvernement italien y voit une façon de faire de l'Italie le « camp de réfugiés de l'Europe » Ouest France 15/10/2018.

[19] Ch. Celinain « ... le gouvernement par le biais de la Police aux frontières continue de fermer les yeux sur les contrôles suivis de détentions de migrants, puis de renvois de ces derniers en Italie sans leur accorder la possibilité de demander l'asile » Le courrier de l'Atlas 27/06/2017.

[20] The treaty between France and UK was signed on February 4, 2003 at the 25th Franco-British summit in French city *Le Touquet*. European Union is not concerned by this agreement.

Police. On this occasion, violence and violations of people's rights have increased. The interior Minister and the prefecture are in charge of these problems out of civil court's supervision. Migrant aid associations denounce the administration powerful: destruction of property, forced displacements and sometimes physical violence.[21]

Finally, my attention was drawn by the immigration situation in Mayotte treated in the articles 16 to 17 of the law September 10, 2018. This island of the Comoros was not attached to the Comorian federation in the seventies and it poses inextricable problems of flows coming from the three others sisters' islands. On this dust of the French Colonial Empire, the right of the soil was questioned because of the reception of many Comorian women who came to give birth in the health services of Mayotte. However, this crisis is not in relation with war or Islamic terrorism: it's a legal imbroglio for a French non-decolonized space.

4. Conclusion

France addresses the problem of its xenophobia through its powerful bureaucracy and its unilateral administrative law. At support of new French policies, the recent laws develop the administrative apparatus and French public rule of law. Most of the time, the civil judge is out of the ordinary procedures accompanying immigration and the person' rights is only weakly the responsibility of this judicial judge. It's through the *"administrative contentious act*" that the migrant issue is discussed and processed.

But above all, immigration has become a major theme in the politic debate dividing the public opinion very deeply. It aggravates the tensions between the different communities settled for decades on the territory. It is not certain that more repressive laws and more powerful administrations will solve the question of identity and security crossing my country.

Fortunately, in contrast to this xenophobic evolution of the laws relating to immigration, a decision of the Constitutional Council excludes the application of the criminal law to people helping migrants in danger. Constitutional Council considers that the criminal law that punishes assistance to the entry and residence of foreigners cannot apply to persons

[21] Cf. M. Agier (ed.) and al. *La jungle de Calais* PUF Paris 2018.

who have not for profit provided assistance to persons in danger or insecurity. As the basis of this criminal exemption the most important is the use for the first time of the constitutional principle of *"fraternity*" enshrined in the constitution.[22]

[22] JORF n°0155 du 7 juillet 2018, texte n° 107 ECLI: FR: CC: 2018: 2018.717.QPC *Fraternité.*

THE FRENCH ASYLUM AND IMMIGRATION ACT 10 SEPTEMBER 2018: A WAY BACKWARDS

KIARA NERI*

1. The adoption of the 2018 Act

The 2018 Act is the 28th Act of Parliament on Immigration, since 1980 and the 4th legislative reform since 2015. Migration matters are no exception to the general legislative inflation and crystallise a lot of tensions. Consulted by the government on the draft Act, the *Conseil d'État* suggested that it would be better to apply and assess the previous Acts before adopting another one.[1] The objectives of the Act are mainly to reinforce a "chosen" migration, grant a better protection to persons in a situation of extreme vulnerability, reduce the length of asylum proceedings and fight against irregular migration.

The Act has been much criticised, not only by NGOs but also by public institutions. For instance, the *Défendeur des droits* (Ombudsman) considers that France went along a "circle of irrationality" as regards immigration and asylum and that the bill "treats asylum seekers badly".[2] Similar reservations were formulated by the Commissioner for Human Rights of the Council of Europe.[3]

Besides, the adoption of the Act itself was difficult, due to the resistance of the Senate.[4] The Upper house of the French Parliament described the text as technical, incomplete and without ambition.[5]

* Université Jean Moulin Lyon 3.

[1] Conseil d'État, *Advisory Opinion*, n° 394.206, 15 February 2018.

[2] Défenseur des droits, Avis n°18-09, *Projet de loi pour une immigration maîtrisée et un droit d'asile effectif*, 15 mars 2018. See also *Le Monde*, 22 February 2018.

[3] Commissaire aux droits de l'homme, Conseil de l'Europe, Lettre au Président de l'Assemblée nationale française, 8 mars 2028, CommHR/NM/sf 005-2018.

[4] The Senate voted against the adoption of the text, triggering the organization of a *Commission Mixte paritaire* in order to find an agreement between the two Houses, without any success. As a result, the Act was adopted by the *Assemblée Nationale* (Lower House) alone. Rapport n° 636 (2017-2018) de M. François-Noël Buffet, sénateur et Mme Elise Fajgeles, député, fait au nom de la commission mixte paritaire, déposé le 4 juillet 2018 (numéro de dépôt à l'Assemblée Nationale : 1140). Résultat des travaux de la commission n° 637 (2017-2018) déposé le 4 juillet 2018.

[5] Rapport n° 552 (2017-2018) de M. François-Noël Buffet, fait au nom de la commission des lois, déposé le 6 juin 2018.

If the Act contains certain rare improvement of the protection of migrants in France -not always viewed favourably by the Senate- (2.),[6] most of the Act is threatening migrants' rights and leads to a breach of France's international obligations (3.).

2. The improvement of the protection of certain categories of migrants

The Act puts forward a certain vision of migration that favours "chosen" over "endured" migration. The Act reveals a policy of welcoming "talented people" and their family members (2.1.). Besides, despite its shortcomings, the Act does grant additional protection for migrants in a situation of extreme vulnerability (2.2.).

2.1. Chosen Migrants

The Act extends the scope of the "Passport talent" and the rights attached to it. This procedure allows high-potential aliens to benefit from a 4-year residence permit (1 year for the workers' residence permit). From now on, it can be granted to aliens who participate in the environmental, social and international development of the company. The Act also recognises craftsmanship as an activity likely to fall within the scope of the "Passport talent". As a result, article L421-10 of the Code of Entry and Residence of Aliens and the Right to Asylum (CESEDA)[7] extends the "Passeport talent" to employees of innovative companies or "likely to participate in the reputation of France".

For them, things are made easier, for instance, their family members can beneficiate from the same 4-year residence permit.[8] However, only a very small number of aliens are granted these permits, as the figures published by the Ministry of the Interior in 2016 show that the overwhelming majority of permits issued to foreigners are workers residence

[6] For instance, the Senate amended the text to suppress the extension of family reunification to the brothers and sisters of refugees who are minors (amendments COM-7 by Jacqueline Eustache-Brinio and COM-31 by Roger Karoutchi).

[7] Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA). The numbering of the Code has been entirely modified by a 2020 Ordinance (Ordonnance n°2020-1733 du 16 Decembre 2020).

[8] Article L313-21 CESEDA.

permits.[9] Therefore, as pointed out by the *Défenseur des droits*,[10] this is a very residual improvement.

2.2. Persons in a Situation of Extreme Vulnerability

The Act inserted in art. L332-2 of the CESEDA the following mention:

> *"Special attention is given to vulnerable persons, especially minors, whether or not accompanied by an adult."*[11]

Indeed, the Act aims at facilitating the protections of aliens in a situation of extreme vulnerability such as victims of violence (2.2.1.) or unaccompanied minors (2.2.2.).

2.2.1. Victims of violence

The Act contains provisions harmonising the regime applicable to victims of domestic violence or sexual abuse and the one applicable to victims of a threat of a forced marriage.

Since 2016,[12] persons who benefit from a protection order due to the threat of a forced marriage must be issued a residence permit as soon as possible (article L425-7 of the CESEDA). However, the text did not provide for an exemption from the condition of entry into France via a long-stay visa (VLS), nor did it indicate that the document issued must authorise to work. This was a significant difference from the provision made in the same article for persons benefiting from a protection order due to domestic violence.

Therefore, the bill provides for consistency in the protections afforded to the various beneficiaries of a protection order: they are exempted from presenting a VLS and granted a work permit.

[9] Avis du *Défenseur des droits* n°18-09, *op.cit*., p. 50.

[10] *Ibidem*.

[11] Original text: "Une attention particulière est accordée aux personnes vulnérables, notamment aux mineurs, accompagnés ou non d'un adulte." (author's own traduction)

[12] Loi n° 2016-274 du 7 mars 2016 *relative au droit des étrangers en France*.

2.2.2. Unaccompanied minors

Unaccompanied minors who have obtained a protection, such as a refugee status, have a right to "family reunion."[13] Before 2018, this right was applicable to their parents only. It is now extended to their brothers and sisters.[14] Besides, the 2018 Act allows for the automatic granting of a work permit to unaccompanied minors in the care of the child welfare agency, as long as they have an apprenticeship contract or a professionalisation contract.

Despite these progresses, the 2018 still allows for the detention of children (see *infra*).

3. The shortcomings of the Act: a curtailment of migrants' rights

Reducing the length of asylum procedures in France and fighting against irregular migration are put forward by the Act as being two of its main objectives. On the one hand, everyone agrees on the necessity to reduce the length of the asylum procedures in France. However, under the cover of the achievement of this objective, the 2018 Act is threatening the asylum seekers procedural rights (3.1.). On the other hand, the fight against irregular migration leads to significant breaches of migrants' rights, especially concerning the rise of the duration of the detention (3.2.), the possibility to put children in detention centres (3.3.) and the non-suppression of the solidarity offence (3.4.) despite their constant condemnation.

3.1. The violation of asylum seekers procedural rights

Reduction of the delay to apply for asylum.

The bill intends to speed up asylum proceedings. However, instead of acting to reduce the length of the administrative procedure, the Act reduces the delay to apply for asylum. Indeed, before 2018, asylum seekers entering illegally in France had 120 days to apply for asylum.

[13] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, p. 12-18.

[14] https://www.vie-publique.fr/eclairage/19455-asile-et-immigration-la-loi-du-10-septembre-2018.

The Act reduces this duration to 90 days.[15] After these 90 days, the accelerated procedure – with reduced rights – applies. In particular, OFPRA must make a decision within 15 days. Such a time limit does not allow for a thorough investigation of the asylum application.[16]

As Catherine Haguenau-Moizard points out, "[t]he authorities tend to forget that the refugees have to wait for around 20 days in the mainland and 35 days overseas before they can even register. According to directive 2013/32, they should not have to wait for more than 3 days."[17] We can only regret the direction taken by the French authorities, which, in order to speed up the processing of asylum applications, has openly chosen to reduce the procedural guarantees for applicants. This choice, which goes directly against the warnings formulated by the *Défenseur des droits* in his advisory opinion n°17-09,[18] raises all the more difficulties as it occurs in a context of saturation of the national reception system. In this context, there is no guarantee that there will not be unjustified placements in accelerated procedure.[19]

Further addressing the length of the asylum procedure, the first version of the draft Act intended to reduce the delay to appeal a negative decision of the OFPRA from one month[20] to 15 days. This delay is undoubtedly too short to ensure the right to an effective remedy, regarding the situation of the asylum seeker. In 15 days, the asylum seeker will have to identify the right interlocutor who can accompany him/her in these procedures, and obtain an appointment. It is unlikely that all asylum seekers will be able to do this, especially if they are not accommodated in a CADA.[21] Even if the asylum seeker can apply for legal aid - which has the effect of interrupting the time limit for appeal - or file a summary application, which he/she will complete later, the fact remains that the accomplishment of these first steps already implies, for a person

[15] Article L. 723-2 CESEDA.

[16] Special provisions are also made for Guyana, where the time limit will be reduced to 60 days.

[17] C. Haguenau-Moizard, "The 2018 French Asylum and Immigration Act", *The Verfassungsblog*, 17 August 2018 https://verfassungsblog.de/the-2018-french-asylum-and-immigration-act/.

[18] Avis du *Défenseur des droits* n°17-09, 25 septembre 2017.

[19] Avis du *Défenseur des droits* n°18-09*, op.cit*., p. 8.

[20] Article R532-10 CESEDA.

[21] A CADA (Centre d'accueil de demandeurs d'asile) is a reception center for asylum seekers.

with a poor command of the French language and the of the French administration, to be able to benefit from an adequate legal support. This draft article had been strongly criticised by the *Défenseur des droits*[22] and removed from the final version of the Act.

Removal Before Appeal

In situations in which the claim for protection is denied and an order to leave French territory (OQTF) is issued, the alien may ask the president of the Administrative Tribunal (Tribunal administratif) to suspend the execution of the removal order until the expiration of the time limit for appeal to the National Court of Asylum or, if the matter has already been referred to the Court, until the date of its decision. Since the 2018 Act, the President of the Tribunal grants the alien's request only if he/she presents serious elements that justify, in the context of his asylum application, his/her continued stay in the country while the Court examines his appeal.[23] Therefore, if the President finds that the applicant did not present "serious elements" that justify his remaining on French territory, the decision of removal can be executed, while the appeal is still pending. This provision is in clear breach of the right to an effective remedy, as applied by the European Court of Human Rights in the *De Souza Ribeiro* v. France.[24] In this case, the Court finds a violation, by France, of article 13 of the Convention because an alien had been expelled while his appeal was pending.

The Language of the Procedure

Before 2018, the CESEDA provided that the asylum seeker shall be heard in the language of his choice, unless there is another language of which he has "sufficient knowledge".[25] This was a transposition of the European requirements of the 2013 Procedure Directive that recalls on several occasions the right of the applicant to be heard and to receive information concerning him or her application "in a language which he understands or may reasonably be supposed to understand".[26]

[22] « Considérant que le délai de 15 jours retenu par le projet de loi ne permettra pas de garantir l'effectivité des recours introduits devant la CNDA, le Défenseur des droits recommande l'abandon des dispositions le prévoyant », Avis du *Défenseur des droits* n°18-09*, op.cit*., p. 11.

[23] Art. L. 743-4 CESEDA.

[24] ECtHR, *De Souza Ribeiro v. France*, 13 December 2012, app. N°22689/07.

[25] Former art. L.723-6 CEDESA.

[26] Directive 2013/32/EU of The European Parliament and of the Council of 26 June

The 2018 Act places significant restrictions on the exercise of this right by the applicant to be heard in a language they understand. [27] It is thus provided that at the stage of registration of his application, the foreigner will be informed of the languages in which he can be heard by OFPRA. The applicant must indicate the language in which he/she prefers to be heard and will be informed that this choice will be binding on him/her for the entire duration of the application, including in the event of an appeal before the CNDA. If the applicant refuses to choose or if his/her request cannot be met, he may be heard in a language of which he has sufficient knowledge. These modifications run counter to the spirit of the European Directive mentioned above, since they compromise the asylum seeker's effective access to the procedure. The abandonment of the provision had been requested by the *Défenseur des droits*, without success.[28]

3.2. The Length of the Detention

Between 2011[29] and 2018, it was possible to detain aliens, including

2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60-95, cons. 25; art. 12.1a and f; 15.3.c; 25.5 a.

[27] The Act modifies former art. L. 723-6 CESEDA and insert a new article art. L. 741-2-1 CESEDA: « Lors de l'enregistrement de sa demande d'asile, l'étranger est informé des langues dans lesquelles il peut être entendu lors de l'entretien personnel mené par l'Office français de protection des réfugiés et apatrides en application de l'article L. 723-6. Il indique celle dans laquelle il préfère être entendu. Il est informé que ce choix lui est opposable pendant toute la durée d'examen de sa demande, y compris en cas de recours devant la Cour nationale du droit d'asile, et que, à défaut de choix de sa part ou dans le cas où sa demande ne peut être satisfaite, il peut être entendu dans une langue dont il a une connaissance suffisante. » Since the 2020 Ordinance, art. L.741-2-1 became art. L521-6.

[28] "The Defender of Rights considers that the change in the manner of exercising the right to be heard in a language he or she understands, as envisaged by the bill, will the bill entails a reduction in the applicant's procedural guarantees is particularly excessive in relation to the objective it pursues. In order to respect the spirit of European texts, which require that asylum seekers be guaranteed effective asylum seekers effective access to procedures, by giving them the means to cooperate and cooperation and communication with the competent authorities, the Human Rights Defender authorities, the Defender of Rights recommends the abandonment of the amendment" *author's personnal translation*, p. 10.

[29] LOI n° 2011-672 du 16 juin 2011 *relative à l'immigration, à l'intégration et à la nationalité.*

children, for a maximum duration of 45 days sequenced as follows: after 48 hours of detention, the judge of freedoms and detention (JLD) had to be seized. The judge could then order the extension of the detention for a period of 28 days. At the end of these 28 days, the JLD was seized again and could order the extension of the detention for an additional 15 days. Derogatory provisions were provided for foreigners who were subject to a sentence of deportation or a deportation order due to terrorism-related offences. In this case, under the supervision of the JLD of the *Tribunal de Grande Instance* of Paris, the detention could be extended up to six months.[30]

The 2018 Act keeps the same procedure, but extends the duration up to 90 days. At the end of these 90 days,[31] it can still be extended for 15 additional days, renewable three times, in the following three cases following cases:

- The alien has obstructed the execution of the removal order;
- The alien has applied for protection against removal because of his or her state of health
- The alien has submitted an application for asylum.

The text specifies that, in the last two cases, the application must have been made for the sole purpose of preventing the removal order. In this respect, it follows the recommendations formulated by the *Conseil d'Etat* in its opinion n°394206.

In the framework of terrorism, the detention can last up to 180 days[32] and even expand to 210.[33]

The justification puts forward by the French Government to increase the maximum duration of detention is to achieve a better execution of removal measures. Indeed, according to the impact study of the Act, the low rate of enforcement of removal orders notified by the French authorities - around 13% - would be partly attributable to the fact that the maximum duration of detention set for France - 45 days - is insufficient to allow the French authorities to obtain the necessary *laissez-passer* in time for the execution of the removal.

While it is true that the maximum duration of detention in France is

[30] Former article L.552-7 CESEDA.
[31] Art. L742-4 CESEDA.
[32] Art. L742-6 CEDESA.
[33] Art. L742-4 to L742-7 CEDESA.

one of the shortest in Europe,[34] the link made by the Government between this short duration and the low rate of execution of removal measures does not seem to be established. On the contrary, as pointed out by the *Défenseur des droits* in his report,[35] several studies agree that extending the length of detention has no effect on the effectiveness of removal policies since the extreme majority of deportations took place between the 6th and the 32nd day of detention.[36]

Therefore, the extension of detention does not appear to be a determining factor in the fight against illegal immigration. It, on the other hand, creates a situation in which aliens who cannot be deported in any case are unnecessarily deprived of their liberty.[37] The following chart shows that the extension of the detention period not only did not increase the execution rates of removal measures, but had the exact opposite effect: the execution rates has fallen from 13,5 % in 2017 to 5,6 % in the first semester 2021. Moreover, many orders to leave French territory are quashed. For instance, 10,379 appeals were registered in 2021 against the decisions to leave the French territory issued by the *Préfecture de police* of Paris. 44,57 % of them were annulled by the Administrative Tribunal.[38]

[34] For instance, Denmark, Germany, Greece, Latvia, Lithuania, Malta, the Netherlands, Slovakia, Switzerland.

Slovakia, Switzerland and the Czech Republic have a maximum duration of the detention of 18 months, in accordance with art. 15§5 and 6 of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98-107.

[35] Avis du *Défenseur des droits* n°18-09, *op.cit*., p. 26.

[36] Report to the submitted to the Prime Minister on May 14th, 2013, by Matthias FEKL, Member of Parliament.

[37] Ibidem.

[38] Rapport d'information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur la question migratoire, Par M. François-Noël BUFFET, Sénateur, 10 mai 2022, N° 626, p. 70.

Execution rates of OQTF (order to leave French Territory)

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021*
OQTF decided	59 998	82 535	89 134	88 225	79 750	81 656	85 268	103 852	122 839	107 488	62 207
OQTF executed	10 016	18 441	15 213	14 765	13 518	11 653	11 535	12 884	14 777	7 376	3 501
En %	16,7 %	22,3 %	17,1 %	16,7 %	17 %	14,3 %	13,5 %	12,4 %	12 %	6,9 %	5,6 %

** First Semester of 2021.*
Source: Ministry of Interior

4. Minors in detention

Article 28 of the Act does not prohibit the deprivation of liberty for minors, as loudly requested for decades by French NGOs,[39] but also the *Défenseur des droits*,[40] Unicef[41] or the UNHCR.[42] It states that a minor cannot be placed in detention unless he/she is accompanying an alien placed in detention. The CESEDA now authorises child detention if the adult accompanying the minor has not complied with one of the requirements of a previous residence order or has absconded or refused the implementation of the removal decision. The Code also allows detention in the 48 hours preceding the scheduled departure.

It is true that the Code provides some safeguards. First, the duration of the detention of a foreigner accompanied by a minor "shall be as short as possible, taking into account the time strictly necessary to or-

[39] https://www.lacimade.org/publication/rapport-2021-sur-les-centres-et-locaux-de-retention-administrative/.

[40] Press release, 22 July 2021, https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/cp_-_defenseur_des_droits_-_cedh_retention_administrative_dune_mere_avec_son_nourrisson_de_4_mois_.pdf

[41] https://www.unicef.fr/article/30-000-enfants-enfermes-9-condamnations-et-la-france-refuse-toujours-d-agir; https://www.unicef.fr/contenu/espace-medias/les-enfants-et-le-projet-de-loi-asile-et-immigration-enfermer-non-proteger-oui; https://www.unicef.fr/contenu/espace-medias/jusqu-quand-la-france-approuvera-t-elle-l-enfermement-des-enfants.

[42] https://www.unhcr.org/fr-fr/news/press/2018/3/5a9ff2884/france-le-hcr-salue-plusieurs-mesures-du-projet-de-loi-sur-lasile-mais.html.

ganise the departure."[43] Second, the detention of an alien accompanied by a minor is only possible in a place of administrative detention with isolated and adapted rooms, specifically designed to receive families.[44] Third, the "best interests of the child" are a primary consideration in the application of these rules.[45]

However, the detention of children is in itself in breach of international and European human rights law, especially of the Convention on the rights of the child[46]. The Committee for the rights of the child repeatedly observed that this practice was a clear violation of the Convention. "[R]egardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable."[47] In addition, France has repeatedly been called to order by the European Court on human rights because of the placement of children in detention centres in the framework of migration.[48]

Despite a clear violation of France's international obligations, the *Conseil constitutionnel* has declared these provisions of the Act compatible with the constitution because of the need not to separate a child from the adult accompanying him/her.[49] As a result, hundreds of children are deprived of liberty for administrative purposes every year in metropolitan territory. The problem is even more topical in Mayotte were more than 3000 children were placed in detention in 2021 alone.

[43] Art. L741-5 CESEDA.

[44] Ibidem.

[45] L741-5 CESEDA.

[46] Convention on the rights of the child, 20 November 1989, art. 37.

[47] Committee on the rights of the child, Report of the 2012 day of general discussion the rights of all children in the context of international migration, §32, https://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf.

[48] The European Court issues 9 Judgments finding a violation by France of the Convention since 2012 on Child detention. Amongst them: ECtHR, *Popov v. France*, 19 January 2012; ECtHR, *M.D. ET A.D. v. France*, 22 July 2021, no 57035/18; ECtHR, *Moustahi v. France*, 25 June 2020, no 9347/14 on the situation in Mayotte.

[49] Conseil constitutionnel, Décision n° 2018-770 DC du 6 septembre 2018, *Loi pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie*, §62.

5. Solidarity Offence

The so-called "solidarity offence" describes the possibility to prosecute any person who helps someone to enter or stay irregularly in France. These types of prosecutions occurred since 2014 at the Italian border or around Calais. For instance, Pierre-Alain Mannoni, a local academic was sentenced to 2 months of conditional imprisonment for having conveyed in his car 3 wounded Eritrean girls to lodge them for one night at his home. [50] The next day, he was to take them to the Cagnes-sur-Mer train station so that they could go to Marseille, where associations and doctors would take care of them. Similarly, Cédric Herrou, a local farmer was sentenced to 4 months conditional imprisonment[51] for having helped migrants from Somalia and Eritrea and conveyed them through the French-Italian border. Following the referral of these procedures by the *Cour de cassation*, the *Conseil constitutionnel* has decided on 6 July 2018[52] that the principle of fraternity[53] had constitutional value and that, therefore, helping for humanitarian reasons cannot be considered as an offence.

Despite this Decision, the 2018 Act missed the occasion to abolished totally the solidarity offence. However, it provides with clear limits: cannot be prosecuted, a person whose help did not give rise to any direct or indirect consideration and consisted of providing legal, linguistic or social advice or support, or any other assistance provided for exclusively humanitarian purposes.[54]

[50] Cour d'appel d'Aix-en-Provence, 13e chambre, en date du 11 septembre 2017.

[51] Cour d'appel d'Aix-en-Provence,13e chambre, en date du 8 août 2017.

[52] Conseil Constitutionnel, n° 2018-717/718 QPC du 6 juillet 2018 *M. Cédric H. et autre.*

[53] Schoettl, Jean-Éric, « Fraternité et Constitution », *Revue française de droit administratif,* septembre-octobre 2018, n° 5, p. 959-973 ; Verpeaux, Michel, « Constitutionnalisation et Constitution », *Revue française de droit administratif*, septembre-octobre 2018, n° 5, p. 966-973 ; Tusseau, Guillaume, « Le Conseil constitutionnel et le »délit de solidarité" », *Revue critique de droit international privé*, janvier-mars 2019, n° 1, p. 35-64; Philippe, Xavier, « La reconnaissance du principe de fraternité par le juge constitutionnel français : révolution ou poursuite d'une évolution ? », *Revue trimestrielle des droits de l'homme*, juillet 2019, n° 119, p. 565-578.

[54] Art. 38 of the Act. Art. L. 823-9 3°CESEDA.

6. Conclusion

Despite all the strong reserves pointed out *supra*, the 2018 Act has being declared compatible with the Constitution by the *Conseil constitutionnel*.[55]

The entire dynamics of the Act seems to be based on questionable assumptions. First, the idea that a dignified and humane refugee reception policy would imply making a distinction between "real" asylum seekers and so-called "economic" migrants. However, such a distinction is inoperative in practice – the causes of exile are always multifactorial – and leads to discrediting all foreigners, including those suspected of being false asylum seekers and who should be removed from French territory as "quickly" and "effectively" as possible. Thus, the entire Act is based on a logic of suspicion that tends to give precedence to repressive considerations over the most fundamental rights of aliens.

Second, the idea that Europe - and France - is dealing with a "crisis" situation and that there is therefore an urgent need to legislate in response to an extraordinary situation. The statistics published by the *Institut national d'études démographiques* (INED) and the *National Institute of Economic Statistics* (INSEE)[56] contradict this analysis. France's net migration has remained more or less the same for nearly 40 years. Of course, the number of entries and exits varies from one year to the next. However, these variations cannot be considered as a "crisis" requiring an immediate modification of the legal framework.

As a result, the 2018 Act is a regressive step in the protection of human rights in the context of migration.

[55] Conseil Constitutionnel, Décision n° 2018-770 DC du 6 septembre 2018, *op.cit.*
[56] Avis du *Défenseur des droits* n°18-09, *op.cit*., p. 4.

SOME OBSERVATIONS ON ITALIAN ASYLUM AND IMMIGRATION POLICIES

ANNA LIGUORI*

1. Introduction

The present paper, which does not claim to be exhaustive, focuses on some of the main innovations in Italian legislation/practice/jurisprudence since September 2019, date of the inaugural Conference of the Maps Network,[1] and at the same time offers some suggestions for the way forward.

I will therefore focus first of all on the major changes in Italian legislation, introduced with Decree n. 130/2020, called "Decreto Lamorgese" after the Minister for the Interior responsible for it. This decree eliminated (or at least reduced) some of the main shortcomings of the previous legislation introduced in 2018 and 2019 by the two questionable "Security Decrees" (or "Decreti Salvini", after the Minister of the Interior at that time).[2]

The second part of this paper will deal rather with what did not change at all, i.e., the Memorandum of Understanding (MoU) Italy-Libya of 2 February 2017 - although right from the start it was clear that the implementation of such an agreement would violate migrants' and asylum seekers' rights as attested by many reports from international organizations.[3] However, the Memorandum was renewed in 2020 without any changes.

* University of Naples "L'Orientale".

[1] The present paper reproduces, with slight changes, the talk given on 19 May 2022, during the Round Table "MAPS National and Supranational Regimes: Weaknesses, Shortcomings and Reform Proposals" of the Final Conference of the Jean Monnet Network on Migration and Asylum Policies Systems (MAPS), https://www.mapsnetwork.eu/wp-content/uploads/2022/04/MAPS-Final-Conference_29-04.pdf (10/22).

[2] On the "Salvini Decrees" (Decrees Nos. 113/2018 53/2019) see G. Cataldi, "Search and Rescue of Migrants at Sea in Recent Italian Law and Practice" and A. Del Guercio, "The Right to Asylum in Italy", in G. Cataldi, A. Del Guercio, A. Liguori (eds), *Migration and Asylum Policies Systems Challenges and Perspectives,* Editoriale Scientifica, Napoli, 2020, respectively p. 11 ff. and p. 27 ff.

[3] See *ultra*, para. 3.

This paper will finally highlight some recent domestic case-law which states, in very clear terms, that Libya is not a safe place for migrants or asylum seekers, and also suggest a way forward.

2. The Lamorgese Decree

As anticipated, one of the main changes to Italian legislation in the period under examination, is the Decree adopted in October 2020 in order to reduce some of the main shortcomings of the two abovementioned "Salvini decrees", which had been convincingly described as "one of the worst examples of the failure to comply with national and international human rights obligations".[4] The new decree, called "Decreto Lamorgese", after the Minister for the Interior who replaced Salvini, was then converted with amendments into Law no. 173 of 18 December 2020.[5]

Although the changes introduced by the new decree with respect to search and rescue activities are not fully convincing (indeed, as several scholars have pointed out, the impression is that the decree still reflects the political will to protect frontiers through the obstruction of search and rescue activities conducted by civil society, and more specifically by NGOs),[6] much more significant progress has been made with respect to other problematic aspects of previous legislation.

[4] A. Del Guercio, "Migration and fundamental rights. The case of Italy", in Giuseppe Cataldi, Michele Corleto, Marianna Pace (eds.), *Migration and Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019, p. 81 ff.

[5] On the Lamorgese decree see C. Corsi, "Il decreto legge 130/2020 tra continuità e cambiamento. Cenni introduttivi sui profili dell'immigrazione e dell'asilo", *Forum di Quaderni Costituzionali*, 2021, https://www.forumcostituzionale.it/wordpress/?p=15680 (10/22); A. De Petris, "Il Decreto Immigrazione e Sicurezza: luci e ombre per il nuovo sistema di accoglienza e integrazione", *ADiM Blog*, *Editoriale*, October 2020, http://www.adimblog.com/2020/10/31/il-decreto-immigrazione-e-sicurezza-luci-e-ombre-per-il-nuovo-sistema-di-accoglienza-e-integrazione/ (10/22).

[6] See S. Zirulia, "Dai porti chiusi ai porti socchiusi: nuove sanzioni per le navi soccorritrici nel Decreto Lamorgese", *ADiM Blog, Analisi & Opinioni*, March 2021, https://www.adimblog.com/wp-content/uploads/2021/03/SodaPDF-converted-ADiM-Blog-Marzo-2021-Analisi-1-1.pdf (10/22); G. Cataldi, "Le sauvetage des migrants en Méditerranée", in S. Breitenmoser, P. Uebersax, P. Hilpold (eds.), *Schengen et Dublin en pratique dans l'UE, en Suisse et dans quelques Etats européens,* forthcoming; F. Venturi, "La gattopardesca riforma della disciplina delle operazioni di soccorso in mare ad opera dell'art. 1, comma 2, del d.l. n. 130/2020", *Forum di Quaderni Costituzionali*, 2020, pp. 87-110, https://www.forumcostituzionale.it/wordpress/?p=15710 (10/22); F.

First of all, while the previous government had in practice abolished "humanitarian protection" (a very important form of protection, granted to foreigners who prove the existence of serious reasons of a humanitarian nature or resulting from constitutional or international obligations of the Italian State), the Decree restores something very similar called "special protection" and provides for a wide range of permits to be converted into residence permits for work reasons.[7] In addition, the competence to examine these requests comes back to *Commissioni Territoriali,* which are composed of fonctionnaires specialized in asylum matters (while Security Decree n. No. 113/2018 had assigned this responsibility to the *Questore or Prefetto*, who belong to the police system). Indeed, the need to intervene on humanitarian protection was due, according to the Explanatory Report of decree law No. 113/2018, to an alleged instrumental use of international protection by Territorial Commissions and by the judges: the reports states that resorting to a "residence permit for humanitarian reasons" had indeed become the most widespread form of protection in the national system, on account of a legal definition with uncertain contours and an "excessively extensive" interpretation. However, as pointed out, the Executive seemed to identify the cause of these great numbers in what was actually the consequence of multiple factors: "an extremely restrictive visa policy; the absence of legal entry channels; the malfunctioning, prior to the reform, of the old Territorial Commissions, which had been composed of unskilled personnel disinclined to recognize international protection even where the requisites established by law existed; and the rigidity of the conditions attached to refugee status and subsidiary protection".[8]

Secondly, while in the previous version the Italian Law explicitly prohibited expulsion or refoulement only if this entailed the risk of torture for migrants/asylum seekers, the article in question has been amended, now

V. Paleologo, "I tribunali demoliscono l'asse del rifiuto Lamorgese-Lega, ma i respingimenti in mare continuano", *Melting Pot*, 25 October 2021, https://www.meltingpot.org/2021/10/i-tribunali-demoliscono-lasse-del-rifiuto-lamorgese-lega-ma-i-respingimenti-in-mare-continuano/ (10/22).

[7] Among them also the so-called "permit for disasters". On this permit see C. Scissa, "La protezione per calamità: una breve ricostruzione dal 1996 ad oggi", *Forum di Quaderni Costituzionali*, 2021, https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2021/01/09-Scissa-FQC-1-21.pdf (10/22), and in this volume A. Fazzini, "Recent developments in the protection of environmental migrants: the case of Italy".

[8] A. Del Guercio, *The Right to Asylum in Italy*, cit., p. 36.

providing for a much broader range of cases in which refoulement, expulsion or extradition are prohibited, in conformity with international law. In particular, the amendment establishes that such measures cannot be adopted when there is a risk of inhuman or degrading treatment (not only of torture), or of the violation of the right to respect for one's private and family life (in the latter case except in circumstances where the measure is necessary for reasons of national security, or of public order and security).

Finally, the new decree modifies reception, introducing a system called the Reception and Integration System (SAI) open both to asylum seekers and beneficiaries of international protection, similar to the SPRAR approach, which had been conversely significantly reduced by the Salvini decrees - although recognized at European level as a best practice to be imitated: indeed the return to a model of reception characterized by the provision of an "integrated reception", with a special focus on the process of self-autonomy and social inclusion of the person (as SPRAR was) is very welcome since it is much closer to the real needs of asylum seekers/refugees than the government centers (CAS), which, on the contrary, have often been criticized as dysfunctional (because of the poor quality of the services and of the facilities, in most cases overcrowded, in remote areas and distant from transportation).

3. The Memorandum of Understanding between Italy and Libya of 2 February 2017

So far, we can say that – thanks to the Lamorgese decree - some of the most problematic aspects of Italian legislation have been overcome.[9]

[9] See in this direction also the elimination of the ban on registration in the municipal registry for asylum seekers ("iscrizione all'anagrafe"): indeed, this ban (introduced by the 2018 Salvini decree) had already been declared incostitutional by the Italian Constitutional Court (judgment n. 186/20209) for violation of Article 3 which provides for the equality of citizens before the law "without distinction of sex, race, language, religion, political opinions, personal and social conditions", considering the ban on registration illegitimate because it creates an "unreasonable difference in treatment" in preventing asylum seekers from being able to access services such as driving licenses, declaration of commencement of activity etc. However, as pointed out *supra* (see literature at note 6 with respect to the changes concerning search and rescue activities), the decree is not free from grey areas: see more in general Corsi, *Il decreto legge n.130/2020 tra continuità e cambiamento*, cit.

However, what remains exactly the same is the very problematic agreement with Libya, concluded in February 2017 and renewed in 2020 without any changes.

Indeed, the core of the deal is represented by articles 1 and 2, which state in very clear terms that the Parties agree to start cooperation initiatives with the explicit aim of *stemming the illegal migrants' fluxes*[10] and that to this end Italy will provide, *inter alia*, "technical and technological support to the Libyan institutions in charge of the fight against illegal immigration …", finance "reception centres already active" and train Libyan personnel.

The most critical aspect of the MoU is - notwithstanding a rhetorical reference provided for in article 5 - the complete lack of concern for migrants' and asylum seekers' human rights. Indeed, Libya is not a signatory of the 1951 Refugee Convention; furthermore, a domestic regime for people in need of international protection is completely lacking and, above all, widespread violations and abuses vis-à-vis migrants in Libya had already been attested to by the European Court of Human Rights in the well-known *Hirsi* judgement.[11] In fact, with this decision the Strasbourg Court had found Italy responsible for violation of article 3 ECHR for having pushed migrants back to Libya in 2009 specifically because of the inhuman treatment to which those people were subjected in Libya, with regard both to the conditions in the Libyan detention cen-

[10] Article 1. Italics added.

[11] On ECtHR, *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012 [GC], applic. No. 27765/09. In this judgment, a cornerstone for the respect of migrants' and asylum seekers' human rights, the Grand Chamber of the European Court of Human Rights stigmatized externalization practices such as interceptions on the high seas when conducted under the effective control of Contracting States. On this case see: F. Messineo, "Yet Another Mala Figura: Italy Breached Non-Refoulement Obligations by Intercepting Migrants' Boats at Sea, Says ECtHR", *European Journal of Int. Law Talk!,* 24 February 2012, <https://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/> (10/22); A. Liguori, "La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi", *Rivista di Diritto internazionale*, 2012, p. 415 ff.; V. Moreno-Lax, "Hirsi v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?", *Human Rights Law Review*, 2012, p. 574 ff.; N. Napoletano, "La condanna dei 'respingimenti' operati dall'Italia verso la Libia da parte della Corte europea dei diritti umani: molte luci e qualche ombra", *Diritti umani e diritto internazionale*, 2012, p. 436 ff.; M. Den Heijer, "Reflections on Refoulement and Collective Expulsion in the Hirsi Case", *International Journal of Refugee Law*, 2013, p. 265 ff.

tres and to the risk of being sent back to the countries from which they were fleeing (indirect *refoulement*). Since 2009, the risk of abuse of migrants in Libya has become increasingly worse; notwithstanding, not only is any positive conditionality completely missing in the 2017 MoU (i.e. there is no clause making the aid subject to the improvement of human rights conditions or to the ratification of the Geneva Convention), but the MoU aims explicitly to send migrants back to Libya. The only difference with the *Hirsi* case is that Italy will not be doing it by itself, aware that this might be contrary to the ECHR, but will be providing technical, technological and financial aid to Libya, in effect achieving the same results. As pointed out, Italy is doing "refoulement by proxy",[12] to circumvent the prohibition unequivocally affirmed by the European Court of Human Rights in the abovementioned *Hirsi* judgment.

Following the Hirsi case, adopted in 2012, the risk of abuse of migrants in Libya increased steadily, due, *inter alia,* to the deterioration of the political situation after the fall of Gaddafi in 2011. With regard to the period immediately before the signing of the MoU, we can refer to the report of 1 December 2016[13] of the Secretary-General on the United Nations Support Mission in Libya,[14] which attests that:

> *Migrants detained in centres operated by the [Libyan] Department did not go through any legal process, and there was no oversight by judicial authorities. Conditions in the centres were inhuman, with people held in warehouses in appalling sanitary conditions, with poor ventilation and extremely limited access to light and water. In some detention centres, migrants suffered from severe malnutrition, and UNSMIL received numerous and consistent reports of torture, including beatings and sexual violence, as well as forced labour by armed groups with access to the centres*.

[12] See the report *Mare Clausum*, by Forensic Oceanography (Charles Heller, Lorenzo Pezzani), affiliated to the Forensic Architecture agency, Goldsmiths, University of London, May 2018.

[13] United Nations Security Council, *Report of the Secretary-General on the United Nations Support Mission in Libya*, 1 December 2016, Doc. S/2016/1011, para. 41 http://undocs.org/S/2016/1011 (10/22).

[14] Pursuant to Security Council resolution 2291 (2016), which decided to extend the mandate of UNSMIL (including inter alia human rights monitoring and reporting).

Many other reports adopted in the same period go in the same direction: the report of the United Nations Support Mission in Libya and the Office of the United Nations High Commissioner for Human Rights, released on 13 December 2016, significantly titled "Detained and dehumanised. Report on human rights abuses against migrants in Libya", stating that "OHCHR considers migrants to be at high risk of suffering serious human rights violations, including arbitrary detention, in Libya and thus urges States not to return, or facilitate the return of, persons to Libya";[15] the EUBAM Libya Initial Mapping Report of January 2017,[16] mentioning gross human rights violations and extreme abuse (including sexual abuse, slavery, torture) vis-à-vis migrants detained in Libyan camps; the Human Rights Watch World Report 2017, published on 12 January 2017, revealing that in Libya "Officials and militias held migrants and refugees in prolonged detention without judicial review and subjected them to poor conditions, including overcrowding and insufficient food. Guards and militia members subjected migrants and refugees to beatings, forced labour, and sexual violence".[17] Also noteworthy is the UNHCR-IOM joint statement[18] addressing migration and refugee movements along the Central Mediterranean route, delivered on 2 February 2017, in which both organizations declared "We believe that, given the current context, it is not appropriate to consider Libya a safe third country nor to establish extraterritorial processing of asylum-seekers in North Africa".

With respect to the period following the signature of the MoU, the situation in Libya became steadily worse, on account of the instability in the region and the involvement of the Libyan coastguard, which was tasked with search and rescue activities previously implemented by Italian naval units. This resulted in shipwrecks, violence and abuses during search and rescue operations, and the return of thousands of migrants to Libya, thus in serious human rights violations, in particular torture and

[15] http://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (10/22), p. 12. Italics added.

[16] http://www.statewatch.org/news/2017/jun/eu-eeas-strategic-review-libya-9202-17.pdf (10/22).

[17] https://www.hrw.org/world-report/2017/country-chapters/libya (10/22).

[18] http://www.unhcr.org/news/press/2017/2/58931ffb4/joint-unhcr-iomstatement-addressing-migration-refugee-movements-along.html (10/22).

inhuman treatments, widely attested by many reports of international organizations[19] and NGOs.[20]

One of the questions much debated by scholars so far has been the international responsibility of Italy for migrants' human rights violations as a consequence of the MoU of 2 February 2017; indeed, at the time of writing there are a number of proceedings pending before international bodies against Italy – as the case of *S.S. et al. v Italy*[21] before the European Court of Human Rights and the case *S.D.G. v. Italy*[22] before the UN Human Rights Committee. In addition, in 2019 a communication[23] was addressed to the Office of the Prosecutor of the International Criminal Court, concerning EU and Member States' officials and agents for crimes against humanity[24] with regard to migration policies in the Mediterranean Basin between 2014 and 2019.[25]

[19] See, ex multis, OHCHR reports in cooperation with UNSMIL, *Abuse Behind the Bars: Arbitrary and unlawful detention in Libya*, April 2018, https://reliefweb.int/report /libya/abuse-behind-bars-arbitrary-and-unlawful-detention-libya-april-2018-enar (10/22); *Desperate and Dangerous; Report on the human rights situation of migrants and refugees in Libya*, December 2018, https://reliefweb.int/report/libya/desperate-and-dangerous-report-human-rights-situation-migrants-and-refugees-libya (10/22); *IOM and UNHCR condemn the return of migrants and refugees to Libya*, 16 June 2021, https://www.unhcr.org/news/press/2021/6/60ca1d414/iom-unhcr-condemn-return-migrants-refugees-libya.html (10/22).

[20] See ex multis AMNESTY INTERNATIONAL, *Libya's dark web of collusion*, *Abuses against Europe-bound refugees and migrants*, 11 December 2017, https:// www.amnesty.org/en/documents/mde19/7561/2017/en/ (10/22), and the many updates from Amnesty, Human Rights Watch etc.

[21] *S.S. and Others v. Italy* case, applic. No 21660/18: on this case see V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the «Operational Model»", in *Migration and Asylum Policies Systems Challenges and Perspectives,* cit, p. 183 ff. and A. Fazzini, "Il caso S.S. and Others v. Italy nel quadro dell'esternalizzazione delle frontiere in Libia: osservazioni sui possibili scenari al vaglio della Corte di Strasburgo", *Diritto, Immigrazione e Cittadinanza*, n. 2/2020, p. 87 ff.

[22] Human Rights Committee, Communication of 18 December 2019, *SDG v. Italy*.

[23] https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf (10/22).

[24] See on this point punto I. Mann, V. Moreno-Lax, O. Shatz, "Time to Investigate European Agents for Crimes against Migrants in Libya", *European Journal of International Law: Talk!*, 29 March 2018, https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/ (10/22); A. Pasquero, "La Comunicazione alla Corte Penale Internazionale sulle Responsabilità dei Leader europei per Crimini contro l'umanità commessi nel Mediterraneo e Libia. Una lettura critica", *Diritto, Immigrazione e Cittadinanza*, 2020, p. 50.

[25] The ICC had already opened investigations for the same crimes against Libya: in

While waiting for the decisions of international organs, and despite the indifference of the government and Parliament – which did not hesitate either to renew the agreement or to refinance it – we wish to mention some interesting domestic case-laws, which unequivocally state that Libya cannot be considered a safe place.[26]

To this end, it is worth mentioning first of all the Assize Court of Milan[27] which, after acknowledging the inhuman and degrading conditions of the Libyan migration detention centres, sentenced a Somali citizen to life imprisonment as a member of the criminal network which managed the Libyan detention centres of Bani Walid and Sabratha.[28]

In addition, in 2019 the Tribunal(e) of Rome ordered the immediate issue of a humanitarian visa to enter Italy to a Nigerian minor – in need of a surgical intervention but trapped in Libya while trying to reach his mother, resident in Italy: the Italian Court made this decision taking into account on the one hand the fact that he could not receive adequate medical treatment either in Nigeria or Libya and on the other the systematic violation of migrants' rights in Libya.[29]

March 2011, the ICC Office of the Prosecutor of the international criminal court opened its investigation into the situation in Libya, following a referral by the UN Security Council, in order to investigate crimes against humanity in Libya starting 15 February 2011. As the ICC Prosecutor Fatou Bensouda clarified to the UN Security Council in her statement of 8 May 2017, the investigation also concerns "serious and widespread crimes against migrants attempting to transit through Libya".

[26] In an opposite direction the judgment of the Consiglio di Stato n. 4569/2020: see on this case A. Marchesi, "Finanziare i rimpatri forzati in Libia è legittimo? Sulla sentenza del Consiglio di Stato n. 4569 del 15 luglio 2020", *Diritti Umani e Diritto Internazionale*, 2020, p. 796 ff.; E. Nalin, "Esternalizzazione delle frontiere nel nuovo Patto sulla migrazione e l'asilo e accordi di "cooperazione" con i Paesi africani stipulati dall'Italia", in I. Caracciolo, G. Cellamare, A. Di Stasi, P. Gargiulo (eds), *Migrazioni internazionali. Questioni giuridiche aperte*, Editoriale scientifica, Napoli, 2022, p. 317.

[27] Judgement No 10/2017 (confirmed on appeal by judgment no. 31/2020 and in cassation by judgment no. 480/2020 filed on 4 March 2021).

[28] Similarly, on 28 July 2020 the GIP (Investigating Judge) of the Court of Messina sentenced to twenty years of imprisonment three jailers for the crime of criminal association (art. 416 co. 2, 5 and 6), for the crimes of torture (art. 613-bis) and seizure for the purpose of extortion (art. 630 c.p.) carried out against migrants detained in Libya in the Zawiya camp. On this case see G. Mentasti, "Centri di detenzione in Libia: una condanna per il delitto di tortura (art. 613 bis c.p.). Nuove ombre sulla cooperazione italiana per la gestione dei flussi migratori", *Sistema Penale*, 2 October 2020, https://sistemapenale.it /it/scheda/mentasti-gip-messina-centri-detenzione-libia-condanna-carcerieri (10/22).

[29] See F.L. Gatta, "A "way out" of the human rights situation in Libya: the

Another very interesting case was the decision of the GIP (Investigating judge) in Trapani of 23 May 2019, overturned by the Court of appeal but finally confirmed by the Court of Cassation in December 2021.[30] It concerned two migrants, accused of aggressive behaviour and mutiny against the command of the ship Vos Thalassa. The rebellion was due to the fact that the crew was about to send these two migrants back to the Libyan Coast Guard, after intercepting them at sea with more than sixty other migrants. The Court, despite ascertaining violent and threatening behaviour by the defendants, acquitted them because it recognized self-defence as justification for their behaviour, dictated by the need to defend their right not to be pushed back to a country (Libya) where their fundamental rights would have been put at risk (in particular the right not to suffer torture and other inhuman and degrading treatment).

Finally, the decision of the Tribunale of Naples of 21 October 2021[31] is worthy of note. The court sentenced the captain of the Asso 28

humanitarian visa as a tool to guarantee the rights to health and to family unity", *Cahiers de l'EDEM*, August 2019.

[30] On the GIP decision see L. Masera, "*La legittima difesa dei migranti e l'illegittimità dei respingimenti verso la libia (caso Vos Thalassa)"*, *Diritto Penale Contemporaneo,* 24 July 2019, C. Ruggiero, "Dalla criminalizzazione alla giustificazione delle attività di ricerca e soccorso in mare – Le tendenze interpretative più recenti alla luce dei casi Vos Thalassa e Rackete", *Diritto, Immigrazione e Cittadinanza*, 2020; on the Court of appeal see F. Vassallo Paleologo, "Dopo la sentenza della Corte di Appello di Palermo sul caso Vos Thalassa, quale tutela per i diritti fondamentali nel Mediterraneo centrale?", *ADIF,* 12 July 2020, https://www.a-dif.org/2020/07/12/dopo-la-sentenza-della-corte-di-appello-di-palermo-sul-caso-vos-thalassa-quale-tutela-per-i-diritti-fondamentali-nel-mediterraneo-centrale/ (10/22); L. Masera, "I migranti che si oppongono al rimpatrio in Libia non possono invocare la legittima difesa: una decisione che mette in discussione il diritto al non refoulement", *Sistema Penale*, 21 July 2020, https://www.sistemapenale.it/it/scheda/masera-appello-palermo-vos-thalassa-migranti-rimpatrio-libia-legittima-difesa (10/22), A. Natale, "Il caso Vos Thalassa: il fatto, la lingua e l'ideologia del giudice", *Questione giustizia*, 23 July 2020, https://www.questionegiustizia.it/articolo/caso-vos-thalassa-il-fatto-la-lingua-e-l-ideologia-del-giudice (10/22); on the Cour of Cassation decision see L. Masera "La Cassazione riconosce la legittima difesa ai migranti che si erano opposti al respingimento verso la Libia", *Sistema Penale*, 22 July 2022, https://sistemapenale.it/it/scheda/masera-cassazione-legittima-difesa-per-migranti-che-si-erano-opposti-al-respingimento-verso-libia?out=print (10/22).

[31] See C. Pagella, "Sulla rilevanza penale dello sbarco su suolo libico di migranti soccorsi in acque internazionali", *Sistema Penale*, https://www.sistemapenale.it/it/scheda/rilevanza-penale-sbarco-su-suolo-libico-di-migranti-soccorsi-in-acque-internazionali (10/22).

– a tugboat on duty in July 2018 at the Sabratha offshore oil platform in international waters – to one year of imprisonment for having sent back to a Libyan patrol boat off the port of Tripoli over one hundred migrants (including minors) rescued near the platform.[32] The judgment has been strongly welcomed by human rights associations such as Amnesty International and ASGI, since it expresses a clear condemnation of the practice of refoulements to Libya (in this case operated by private boats and coordinated by the Italian authorities).

4. Conclusion

In conclusion, although I am aware that nowadays the focus is on the Ukrainian situation,[33] especially since the historical decision of the European Union of March 2022 which for the first time applied the directive on temporary protection, my proposal for the way forward is that the rejection of the MoU as it is today should be a priority, together with the evacuation of migrants still trapped in Libyan detention centres, the creation of safe and legal ways to reach Europe, and more generally the abandonment of policies of externalized border controls and/or externalized asylum systems, or at least the introduction of strong substantive and procedural guarantees for the protection of migrants and asylum seekers.[34]

[32] More specifically, for the crimes of "arbitrary disembarkation and abandonment of people"(referred to in art. 1155 of the Navigation Code), and of "abandonment of a minor" (referred to in art. 591 of the Penal Code).

[33] See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection. On this decision see, ex multis, D. Thim, "Temporary Protection for Ukrainians: The Unexpected Renaissance of 'Free Choice'", *EU Immigration and Asylum Law and Policy*, 7 March 2022, https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/ (10/22).

[34] See, *ex multis,* T. Gammeltoft-Hansen, J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation*, Routledge, London and New York, 2017; V. Moreno-Lax, *Accessing Asylum Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law*, Oxford University Press, Oxford, 2017; A. Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility,* Routledge, London and New York, 2019 and more recently *Refugee Law Initiative Declaration on Externalization and Asylum, International Journal of Refugee Law,* 2022, p. 1 ff.

RECENT DEVELOPMENTS IN THE PROTECTION OF ENVIRONMENTAL MIGRANTS: THE CASE OF ITALY

ANNA FAZZINI*

1. Introduction

The issue of the so-called 'environmental migrants'[1] is an increasingly crucial one, in light of the growing awareness, by the international community, of the effects of environmental degradation and climate change on human rights, as well as on mobility associated with these phenomena. According to the UN High Commissioner for Human Rights, climate change and environmental degradation pose a "rapidly growing and global threat to human rights".[2] It is therefore common knowledge that without adequate measures and effective climate change mitigation and adaptation strategies, there will be an increase in natural disasters and environmental degradation, due to the combined effects of fast-onset events (such as hurricanes and floods) and slow-onset events (such as rising sea levels, desertification, erosion and loss of soil fertility and so on).[3] It is clear that these events, because they will contribute to the increase in poverty, resource scarcity and related conflicts, diseases, pandemics and so on, will also result in the impairment of human rights, such as the right to life, the right to health and the right to a healthy environment.[4] Therefore, if, on the one hand, it is clear that a first level of

* University of Naples L'Orientale.

[1] In this contribution, we will use the term 'environmental migrants' to refer to people who migrate for reasons related to the effects of climate change and environmental disasters. However, there is not unanimous agreement on which definition to use in this regard, as will be detailed below.

[2] See *Global update at the 42nd session of the Human Rights Council, Opening statement by UN High Commissioner for Human Rights Michelle Bachelet*, 9.09.2019.

[3] See United Nations, *Slow onset events. Technical Paper*, FCCC/TP/2012/7, 26.11.2012.

[4] As enshrined in a United Nations General Assembly resolution: Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment,* UN-Doc. A/HRC/48/L.23/Rev.1, 5.10 2021; On the impact of climate change on human rights see, *inter alia*, United Nations Environment Programme (UNEP), *Climate Change and Human Rights*, UNON Publishing Services Section, Nairobi, 2015 and the several reports published by the UN Human Rights High Commissioner (OHCHR) on the mat-

action can only concern the implementation of effective measures to fight climate change, on the other hand the question arises of how to protect people who are forced to leave their home countries or the region where they live for reasons related to these phenomena.

Firstly, it is essential to provide support and relocation options to displaced people, who do not cross the borders of their own country and who constitute the majority of the so-called environmental migrants. Actually, according to data by the Internal Displacement Monitoring Centre (IDMC) relating to 2021, environmental disasters were the leading cause of internal displacement of people worldwide (23.7 million), surpassing the figure caused by wars and conflicts (14.4 million).[5] Secondly, the question arises of the cross-borders migrants, and therefore of the system of protection they can access in the destination countries.

This contribution focuses on this second aspect. Specifically, considering the lack of an international legal framework protecting environmental migrants, this article aims at identifying the main developments emerging at the jurisprudential level, both supranational and national, on the matter. In fact, starting from the guidance taken by the UN Human Rights Committee in the famous *Teitiota* decision,[6] where for the first time they affirmed the applicability of the prohibition of *refoulement* in cases related to the adverse effects of climate change and natural disasters, several pronouncements by European domestic courts show that a consensus is emerging around the need to also offer some kind of protection to environmental migrants. Among them, the Italian case will be the focus of this contribution, considering, in particular, the orientation taken by the Supreme Court of Cassation, in the Ordinance no. 5022/2021.[7]

ter, https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change (09/22).

[5] See the IDMC website: https://www.internal-displacement.org/database/displacement-data (09/22).

[6] Committee of Human Rights, *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, January, 7, 2020.

[7] Court of Cassation, Second Civil Section, Ordinance of 12 November 2020, no. 5022.

2. Protecting environmental migrants: a general overview.

Despite the abundance of studies on the phenomenon of migration related to environmental and climate change,[8] the current international legal framework on the subject is decidedly inadequate.[9] With regard to the soft-law, we can mention several documents, which contain references to environmental migration. These include for example the 2016 *New York Declaration for Refugees and Migrants* that recognises how human mobility is also linked to "the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors".[10] Then, it is in particular the 2018 *Global*

[8] See, *ex multis*, N. Myers, "Environmental Refugees: in a Globally Warmed World", in *BioScience*, Vol. 43 No. 11, 1993, p. 752; J. McAdam, "Swimming Against The Tide: Why A Climate Change Displacement Treaty Is Not The Answer", in *International Journal of Refugee Law*, 2011, p. 1; J. McAdam*, Climate Change, Forced Migration, and International Law*, 2012; J. Morrissey, "Rethinking the 'Debate on Environmental Refugees': From 'Maximalists and Minimalists' to 'Proponents and Critics'", in *Journal of Political Ecology*, 19, 2012, p. 36; E. Piguet and F. Laczko, *People on the Move in a Changing Climate. The Regional Impact of Environmental Change on Migration*, 2014; B. Mayer and F. Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law*, Edward Elgan Publishing, Cheltenham, Northampton, 2017; D. Manou et al. (eds.), *Climate Change, Migration and Human Rights Law and Policy Perspectives*, 2017; G.C. Bruno et al. (eds.), *Migration and the Environment. Some Reflections on Current Legal Issues and Possibile Ways Forward*, 2017; S. Atapattu, *'Climate Refugees' and the Role of International Law*, 2018; S. Behrman e A. Kent (eds.), *'Climate Refugees'. Beyond the Legal Impasse?*, 2018; M. Scott, *Climate Change, Disasters, and the Refugee Convention*, Cambridge University Press, 2020; and more recently G.D.R. Laut, *Humans on the move : integrating an adaptive approach with a rights-based approach to climate change mobility*, , 2022; E. Fornalé, "Collective action, common concern and climate-induced migration", in Simon Behrman and Avidan Kent (eds.), *Climate Refugees: Global, Local and Critical Approaches. Earth System Governance*, 2022; A. Del Guercio, "Una Governance integrata della mobilità umana nel contesto del cambiamento climatico. spunti di riflessione a partire dalla decisione Teitiota del comitato per i diritti umani", in *Diritto Pubblico Europeo Rassegna Online*, 1/2022, p. 334.

[9] However, although the protection regime is lacking for the so-called environmental migrants at an international level, there is no shortage of interesting initiatives worth mentioning, including the *Nansen Initiative*, launched by the Norwegian and Swiss governments, which led to the adoption of the *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change* in 2015, https://www.nanseninitiative.org/ (09/22).

[10] UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, Introduction.

Compact for Safe, Orderly and Regular Migration, that, by recognising climate change and natural disasters among the causes of migration, states the need to cooperate in order to find solutions for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation (among the mentioned solutions there are "planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible").[11] In any case, despite the urgency of adequate responses, there is no binding instrument on the subject, nor is there the recognition of a legal status for the so-called 'environmental migrants'. Actually, there is not even an agreed definition shared by the international community of people forced to move for environmental and climatic reasons. While in this contribution we will use the term 'environmental migrants', as proposed by the International Organisation for Migration (IOM),[12] it must be said that there is an ongoing debate on the matter. Indeed, different expressions are currently used, such as 'environmental or climate refugees', which presents some critical issues[13], 'eco-refugees', 'environmentally induced migration',[14] etc. Some authors also suggest expressions that may provide a more comprehensive understanding of the phenomenon, such as 'migration *linked* to environmental and climatic phenomena'.[15] The last proposal might actually better convey the *complexity*[16] of the phenomenon of 'environmental

[11] UN General Assembly, *The Global Compact for Safe, Orderly and Regular Migration*, 19 December 2018, A/RES/73/195, art. 21; see also art. 18.

[12] See the appropriate section on the IOM website: https://environmentalmigration.iom.int/#home (09/22).

[13] As discussed below, environmental migrants cannot be considered refugees due to the difficulty in meeting the eligibility criteria under the 1951 Geneva Convention Relating to the Status of Refugees. See on this point the comments of the United Nations High Commissioner for Refugees (UNHCR), *Climate Change, Natural Disasters and Human Displacement: A UNHCR Perspective*, 2009, f. 8; *Key Concepts on Climate Change and Disaster Displacement*, 2017, p. 3.

[14] As used by the European Commission, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility,* COM(2011) 743 final, Brussels, 18.11.2011, p. 7.

[15] See A. Del Guercio, *Una Governance integrata della mobilità umana*, cit.

[16] In particular, it must be considered that in most cases there is not a direct causal relationship between the climate change/natural disasters' effects and migration. Rather, the migration is determined by a combination of economic, social and political factors to which environmental and climatic phenomena are also increasingly connected. These

migrants', which indeed requires multiple protection regimes, ranging from climate change mitigation and adaptation interventions to recollection solutions for internally displaced persons (for which specific instruments have been adopted[17]), to the forms of protection for the so-called cross-border migrants in the countries of destination.

Concerning this last aspect, therefore, noting the absence of an *ad hoc* convention which provides a specific protection discipline for environmental migrants, it is important to question the possibility of extending existing protections, such as the refugee status, or complementary protection mechanisms, for people who move for climatic and environmental reasons. This possibility is not without issues. In particular, the recognition of the refugee status[18] presents several problematic aspects, although the 1951 Geneva Convention has been subject to evolutionary interpretations which have gone to include categories of persons not expressly provided for in the definition of refugee. This has been possible thanks to the extensive interpretation of the concept of persecution due to belonging to a 'particular social group', which has gradually gone to include, for example, persecutions on the basis of gender, sexual orientation and gender identity.[19] In any case, even if in some ways such an

phenomena act as "existing *vulnerability* amplifiers" (A. Del Guercio, *Una Governance integrata della mobilità umana*, cit., p. 336; on the notion of vulnerability related to climate and environmental phenomena see M. Scott, *Climate Change,* cit.). On the causal relationship between climate change/environmental disasters' effects and migration, see W. Kälin and N. Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, Legal and Protection Policy Research Series, UNHCR Division of International Protection, Ginevra, 2012, p. 4 ff.

[17] Important instruments on the subject include: UN Office for the Coordination of Humanitarian Affairs (OCHA), *Guiding Principles on Internal Displacement*, 2004; UNHCR, *Guidance Package for UNHCR's Engagement in Situations of Internal Displacement*, 2019, African Union, *Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),* adopted in 2009, entered into force in 2012.

[18] Please note that the eligibility criteria for the recognition of refugee status under the 1951 Geneva Convention are 1) the presence of a well-founded fear of persecution (on the basis of race, nationality, religion, political opinion, belonging to a particular social group); 2) removal from the country of origin; 3) the lack of protection from the country of origin; see extensively A. Del Guercio, *La protezione dei richiedenti asilo nel diritto internazionale ed europeo*, 2016.

[19] UNHCR, *Guidelines on International Protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2)*

interpretative development could also cover the category of environmental migrants,[20] there is no doubt that it would be complex to bring the need for protection on environmental and climatic grounds back into the general framework offered by the Geneva Convention.[21] This is particularly due to the notion of 'persecution' required and the link between the victim in question and the agent of persecution.[22] In fact, in its strictest interpretation, persecution requires the presence of a discriminatory motive and, therefore, the commission of persecutory acts by state or non-state agents, induced by particular characteristics of the victim. Persecutory conduct thus suggests the existence of a specific intention of an agent of persecution to cause the harm to another person or group of persons.[23] At the same time, it is the agent of persecution itself that is difficult to identify in these cases, due to the absence of a direct causal

of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 2012.

[20] On this point see for example A. Ciervo, 'I rifugiati invisibili. Brevi note sul riconoscimento giuridico di una nuova categoria di richiedenti asilo', in Salvatore Altiero e Maria Marano (eds), *Crisi ambientale e migrazioni forzate. L'ondata silenziosa oltre la fortezza Europa*, Associazione A Sud- CDCA, 2016, p. 261.

[21] See, *inter alia*, J. McAdam, 'The Relevance of the International Refugee Law', in Jane McAdam (ed.) *Climate Change, Forced Migration, and International Law*, cit., pp. 39-51; G. SCIACCALUGA, '(Non) rifugiati climatici dal 1995 al 2015: perché il diritto internazionale dei rifugiati non può applicarsi al fenomeno delle migrazioni causate (anche) dai cambiamenti climatici', in *Rivista giuridica dell'ambiente*, 3, 2015, p. 469. In light of these considerations, some authors have also proposed to revise the Geneva Convention Relating to the Status of Refugees in order to expressly add the ground of persecution on environmental grounds (see J.B. Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', in *New York University Environmental Law Journal*, 6, 1998, p. 480; G. Kibreab, 'Climate Change and Human Migration: A Tenuous Relationship?' in *Fordham Environmental Law Review*, 20, 2010, p. 357). However, this hypothesis seems rather unlikely: even the UNHCR has taken a negative stance on the issue, fearing that, given the current political circumstances, reopening the negotiations might actually lead to a narrowing of the scope of the Convention rather than to its expansion (see A. Guterres, *Climate Change, Natural Disasters and Human Displacement: a UNHCR perspective*, UNHCR, 2008, p. 7; on this point see also C. Cournil, 'The inadequacy of international refugee law in response to environmental migration', in Benoît Mayer and François Crépeau (eds), *Research Handbook on Climate Change, Migration and the Law*, cit., pp. 100-101).

[22] G. Sciaccaluga, *(Non) rifugiati climatici dal 1995 al 2015*, cit., p. 471

[23] *Ibidem*; see also C. Cournil, *The inadequacy of international refugee law*, cit., p. 98 ff.

relationship between the wrongful conduct and the caused harm.[24] However, even considering such a framework, this does not mean that environmental migrants are not, under any circumstances, entitled to access the highest form of recognised protection. Indeed, in a recent document,[25] UNHCR stated that environmental migrants may have valid grounds for refugee status. The effects of climate change and natural disasters, as we have seen, can result in the undermining of the fundamental rights of already vulnerable and marginalised people, leading to territorial conflicts and discriminatory access to resources essential for survival. Therefore, if the criteria for eligibility are met, and the discriminatory treatment is sufficiently severe, persecution cannot but occur. *A fortiori*, if the stringent requirements of refugee status are not met, consideration should be given to granting complementary or humanitarian forms of protection, provided at regional and national level (such as subsidiary protection within the European Union).

In light of these considerations, it is important to analyse the orientation that is emerging at a jurisprudential level on the matter. A starting point is certainly the famous decision *Teitiota v. New Zealand* by the UN Human Rights Committee of January 2020, where, for the first time, they affirmed that the prohibition of refoulement can also apply in cases where the right to life is compromised by the effects of climate change and environmental disasters.[26]

[24] G. Sciaccaluga, *(Non) rifugiati climatici dal 1995 al 2015*, cit., p. 471 ff.

[25] UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*, 2020.

[26] On the case see, *ex multis*, J. H. Sendut, "Climate Change as a Trigger of Non-Refoulement Obligations Under International Human Rights Law, in *EJIL:Talk!*", 6 February 2020; G. Reeh, "Climate Change in the Human Rights Committee", in *EJIL:Talk*!, 18 February 2020; F. Maletto, "Non-refoulement e cambiamento climatico: il caso Teitiota c. Nuova Zelanda", in *SidiBlog*, 23 March 2020; G. Citroni, "Human Rights Committee's decision on the case Ieoane Teitiota v New Zealand: Landmark or will-o'-the-wisp for climate refugees?, in *QIL-Questions of International Law*, 75, 2020, p. 1; V. Rive, "Is an Enhanced Non-refoulement Regime under the ICCPR the Answer to Climate Change related Human Mobility Challenges in the Pacific? Reflections on Teitiota v New Zealand in the Human Rights Committee", in *QIL- Questions of International Law*, 75, 2020, p. 7; S. Behrman and A. Kent, "The Teitiota Case and the Limitations of the Human Rights Framework", in *QIL-Questions of International Law*, 75, 2020, p. 25; A. Brambilla and M. Castiglione, "Migranti ambientali e divieto di respingimento", in *Questione Giustizia*, February 2020; M.Courtoy, "An Historic Decision for 'Climate Refugees'? Putting It into Perspective", in *Cahiers de l'EDEM*, March 2020; L. Imbert, "Premiers éclaircissements sur la protection internationale des «mi-

3. *Teitiota v. New Zealand*: the findings of the Human Rights Committee

The facts of the case concern Mr. Teitiota, a citizen of the Republic of Kiribati, who had applied for the refugee status from New Zealand because of the unlivable conditions in his home country due to the effects of climate change.[27] After being denied the refugee status,[28] Mr. Teitiota appealed to the UN Committee, alleging the violation of art. 6 of the U.N. Covenant on Civil and Political Rights. Specifically, he argues that, by turning him back to Kiribati, New Zealand had violated his right to life under the Covenant, since "sea level rise in Kiribati has resulted in: (a) the scarcity of habitable space, which has in turn caused violent land disputes that endanger the author's life; and (b) environmental degradation, including saltwater contamination of the freshwater supply".[29]

Entering into the merits of the case, first of all, it should be recalled that the Committee does not find a violation in the present case (the point will be discussed shortly), as, in its view, the applicant did not demonstrate that the conduct of the judicial proceedings was arbitrary or

grants climatiques»", in *La Revue des droits de l'homme*, 2020; A. Maneggia, "Non-refoulement of Climate Change Migrants: Individual Human Rights Protection or 'Responsibility to Protect'? The Teitiota Case Before the Human Rights Committee", in *Diritti umani e diritto internazionale*, 2020, p. 63; F. Mussi, "Cambiamento climatico, migrazioni e diritto alla vita: le considerazioni del Comitato dei diritti umani delle Nazioni Unite nel caso Teitiota c. Nuova Zelanda", in *Rivista di diritto internazionale*, 2020, vol. 3, pp. 827 ff.; M. Ferrara, "Looking Behind Teitiota V. New Zealand Case: Further Alternatives of Safeguard For "Climate Change Refugees" Under the ICCPR and the ECHR?", in G. Cataldi, A. Del Guercio, A. Liguori (eds), *Migration And Asylum Policies Systems Challenges And Perspectives*, 2020, p. 291.

[27] Specifically, Mr. Teitiota comes from the island of Tarawa, where, as he argued, climate change and rising sea levels had led to coastal erosion, frequent floods, salinisation of freshwater wells, reduction of arable land and thus a shortage of habitable space (also due to overcrowding on the island), as well as worsening health conditions, instability and conflict in the population. The Republic of Kiribati is among the so-called "disappearing states", destined to be submerged by 2050, due to rising sea levels. See on the matter M. Oppenheimer et al., "Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities", in H.O. Portner (eds.), *IPCC Special Report on the Ocean and Cryospherein a Changing Climate*, Cambridge University Press, UK and New York, NY, USA, pp. 321-445.

[28] For more on the case history see S. Behrman and A. Kent, The Teitiota Case, cit.

[29] *Teitiota v. New Zealand*, para. 3.

amounted to a manifest error or denial of justice, or that the New Zealand courts otherwise had violated their obligation of independence and impartiality.[30] However, it recognizes that hypothetically the principle of *non-refoulement* may also apply in cases related to environmental degradation and climate change issues. Specifically, the Committee comes to the conclusion that

> *without robust national and international efforts*, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible *with the right to life with dignity before the risk is realized.*[31]

Such a conclusion is decidedly innovative, as it reflects an expansive interpretation of the right to life in several respects. In particular, in light of the *General Comment No. 36*,[32] the Committee affirms that "the right to life also includes the right to enjoy a *life with dignity* and to be free from acts or omissions that would cause their unnatural or premature death", adding also that the obligation of the States to respect and protect "extends to *reasonably foreseeable threats* and life-threatening situations that can result in loss of life".[33] In doing so, the Committee's traditional position on the matter, that the threat to life under art. 6 of the Covenant, must be *real, personal and imminent*, is partly superseded.[34] In the current view, in fact, injury to the right under art. 6 may occur even *before* the risk to life is realized or becomes 'imminent',[35] if the

[30] Ivi, para 9.13.

[31] Ivi, para. 9.11.

[32] Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 2018.

[33] *Teitiota v. New Zealand*, para 9.4.

[34] See A. Brambilla and M. Castiglione, *Migranti ambientali e divieto di respingimento*, cit.

[35] On the notion of 'imminence' in the practice of human rights monitoring bodies, see A. Anderson, M. Foster, H. Lambert, J. McAdam, "Imminence In Refugee and Hu-

threat is incompatible with the possibility of living a dignified life. The Committee specifies that these threats include phenomena such as "environmental degradation, climate change and unsustainable development",[36] thus both the effects of fast-onset events and slow-onset events, which do not have an immediate impact.[37] As argued,[38] moreover, the innovative concept of 'dignified life' also marks the international recognition of the so-called *human rights integrated approach* whereby the impairment of social rights (such as the right to water and food) can result in the violation of civil rights such as the right to life and the prohibition of inhuman or degrading treatment.

Finally, great prominence is given to positive obligations under art. 6 of the Covenant, which, in light of the evolving reading of the provision, implies that the State shall implement all appropriate measures to prevent threats to the right to life, including those that are reasonably foreseeable.[39] There is no doubt, therefore, that States are called upon to prevent and protect people against the effects of environmental degradation and climate change on the right to life (and in particular, it should be recalled, to live a *dignified life*). In a significant opening, echoing the *General Comment No. 36*, the Committee states that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life".[40] This aspect of the decision is decidedly important,[41] since the Kiribati government's fulfillment of its positive obligations under the Committee's assessment[42] is found to be an appropriate element to exclude

man Rights Law: A Misplaced Notion for International Protection", in *International and Comparative Law Quarterly*, 68, 2019, pp. 111 ff.

[36] *Teitiota v. New Zealand*, para 9.4.

[37] Ivi, para 9.11.

[38] A. Brambilla and M. Castiglione, *Migranti ambientali e divieto di respingimento*, cit.

[39] *Ibidem.*

[40] *Teitiota v. New Zealand*, para 9.4, which echoes the General Comment No. 36 at para 62.

[41] In fact, some authors believe that the *Teitiota* decision does not strictly express a position on migration related to environmental and climatic causes, but rather should be read from the perspective of fighting climate change, due to its emphasis on positive obligations on States in this regard, see A. Del Guercio, *Una Governance integrata della mobilità umana*, cit.

[42] In this regard, in fact, it is recalled that the Committee considers the measures put in place by the Government of Kiribati to be sufficient (among them the 2007 National

a violation of art. 6 in this case. Indeed, it is worth pointing out that the Committee's conclusions state that *without robust national and international efforts*, the effects of climate change may trigger non-refoulement obligations under articles 6 and 7 of the Covenant.[43] Therefore, it seems appropriate to state that in these cases, according to the Committee, the violation of the right to life can be established in presence of a reasonably foreseeable risk *together with* the inability of the States to fulfil their due diligence obligations to protect.[44]

In any case, if these are the most innovative aspects of the decision, there is no shortage of criticism, particularly with regard to the Committee's reasoning that led to rule out the violation of art. 6, as also emphasised by the dissenting opinions of judges Sancin and Muhumuza. In the Committee's view, in fact, the applicant had failed to prove that he would run "a *real*, *personal* and *reasonably foreseeable risk* of a threat to his right to life".[45] In particular, with regard to the risk to life resulting from overcrowding or private land disputes, the Committee notes that the appellant had not been involved in such conflicts, which, by the way, were sporadic, nor had he been able to demonstrate that he was running a greater risk than other inhabitants. In this regard, the Committee recalls that only in the most extreme cases does a *general situation* of violence come into play in the assessment of a real risk of irreparable harm under articles 6 or 7 of the Covenant, i.e. "where there is a real risk of harm simply by virtue of an individual being exposed to such violence or where the individual in question is in a particularly vulnerable situation".[46] Similarly, in the opinion of the Committee, the applicant has failed to provide sufficient evidence indicating a lack or insufficiency of drinking water supply such as to result in a reasonably foreseeable threat of a health risk that "would impair his right to enjoy a life with dignity".[47]

Adaptation Program of Action, the 2008-2011 National Development Plan, the 2008 National Water Resources Policy, and the 2010 National Sanitation Policy's priorities are also recalled), but it also points out that, within 10 to 15 years, the state, with the assistance of the international community, could adopt effective strategies to protect and relocate the population elsewhere (para. 9.12).

[43] *Teitiota v. New Zealand*, para 9.11.

[44] A. Brambilla and M. Castiglione, *Migranti ambientali e divieto di respingimento*, cit.

[45] *Teitiota v. New Zealand*, para 9.7.

[46] Ivi, para 9.7.

[47] Ivi, para 9.8.

In this regard, the two dissenting judges highlight the 'disproportionate' burden of proof that was on the applicant. In fact, as argued by the judge Sancin, in light of the positive obligation under art. 6, it should be the State that provides evidence of access to safe drinking water, considering also that the applicant has limited means, compared to the government, to access all the necessary information in this regard.[48] Moreover, as observed by the judge Muhumuza, "whereas the risk to a person expelled or otherwise removed, must be personal – not deriving from general conditions, except in extreme cases, the *threshold should not be too high and unreasonable*".[49] On the other hand – he continues – "it would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable in order to consider the threshold of risk as met".[50] Indeed, the need to prove the *personal nature* of the risk is difficult to reconcile with the effects of climate change, which generally affect all or a large part of the population and this is indeed one of the main problems in assessing cases of this type.[51]

The issue of the 'high threshold' required with respect to the assessment of the personal nature of the risk will also come to the fore in the examination of the Italian Supreme Court's Ordinance no. 5022/2021, where a more flexible criterion seems to have been adopted.

[48] Dissenting opinion of Committee member Vasilka Sancin, para 5.

[49] Dissenting opinion of Committee member Duncan Laki Muhumuza, para 3 dissenting opinion.

[50] Ivi, para 5.

[51] On this point see *inter alia* S. Behrman and A. Kent, *The Teitiota Case*, cit.; In this regard, it is argued in doctrine that it would be more appropriate to require a lower risk threshold when a number of rights are affected, as in the *Teitiota* case, since the protection of the right to life should not be delayed in order to be effective. Therefore it should not be necessary to wait for high mortality rates or generalised violence to trigger the *non-refoulement* obligation (G. Cataldi, "Human Rights of People Living in States Threatened by Climate Change", in *QIL-Questions of International Law,* 91, 2022, p. 51); in this matter, it should also be noted that the UN Committee's interpretative practice has not affirmed an attenuation of the personal nature of the risk where the phenomenon depends not only on a general condition, but predominantly on the actions or omissions of the State, as was the case in the jurisprudence of the Strasbourg Court, see ECtHR, judgment of 28 June 2011*,* ric. no. 8319/07 and 11449/07*, Sufi and Elmi v. United Kingdom* (on the matter A. Del Guercio, *La protezione dei richiedenti asilo,* cit., pp. 160 ff.).

4. Recent developments in the case-law at national level: the case of Italy

In the aftermath of the *Teitiota* case, there have been several interesting rulings at a domestic level in Europe, such as in Germany[52] or France,[53] which demonstrate the tendency of national courts to evolving interpretations that can guarantee some kind of protection for environmental migrants. This contribution focuses on the Italian case, which is particularly interesting in many respects.

In the first place, the Italian legal system is currently considered as one of the most advanced on the subject, since it expressly provides multiple forms of protection for so-called environmental migrants.[54] These include, for example, the possibility of granting temporary protection measures, as regulated by the art. 20 of the Consolidated Immigration Act (TUI),[55] "for significant humanitarian needs, during conflicts, *natural disasters* or other particularly serious events". Further-

[52] See for example VGH Baden-Wuerttemberg, judgement of 17th December 2020 – A 11 S 2042/20, regarding the annulment of a return decision issued against an Afghan citizen due to environmental and climatic conditions in his country of origin. What is relevant in this case is the fact that environmental factors are not assessed as determinant per se, but 'support' the prohibition of refoulement under art. 3 ECHR (whereas the jurisprudence of the German Supreme Court is based on a restrictive application of art. 3 ECHR, which, in these cases, comes into play when the harm is caused by a humanitarian crisis due to a major disaster of completely 'natural' origin), see C. Schloss, "Climate migrants – How German courts take the environment into account when considering non-refoulement", *Völkerrechtsblog*, 3 March 2021; C. Scissa, "Migrazioni ambientali tra immobilismo normativo e dinamismo giurisprudenziale: un'analisi di tre recenti pronounce", in *Questione Giustizia*, 2021, p. 1.

[53] See CAA de Bordeaux, 2ème chambre, 18/12/2020, 20BX02193, 20BX02195, regarding the issue of a temporary residence permit for medical treatment to an asylum seeker from Bangladesh who could not have had access to the essential medical treatment he needed in his country of origin, because of the health and environmental conditions, see C. Scissa, *Migrazioni ambientali tra immobilismo normative*, cit.

[54] In Europe, only Sweden and Finland explicitly listed environmental disasters as valid grounds for subsidiary (in the case of Sweden) and temporary protection (in the case of Finland, with the Finnish Aliens Act 301/2004). However, both statuses were suspended after the so-called refugee crisis of 2015; see C. Scissa, "Estrema povertà dettata da alluvioni: condizione (in)sufficiente per gli standard nazionali di protezione?", in *Questione Giustizia*, 2022, p. 1

[55] Legislative Decree 25.7.1998, No. 286 on "Consolidated Act of Provisions concerning immigration and the condition of third country nationals".

more, the art. 20bis provides for the possibility of issuing a residence permit "to foreigners unable to return to a country experiencing a *serious calamity* situation", as recently modified by the Lamorgese Decree,[56] which emended the controversial 'Security (or Salvini) Decrees'.[57] In this regard, it is worth noting that the Salvini Decree provided for the issuance of the said residence permit in case of "situation of *contingent and exceptional calamity*".[58] Therefore, as it was noted,[59] the current rule (as amended by the Lamorgese decree) suggests a less restrictive interpretation of the notion of calamity, which could therefore include more cases, which do not qualify as 'contingent' and 'exceptional'.

Anyway, it must be said that art. 20 TUI has never found application in reference to natural disasters. Actually, cases of vulnerability connected to environmental and climatic reasons have been included in the scope of application of the humanitarian protection (now, following the Lamorgese decree, 'special protection'), regulated by art. 5 (6) TUI, which does not allow the refusal or revocation of a residence permit if there are "serious reasons of a humanitarian nature or resulting from constitutional or international obligations of the Italian State".[60] This orientation was expressed by the Ministry of the Interior in 2015, as reflected in the Circular of the National Commission for the Right to Asylum, which, in providing guidance to the Territorial Commissions on the requirements for the recognition of humanitarian protection, clarified

[56] Named after the Minister of the Interior responsible for that, see Law Decree no. 130/2020, converted with amendments by Law no. 173/2020; on the changes brought about by the so-called Lamorgese decree in Italian legislation see in this volume A. Liguori, *Some Observations on Italian Asylum and Immigration Policies*.

[57] Law Decree no. 132/2018 and 53/2019, converted with amendments respectively by Law no. 113/2018 and 77/2019; on the 'Salvini Decrees' see G. Cataldi, "Search and Rescue of Migrants at Sea in Recent Italian Law and Practice" and A. Del Guercio, "The Right to Asylum in Italy", in G. Cataldi, A. Del Guercio, A. Liguori (eds), *Migration and Asylum Policies Systems Challenges and Perspectives,* Editoriale Scientifica, Napoli, 2020.

[58] See Law Decree no. 130/2020, p. 2.

[59] A. Del Guercio, "Migrazioni connesse con disastri naturali, degrado ambientale e cambiamento climatico: sull'ordinanza n. 5022/2020 della Cassazione italiana", in *Diritti umani e diritto internazionale,* 2, 2021, p. 527.

[60] On the matter A. Brambilla, "Migrazioni indotte da cause ambientali: quale tutela nell'ambito dell'ordinamento giuridico europeo e nazionale?", in *Diritto Immigrazione e Cittadinanza*, 2, 2017, pp. 15 ff.

that it also included "serious natural disasters or other serious local factors hindering repatriation in dignity and safety".[61] Therefore, humanitarian protection has gradually found greater application in cases related to natural disasters and climate change.[62]

4.1. The Ordinance no. 5022/2021 of the Supreme Court of Cassation

The ordinance no. 5022 of February 2021 comes after several decisions of the Italian Supreme Court, testifying to a trend of openness to the recognition of environmental and climatic factors as elements to be taken into account in the assessment for granting humanitarian protection.[63] In this regard, special mention should be made of the judgment no. 4555/2018, where the Supreme Court affirmed that, for the purposes of recognition of humanitarian protection, the lack of minimum conditions for leading a dignified life could also be found in "a very serious political-economic situation with *radical impoverishment effects concerning the lack of basic necessities*, of a nature that is also not strictly contingent, or even [...] a geo-political situation that offers no guarantee of life within the country of origin (*drought, famine, situations of unendurable poverty*)".[64] Subsequently, in the Ordinance no. 7832/2019, the Court makes explicit reference also to the "*disastrous climatic situation*

[61] Ministry of the Interior, National Commission for the Right to Asylum, Circular prot. 00003716 of 30.7.2015.

[62] See again A. Brambilla, *Migrazioni indotte da cause ambientali*, cit.

[63] See on the ordinance, *inter alia*, A. Ciervo, "Verso il riconoscimento dei 'rifugiati ambientali'? Note a prima lettura ad una recente ordinanza della Corte di Cassazione", in *ADiM Blog*, Osservatorio della Giurisprudenza, 2021, http://www.adimblog.com/2021/05/31/verso-il-riconoscimento-dei-rifugiati-ambientali-note-a-prima-lettura-ad-una-recente-ordinanza-della-corte-di-cassazione/ (09/22); A. Del Guercio, *Migrazioni connesse con disastri naturali*, cit.; F. Vona, "Environmental Disasters and Humanitarian Protection: A Fertile Ground for Litigating Climate Change and Human Rights in Italy? Some Remarks on the Ordinance No. 5022/2021 of the Italian Corte Suprema di Cassazione", in *The Italian Review of International and Comparative Law*, 1. 2021, p. 146; F. Perrini, "Il riconoscimento della protezione umanitaria in caso di disastri ambientali nel recente orientamento della Corte di Cassazione", in *Ordine internazionale e diritti umani*, 2021.

[64] Court of Cassation, First Civil Section, judgment of 23 February 2018, no. 4455, p. 9.

in the country of origin".[65] Not least, in the Ordinance no. 2563/2020,[66] the Court recognizes environmental disasters, such as floods, as suitable grounds for granting the humanitarian protection.

This is the background under which the findings of the ordinance currently under analysis have matured.

Firstly, it should be pointed out that the ruling refers to the case of a citizen from the Niger Delta, who unsuccessfully brought an appeal before the Court of First Instance, since his application for international or humanitarian protection had been rejected. The applicant complains of violation of art. 360, no. 5 of the Code of Civil Procedure (failure to examine a decisive fact), because the Court of First Instance had not considered the situation of environmental disaster existing in the Niger Delta, as well as the violation of art. 5 TUI for the non-recognition of the humanitarian protection. Actually, the lower Court had not failed to establish the existence of a serious environmental degradation in the applicant's area of origin. In fact, Niger Delta is notoriously recognised as an area marked by severe environmental degradation, due to the exploitation and pollution caused by oil companies. The judges also noted the existence of polluted areas due to crude oil spills caused by breakdowns and sabotage by paramilitary groups, as well as the depletion of the area and the existence of ethnic and political conflicts for the control of resources.[67] Anyway, they did not consider this situation to constitute a 'serious harm' in order to grant the subsidiary protection under art. 15 (c) of Qualification Directive,[68] nor they considered the possibility of granting humanitarian protection at all.

The Supreme Court, on the other hand, takes a different view and

[65] Court of Cassation, First Civil Section, ordinance of 17 December 2019, no. 7832, p. 3.

[66] Court of Cassation, First Civil Section, ordinance of 4 February 2020, no. 2563.

[67] The area is indeed subject to widely reported environmental degradation, starting with the 2011 UNEP report that illustrated the disastrous consequences of oil extraction activities on the territory, see UNEP, *Environmental Assessment of Ogoniland*, 2011, https://wedocs.unep.org/bitstream/handle/20.500.11822/25282/ogoniland_chapter1_UNEP_OEA.pdf?sequence=1&isAllowed=y (09/22).

[68] Please note that, under the art. 15 (c) of Qualification Directive, a serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (see A. Del Guercio, *La protezione dei richiedenti asilo*, cit.).

does not miss the opportunity to align itself with the *Teitiota* case findings. Indeed, in line with the notion of a *life with dignity*, offered by the UN Committee, the Court explicitly affirmed that:

> The assessment of the condition of widespread danger existing in the country of origin of the applicant, for the purposes of recognition of humanitarian protection, *must be conducted with specific reference to the peculiar risk for the right to life and for the right to a dignified existence resulting from environmental degradation, climate change or unsustainable development of the area.*[69]

In order to reach this conclusion, the Court provides an evolutionary interpretation of the notion of 'ineliminable core constituting the foundation of personal dignity', that, in the jurisprudence of the Court, represents the parameter to which the judge must refer in order to assess the *individual vulnerability* that justifies the granting of humanitarian protection.[70] In this regard, the Court affirmed:

> For the purpose of recognizing, or denying, humanitarian protection […], the concept of 'ineliminable core constituting the foundation of personal dignity' identified by the jurisprudence of this Court […] is *the minimum essential limit* below which the right to life and the right to a dignified existence of an individual are not guaranteed. That limit must be appreciated by the trial judge […] in relation to any context that is, in practice, able to put the fundamental rights to life, liberty and self-determination of the individual at risk of zeroing or reduction below the aforementioned minimum threshold, *therein specifically including – if their existence in a given geographical area is concretely established – situations of environmental disaster, […] climate change, and unsustainable exploitation of natural resources*.[71]

Therefore, in the Supreme Court's view, the lower court failed to correctly assess the risk of compromising the minimum threshold of human rights, since it considered only the condition of *generalised dan-*

[69] Ordinance no. 5022/2020, pp. 5-6.
[70] As specified in the aforementioned judgment no. 4555/2018, see below.
[71] Ordinance no. 5022/2020, pp. 8-9.

ger resulting from armed conflict, and not also from environmental disaster, both for the purposes of granting subsidiary protection and humanitarian protection.[72] As stated elsewhere,[73] this passage of the ordinance seems to suppose that the compromission of the minimum threshold of human rights due to environmental or climatic reasons might be suitable for granting even the subsidiary protection, not only the humanitarian one. In any case, this formulation is not maintained subsequently, when the Supreme Court indicates the principle of law which the Tribunal of different composition must abide by, referring only to humanitarian protection. In this regard, it is therefore reasonable to wonder whether the Supreme Court has missed the opportunity to conclude a reasoning that could have led to the recognition of broader forms of protection, such as that provided for by subsidiary protection, if not the refugee status.[74] In the present case, in fact, the Supreme Court could have gone so far as to recognize the existence of a 'serious harm', constituted, in fact, by the situation of generalized violence deriving from the resources conflicts between armed groups, in turn determined by the situation of environmental disaster.[75]

That being said, the importance of this ordinance in the framework of the protection of environmental migrants is undisputed. In particular, an innovative element seems to emerge from the Court's reasoning, even compared to the Teitiota decision. In fact, in the ordinance, the Supreme Court seems to highlight the *objective* situation of environmental degradation in the applicant's country of origin and the possible consequences on human rights in case of return.[76] Likewise, the burden of proof of the applicant is mitigated, not having to prove an *individualised risk* to his life resulting from the environmental disaster. Therefore, there is not any specific focus on the personal and individual condition

[72] Ordinance no. 5022/2020, p. 8.

[73] A. Del Guercio, *Migrazioni connesse con disastri naturali*, cit., pp. 530 ff.

[74] *Ibidem*.

[75] It should be noted that in 2019, the Naples Court of Appeal granted subsidiary protection to an asylum seeker coming precisely from the Niger Delta because of the risk of suffering inhuman and degrading treatment, in the event of repatriation, due to the environmental, economic and social damage resulting from oil extraction by multinationals, associated with conflicts between ethnic groups and situations of police violence to quell riots (Court of Appeal of Naples, judgment of 8 May 2019, no. 2798).

[76] On this point see F. Vona, *Environmental Disasters and Humanitarian Protection*, cit.

of the applicant that specifically caused the migration, which the Court previously had indicated as a fundamental criterion to grant the humanitarian protection. Specifically, in the aforementioned judgment no. 4555/2018, the Court clarified that the applicant's vulnerability must be determined throughout "an *individual* case-by-case assessment of the applicant's private life in Italy *compared* with his personal situation experienced before the departure and the situation to which he would be exposed in case of return".[77] In the ordinance, such an individual and comparative assessment seems to be absent. Actually, this element can be a key point that could open up a more expansive interpretation of the prohibition of *refoulement* and in relation to the granting of forms of protection, because it should establish an effective (*but more general*) risk to the enjoyment of the applicant's human rights. Consequently, this could have implications also for the burden of proof upon the applicant, that can be reduced (in this regard, the judgment seems to be a step forward even with respect to the *Teitiota* case).

5. Conclusion

In this contribution, it was pointed out that environmental migration is a complex phenomenon that requires multiple tools and interventions to be managed by the international community. Indeed, mitigation and adaptation actions to respond to the threat of climate change are indispensable, as well as support and resettlement solutions for displaced people. Likewise, it is necessary to provide forms of protection for cross-border environmental migrants in the destination countries. With respect to this issue, the absence of an effective international legal framework has been highlighted, since, at the moment, the status of 'environmental migrant' is not effectively recognized, nor protected. However, there are interesting developments at the jurisprudential level, both at supranational and national levels, which are clearly aimed at broadening the scope of beneficiaries of currently existing forms of protection to include the so-called environmental migrants, through the use of an *integrated human-rights based approach*. In fact, starting from the *Teitiota* decision, where for the first time the applicability of the prohibition of refoulement was recognized in these contexts, several European do-

[77] Judgment no. 4455/2018, p. 10.

mestic courts have proved to be inclined to evolutionary interpretations in this regard. Significant in this sense is the Ordinance 5022/2021 of the Italian Court of Cassation, which expressly recognized the applicability of humanitarian protection in cases where the effects of climate change and environmental degradation compromise the *ineliminable core constituting the foundation of personal dignity*, as essential limit established by the jurisprudence of the Court, below which the right to life is not guaranteed. Furthermore, noteworthy is the fact that the Supreme Court's ruling seems to overcome some critical issues of the *Teitiota* decision, since, for the purpose of recognizing humanitarian protection in the present case, they give prominence to the *objective* situation of environmental degradation in the applicant's country of origin and the possible consequences on human rights in case of return, not to the *personal* threat to the applicant's life. Consequently, also the burden of proof upon the applicant seems to be reduced, not having the latter to prove an *individualised risk* to his life resulting from environmental degradation. This kind of development could actually open up to a more expansive interpretation of the prohibition of *refoulement*, as well as of the requirements for granting forms of protection to environmental migrants. In any case, it is desirable that courts do not 'settle' on the recognition of residual forms of protection in these cases, but that, depending on the circumstances, they do consider the possibility of granting higher protection statuses, such as the subsidiary protection, if not even the refugee status.

THE GERMAN EXPERIENCE

CHRISTIAN TOMUSCHAT*

Nobody here needs to be taught a lesson. Migration is not a situation of stability, it describes a process fraught with fear and apprehensions that should end as early as possible. No population wishes to be constantly on the run. Migrants are people who have left their country of origin on the most diverse grounds, attempting to find a place somewhere else where they can lead a life in security, shielded against threats of death and misery. Two main problems arise for every migrant: can they find a country willing to receive them? And will the conditions at such a place of reception permit them to unfold their capacities to provide for their own livelihood? Migrants are not beggars. They wish to live and work as members of a community in which they are protected, but to which they can also make a valuable contribution.

The many issues raised by the phenomenon of migration have always been the object of careful study. In the present context, only a small empirical element can be conveyed with a view to facilitating the understanding of some facets of that phenomenon in its complexity.

1. Constitutional foundations – The current position

Germany lies at the heart of Europe. This geo-political fact has over the centuries entailed a variety of consequences for its population. Migratory movements have succeeded one another sometimes at short intervals, in addition to the steady flow of individuals across borders. Nonetheless, since it appeared in 1871 as a nation State comparable to its peers in Europe (Deutsches Reich, German Empire), Germany has never adopted a deliberate migration policy for persons seeking to be permanently admitted on its territory. Germany's Constitution, its Basic Law of 1949, contented itself with laying down in its Art. 16 (2, second sentence)[1] a right of asylum in favour of persons persecuted on political grounds, following in this respect the 1951 Geneva Convention relating

* Emeritus Professor at the Humboldt University in Berlin.

[1] The right has now its seat in Art. 16a (1) BL.

to the status of refugees,[2] but departing decisively from this Convention by setting forth an individual right that is enforceable by judicial remedies.

This was a unique gesture intended to express the gratitude of the German people for the assistance provided in particular to the German citizens of Jewish origin who during the criminal Nazi dictatorship from 1933 to 1945 had found protective refuge in other countries. Germany wanted to pay back to other people persecuted on political grounds some elements of the debt it had accumulated vis-à-vis the host countries that had taken care of its countrymen and countrywomen during the abhorrent years. The consecration of the right of asylum was designed to show at the same time that the "new" Germany conceived of itself henceforth as a democratic State under the rule of law where the rights of the individual would enjoy firm protection.[3]

A comprehensive migration policy cannot be confined to regulations on asylum since exchanges over borders take place for a vast variety of reasons. The drafters of the Basic Law believed, however, that by setting forth the right of asylum as a constitutional right the essential features of the German migration policy were more or less complete. They eschewed laying down at the same time paradigmatic decisions on migration in general, leaving such determinations to later legislative measures in light each time of the relevant historical circumstances. Thus, Germany was free, in connection with the pace of European integration, to consent to treaty rules on freedom of movement first within the limited framework of the European Community of Coal and Steel, later within the European Economic Community for all economic operators and lastly, within the framework of the European Union, for European citizens without any additional specification relating to the aims and purposes of transborder movement. Thus, from the very outset, the Basic Law provided for a tremendous amount of flexibility with regard to freedom of movement, including emigration and immigration. In this respect, the Basic Law has stood the test of time.

On the other hand, recently the question has arisen again whether an individual country is really able to extend a helping hand to everyone who anywhere in the world may be the victim of repressive policies.

[2] 189 UNTS 137.

[3] The drafting history is disappointing in this regard, see *Jahrbuch des Öffentlichen Rechts, Neue Folge* 1 (1951), 165-169.

When looking around not only in developing countries but also in Europe, the observer notes that many regimes have emerged that hold their inhabitants under such tight control that structurally all of them might be classified as persons entitled to asylum, in Germany as well as in other countries that have embraced genuine asylum policies. China and Russia belong to such autocratic systems where individual freedom has been reduced nearly to inexistence. We are still waiting for the real test. Should a country that sets its political standards at such high levels be applauded as a frontrunner, or does its ambition simply amount to hubris that must fail against the resistance of hard realities? In any event, the right to asylum can be claimed only from the German territory, not from abroad.[4] And efforts to subvert this restriction have not been successful at the European level. [5]

I do not wish to deepen this issue, since today the same challenges have to be confronted in a similar fashion by all members of the European Union inasmuch as the EU has established an asylum regime that does not only grant privileged treatment to people suffering from individual persecution but provides furthermore 'subsidiary protection' to those who generally live in surroundings threatening their life and security.[6]

2. Looking back to the past - Significant events in German history

Instead, I will focus on some crucial episodes of migration in German history in order to show what deep-going influence changing historical circumstances may have on migration. The first two relevant examples are taken from Prussian history at a time when Prussia was still a middle-sized monarchy, not one of the leading European powers which it became only after the Vienna Congress of 1815. Prussia gained widespread recognition by acting as benefactor for refugees that had been driven away

[4] Federal Administrative Court, 26 June 1984, BVerwGE (Reports) 69, 323.

[5] EU Court of Justice, 7 March 2017, Case C-638/16 PPU, *X and X v. Belgium*.

[6] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Official Journal *L 337, 20 December 2011, 9.*

from their ancestral lands. It is indeed worth recalling that in the past Germany did not always act as a country persecuting human beings on account of their race or their religion, as it happened during the last century under the criminal ideology of National Socialism.[7]

2.1. Prussia receiving religious refugees in the 17th and the 18th century

The first noteworthy development was triggered by the decision of the King of France in October 1685 to revoke the Edict of Nantes that in 1598 had granted a status of safety and equality to French Protestants after the religious wars that followed the reformation of the 16th century. To leave French territory was the only conceivable solution for people unwilling to revert to the catholic faith in order to evade the threat of death. The monarch of Brandenburg, Elector Friedrich-Wilhelm, saw the French expulsion measures as a welcome opportunity to repopulate his country that had gravely suffered from the Thirty Years' War. Immediately after the French Edict of revocation, he issued on 29 October 1685 the Edict of Potsdam (first in French!)[8] through which he invited the Huguenots to come to Brandenburg, promising them appreciable economic advantages.[9] Accepting this generous offer, around 20,000 refugees moved to Prussia where a great number of them settled down in Brandenburg, in particular in the city of Berlin and even in the remote province of East Prussia close to Lithuania.[10] The new citizens were incorporated in a special 'colony' guaranteeing them a large measure of autonomy for the preservation of their language, regarding religious service and education of the children.[11] Berlin thereby enjoyed a tremendous rise in economic and intellectual ca-

[7] The extensive study by D. Gosewinkel, *Einbürgern und Ausschließen. Die Nationalisierung der Staatsangehörigkeit vom Deutschen Bund bis zur Bundesrepublik Deutschland* focuses on naturalization as a counterpart to migration.

[8] http://www.huguenot-museum-germany.com/huguenots/edicts/04-a-edict-potsdam-1685.pdf.

[9] See A. Schunka, 'Konfession, Staat und Migration in der Frühen Neuzeit', in J. Oltmer (ed.), *Handbuch Staat und Migration in Deutschland seit dem 17. Jahrhundert*,117, 148-149.

[10] The present author counts one of those refugees among his ancestors.

[11] See E. Birnstiel, 'Asyl und Integration der Hugenotten in Brandenburg-Preussen', in: Guido Braun and Susanne Lachenicht (eds), *Les états allemands et les huguenots. Politique d'immigration et processus d'intégration*, 2007 139-154.

pacity, it was transformed from a predominantly agrarian town to a center of craftsmanship and small industries.[12] In 1700 every fifth Berliner was of French origin. Before the passage of a century the integration process was completed, and the French language disappeared progressively as language of communication.[13]

Obviously, the successful implantation of such a great number of new citizens was the fruit of interests that matched easily. The refugees received new homes, and the Brandenburg government could lay the foundations of a modernized State, reaping sizeable advantages for their country, not only being motivated by feelings of solidarity and compassion. Thus the external circumstances promoted a situation that differed fundamentally from the typical representation of a flow of refugees where the new arrivals would need to be taken care of in a comprehensive fashion.

A similar scenario developed half a century later when again religious intolerance led to the expulsion of large numbers of people who had converted to the protestant faith. It was the prince bishop of Salzburg who in 1731 ordered all protestants to leave his territory.[14] The process of expulsion started in 1731, and in the summer of 1732 tens of thousands of craftsmen and peasants left Salzburg together with their families, attracted again by promises made by the Prussian monarchy whose main motive was again the desire to repopulate the country-side that had not yet fully recovered from the tremendous demographic losses suffered during the Thirty Years' War. The main area of destination was this time East Prussia to which the refugees were transported by land and by sea, relying only partly on their own forces. The operation came to its conclusion in November 1733. The resettlement plan encountered many obstacles[15] but eventually the former inhabitants of an Austrian principality found a new homestead in far-away East Prussia.[16]

[12] Extensive portrait of the huguenots in Berlin by Gerhard Fischer, *Die Hugenotten in Berlin*, 2010.

[13] Detailed description by M. Böhm, 'Le changement du français à l'allemand chez les Huguenots de la colonie de Berlin et dans les colonies rurales du Brandebourg', in Braun and Lachenicht, note 11, pp. 155-168.

[14] See Schunka (note 9), 155-157.

[15] A quarter of the newcomers died during the first two years after their arrival in East Prussia, see G. Emrich, *Die Emigration der Salzburger Protestanten 1731-1732* (Hamburg / London: LIT Verlag, 2002) 2.

[16] See with many details C. Lindenmeyer, *Rebellen, Opfer, Siedler. Die Vertreibung der Salzburger Protestanten*, 2015; G. Turner, *Die Heimat nehmen wir mit*, 2008.

Both situations shared many common features. The origin of the exodus lay in religious conflicts, the traditional forces attempting to vanquish the new religious movements that had gained ground against the formerly dominant catholic creed. Eventually, tensions reached such a high degree of intensity that expulsion was chosen by the governmental authorities as a remedy of last resort. The expellees were received in a country whose Monarch also had decided to adhere to the new religious faith. Sizeable economic advantages were provided to the refugees upon their arrival. The language problem did not exist in the case of the Salzburg expellees, and in the case of the Huguenots the acculturation was greatly facilitated by the prestige of the French language in the whole of Europe, which cast some reflections of its glamour also on Brandenburg.

The two examples just highlighted were not representative for the general climate surrounding people lacking a stable residence. From 1648 to 1806 ordinary citizens were often tied to their land, not entitled to travel freely. Fears of bands of vagrants led to the instauration of strict control mechanisms. Human rights had not yet begun their victorious assault on the repressive aspects of absolute monarchical rule.[17]

2.2. The German Empire from 1871 to 1918

During the time of the German Empire from 1871 to 1918 Germany did not develop any specific immigration policy.[18] The Constitution provided for a power of the Federation to issue rules on the formal aspects of the sojourn of foreigners in Germany, which did not include substantive aspects of entry and stay. In the exercise of the powers remaining with them, the individual States generally refrained from introducing guiding substantive considerations. The rules for entry to German territory required little more than probity and decency.[19] Admission was regularly granted without any specific authorization, free from political criteria, al-

[17] See K. Härter, 'Grenzen, Streifen, Pässe und Gesetze. Die Steuerung von Migration im frühneuzeitlichen Territorialstaat des Alten Deutschen Reiches (1648-1896)', in Oltmer, note 9, pp. 5-86.

[18] Short review of the relevant legislation by R. Schiedermair, *Handbuch des Ausländerrechts der Bundesrepublik Deutschland*, 1968, pp. 6-8.

[19] It was regularly checked whether an alien seeking entry for a long-term sojourn could constitute an 'economic, political or security-related risk potential', see A. Fahrmeier, 'Migratorische Dereguliarung durch Reichseinigung', in Oltmer, note 9, pp. 319, 335.

though the practice showed a widely extended bias against immigrants from Poland and Jews from other east-European countries.[20] Travelling between European countries was essentially free from any bureaucratic impediments, and foreigners were generally authorized to take up professional activities either as workers or as self-employed business people. As a matter of principle, foreign citizens enjoyed a status of equality with the citizens of the country concerned, with the exception only of political rights.[21] The benefits of the social welfare State became a controversial topic only in the late 19th century. This liberalism is at least partly explained by the fact that during the entire 19th century no mass migrations took place across the borders into Germany.

2.3. Migration policies in the Weimar Republic after 1919

The first major crisis causing political tensions in the field of aliens' policy was the Soviet revolution in Russia with its threats for the members of the upper and middle classes. Tens of thousands left their homes, many of them seeking refuge in Germany. The democratic institutions of the Weimar Republic all of a sudden had to face up to the presence of great numbers people who had lost income and possessions. No welfare legislation existed that would have provided those people with rights to social benefits – all the less so since the relevant benefits accruing to German nationals were also fixed at rather low levels. Yet Germany accepted the influx of the Russian refugees without erecting any prohibitive barriers. No asylum regime was established for their support. They were not welcomed, they were just admitted, having to take care of their own livelihood.[22] Administrative authorities could at any time put an end to their stay in Germany; no remedies were available against such decisions. According to the available statistical data, Germany became the most important country of reception in Europe. For 1923, the number of Russians staying in Germany was counted at 560,000 persons.[23]

[20] This bias characterized also the subsequent stage of naturalization, see Gosewinkel (note 7) pp. 263-277.

[21] Preussisches Allgemeines Landrecht (Prussian Code of Common Law) (1794), §§ 34-41.

[22] Elaborate description by Karl Schlögel, 'Berlin: "Stiefmutter unter den russischen Städten"', in id. (ed.), *Der große Exodus. Die russische Emigration und ihre Zentren 1917 bis 1941* (München: C.H. Beck, 1994) pp. 234-259.

[23] J. Oltmer, 'Schutz für Flüchtlinge in der Weimarer Republik', in Oltmer, note 9, pp. 439, 459.

2.4. Nazi Germany from 1933 to 1945

I am not going to deal with the murderous activities of the Nazi regime not only in Germany, but all over Europe, in particular in Poland and in the Soviet Union including Ukraine. These atrocities shocked the entire world, and they gave eventually rise to the new World Organization, the United Nations. It is self-evident that the holocaust was the major political event during the 20th century. But the focus of these reflections is directed on migration into Germany, which after the end of World War II posed a major challenge to the rudimentary German authorities at that time.

2.5. Receiving refugees after the end of World War II

According to the Potsdam Agreements of 1945 concluded among the victorious Allied Powers[24] without any active German participation, Germans living east of the Oder-Neisse line were to be resettled in the Central and Western regions – which were divided into three zones of occupation. Thus millions of German nationals were expelled from German territory but ethnic Germans were additionally expelled from the territories of almost all States in Eastern Europe where German settlement had taken place over centuries, mostly upon invitation by the responsible governments. The Potsdam Agreement spoke of a 'transfer' in an 'orderly and humane manner' but in practice these requirements were rarely fulfilled. Many German citizens had already fled in anticipation of what might happen to them after the defeat of the German military forces. In any event, the provisional governmental institutions, still under supervision by the allied occupation forces, had to face up to the presence of millions of persons who all had to be taken care of, lacking everything, starting with sufficient supplies of bread and water. The exact numbers are unknown until today, not least because up to two million people lost their lives during the exodus.

Was this a situation to be considered within the framework of the present topic? The expellees were in the great majority Germans, who arrived in the central and western parts of their own country. They did not have to wait at the borders to be admitted. Quite obviously, rump

[24] Reprinted in: Ingo von Münch (ed.), *Dokumente des geteilten Deutschland* (Stuttgart: Alfred Kröner, 1968) 32, Section XIII.

Germany had a constitutional obligation to provide food and shelter to its citizens from the eastern parts of the national territory, including those who had lived in other European countries but who had been expelled because of their German ethnicity and culture. The challenge was dramatic. But no one doubted that a major effort had to be made to provide the new arrivals with basic commodities of survival. They all needed a roof over their heads. No doubts emerged suggesting that the immeasurable size of the catastrophe had to be borne by the refugees themselves. National solidarity prevailed – and frankly, no other outcome could seriously be envisaged. Yet, as reported by many sources, the reception by the Western population was largely cool and unpleasant.[25]

3. The Practice under the Basic Law

3.1. The line of separation between the FRG and the GDR

Strangely enough, a few years later, after the immediate consequences of the mass expulsions had been overcome, Germany again had to confront a problem of mass migration when, after the consolidation of the German Democratic Republic (GDR) under Soviet control in the east of the country and the establishment of the Federal Republic of Germany (FRG) in the three Western zones (1949), a steady flow of refugees sought to escape from communist rule, crossing the demarcation lines into the Western occupation zones. The numbers of refugees rose by the day, placing the newly established Federal Government before serious problems. Amid controversial debates, the parliamentary bodies in the West decided to enact a law on 'Emergency Admission' in the FRG of Germans resident in the GDR, which in the West was still called Soviet occupation zone.[26] The Law limited the right of free movement, anchored in Article 11 of the Basic Law, by establishing, articulating a prohibition in a positive fashion, that applicants 'shall not be denied' admission to the federal territory' if their life and limb or their freedom was threatened so that they had to leave their place of residence. Accor-

[25] A. Kossert, *Kalte Heimat: Die Geschichte der deutschen Vertriebenen nach 1945,* (Berlin: Siedler-Verlag, 2008).

[26] Gesetz über die Notaufnahme von Deutschen in das Bundesgebiet, 22 August 1950, BGBl. 1950 I, p. 367.

dingly, for the entry to the FRG a special permit was mandatory, which was however granted with generosity. Nonetheless, this was of course a frightening interference with the right of free movement in the entire federal territory at a time when, notwithstanding the emergence of the two rump States, uniform German nationality still existed. It was foreseeable that the Act would be submitted to the Federal Constitutional Court, which confirmed its conformity with the Basic Law.[27] The observer is surprised when reading that judgment. The judges dealt with the objections that had been raised as a matter of routine, not even hinting that the restriction had a symbolic character which went far beyond the case at hand. To recognize as legally relevant a de facto boundary line right in the middle of Germany could be interpreted as a first step towards a definitive partition of the nation. It is true that Art. 11 contained a restriction clause which specified that limitations could be introduced where 'the absence of adequate livelihood would result in a particular burden for the community'. It could easily have been argued that the new legislative regime violated the principle of proportionality, but the judgment remains silent in that regard.

At least one argument can be adduced to mitigate the blame deserved by the constitutional judges. The young FRG was still placed under the supervisory authority of the occupation forces which remained ultimately responsible for the existence of the rebuilt German State and for the welfare of the German people. Their concerns may have constituted the true considerations supporting the Emergency Act.

The outcome of the proceeding shows that freedom of movement is intimately connected with the issue of social and economic welfare. In the case adjudicated by the Constitutional Court, that elementary freedom was sacrificed out of the fear that open borders would exceed the economic capacities of the State that was still recovering from its total breakdown in 1945.

3.2. European freedom of movement

The most far-reaching step in migration policies was in the recent history the introduction of the right of free movement in Europe first for a small segment of workers only in the coal and steel sector (1953), later for 'market citizens' within the Common Market (1958) and finally the

[27] Judgment of 7 May 1953, BVerfGE (Reports) 2, pp. 266.

completion of freedom of movement in the whole of Europe without regard for anybody's usefulness as an economic actor through the Lisbon treaty of 2009. National control over the population within the national territory was thereby largely abandoned. And yet no outcry of indignation could be heard. Not a single one of the member States complained that the opening of the borders would lead to unbearable financial burdens and might even entail the destruction of national identity. They all accepted the arrival, in accordance with economic opportunities, of nationals of other countries notwithstanding many important cultural divergencies.[28] The principal explanation for this mood of pacific tolerance was the reciprocity element inherent in free movement. No member State was unilaterally burdened with the consequences of the new mobility: opening of one's own borders meant at the same time that the others, too, had to lift any restrictions for migration. Indeed, no invasive wave of immigration hit one or several countries specifically as a consequence. A process of progressive interpenetration unfolded almost imperceptibly, the fact aiding that the citizens of the different members of the Community were no total strangers to another. They had been tied together for centuries by a common history in spite of a seemingly endless series of conflicts. Fortunately, after 1945 Germany's neighbours had accepted the new democratic Federal Republic of Germany again in their midst after a few years of hesitation whether a nation in whose name millions of human beings had been put to death deserved being received again in the civilized world.

3.3. The amendment of the asylum clause in 1993

In the early years of the 1990s the number of asylum seekers grew constantly and threatened to exceed German reception capacities.[29] Art. 16 (2, second sentence) did not contain any restriction clause that would have enabled the legislature to introduce some kind of numerical upper limit. Anxieties arose that Germany could be overwhelmed by asylum applications without being able to handle them appropriately. In politi-

[28] Such fears, however, surfaced in 2004 at the time when the European Community was enlarged by new member States that beforehand had existed under the regime of socialism (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia).

[29] In 1992 the number of asylum applications rose to 438,191.

cal circles the conviction prevailed that the substance of the right of asylum should not be touched upon since the right was deemed to belong to the 'sacred' core substance of the FRG. Instead, by constitutional amendment[30] the conditions for access to asylum were defined more restrictively in the sense that no person who arrived in Germany from another member State of the EU or from a country in which the application of the 1951 Geneva Convention on the Status of Refugees[31] and of the European Convention on Human Rights was effectively ensured could not invoke the asylum guarantee of the BL. This amounted to a severe curtailment of the scope of the constitutional guarantee and was therefore challenged before the Federal Constitutional Court. Foreseeably, the relevant constitutional complaint was bound to fail since the amendment had been operated at constitutional level. The Constitutional Court would have had to take the position that the constitutional amendment ran counter to the core substance of the BL, guaranteed in Art. 79 (3), in particular the dignity of the human being. Avoiding this quagmire, it shied away from venturing into the largely uncharted territory of unconstitutional constitutional norms.[32]

The amendment soon produced its effects. Fairly soon, the applications by asylum seekers sank significantly.[33] At European level, Germany's new asylum policy instigated initiatives to introduce a common European asylum policy, but which could materialize only step by step[34] after the EU had been endowed, in 1997, with powers for the introduction of a common asylum policy by virtue of the Treaty of Amsterdam.[35]

3.4. The Refugee crisis of 2015

The next series of events that need to be addressed is the influx of refugees that occurred in 2015 after several million migrants mostly from Syria had reached the shores of Greece by sea and could not be deterred by Greece police from continuing their route further to the West

[30] Act of 27 July 1993, BGBl. I, 1631.

[31] *Supra* fn. 2.

[32] Judgment of 14 May 1996, BVerfGE (Reports) 94, 49, in particular 102-104. The judgment indicates that the decision was not taken unanimously (114).

[33] In 1995 the number of asylum applications had fallen to 127,937.

[34] Completion by Directive 2011/95, 13 December 2011, on standards for the qualification of third-country nationals as beneficiaries of international protection.

[35] Of 2 October 1997, Official Journal C 340/1.

on foot. Most members of these groups wished to reach Germany where they hoped to be admitted and to be provided with appreciable social benefits and to be integrated into a working society. None of Greece's Western neighbours in the Balkans was prepared to admit these groups which were partly composed of people who had indeed suffered political persecutions but among whom many others had to be classified, in strict legal terms, as 'economic migrants', i.e. persons lacking any claim to admission as refugees. With their obstinacy, overcoming even border lines with barbed wire, roughly one and a half a million people arrived finally at the border between Austria and Germany.

As already pointed out, Germany lacked special rules for such a mass arrival of migrants. According to the applicable rules of the so-called Dublin II Regulation,[36] the asylum-seekers should have been registered in the country where they first had set their foot on European soil. In any event, for the purposes of admission it would have been mandatory to check every person desiring to enter the German territory, proceeding to a clear selection between asylum-seekers and persons wishing to leave behind the hardship of life in Syria and to procure for themselves the advantages of a better life in tranquility and security. In the chaotic scenes unfolding at the external border, such 'triage' proved unmanageable. Chancellor Merkel, deeply moved by the human tragedy unfolding before her eyes, decided at a first stage in the night from 3 to 4 September 2015 to open the German borders without any check of identity. The Bundestag was not even consulted and the Laender were not informed. Nor took any concertation with the European institutions place. It was a kind of dictatorial determination, allegedly justified by the urgency of the situation. A huge debate was entailed by this decision.[37] It seems indeed that Chancellor Merkel was not entitled to take such a drastic step. Many were those who reproached the Chancellor with having committed a grave breach of the Basic Law. In fact, the careful legal border scheme simply collapsed, the dramatic factual events

[36] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ L 50, 25 February 2003, 1.*

[37] See M. Cinalli *et al*., 'Solidarity contestation in Germany – "Can we really do it?": Refugee solidarity in the German context', in id., *Solidarity in the Media and Public Contestation over Refugees in Europa*, 2021 113-120. The article does not touch upon legal aspects.

overriding the law. The unilateralism of our Government, acting in isolation without support from the relevant democratic institutions, led to a deep-going crisis situation. Eventually, however, those voices found no resonating political echo and remained without any palpable legal consequences.

3.5. The Ukrainian crisis of 2022

The Ukrainian crisis unleashed by the Russian Federation's aggression against Ukraine and the subsequent flight of millions of Ukrainians to Western Europe found its first response in a wave of solidarity. As from the first day, refugees from Ukraine were received in Germany without and bureaucratic subtleties. The borders were opened for them. One week later, the EU followed suit by activating a Directive of 2001[38] that provides for simplified procedures, granting the person concerned unlimited freedom of movement within the entire territory of the Union for an initial period of 90 days and granting unlimited access to the labour market. [39] Additionally, social welfare and financial support and medical care were to be provided. The duration of this temporary regime has been set at two years but may be extended for up to two more years. The spirit of generosity characterizing this Directive is remarkable.

Several factors may explain the positive response both by the European Union and by Germany. On the one hand, the general horror provoked by the Russian attack motivated governments to manifest their public rejection of that abhorrent conduct. On the other hand, since the fall of the Berlin wall in 1989 a feeling of solidarity had persistently grown up in Europe, the Europeans realizing that the Ukrainians were sincerely trying to set up a new governmental system within a framework of liberal democracy and respect for human rights and fundamental freedoms. A true political rapprochement had become visible.

[38] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *OJ L 212, 7 August 2001, 12.*

[39]. Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, 4 March 2022.

Lastly, the basic fact seems to have gained prominence that the Ukrainians were a Christian European people with which cultural ties had existed for more than a century.

4. Some cursory conclusions

For any State, the arrival of large groups of foreign persons at its doorsteps, seeking entry, constitutes a major challenge. It is not a matter of evidence that such people, who may be seen as a disquieting element, causing disturbances in a well-balanced societal edifice, will be welcomed easily. Invoking the unity of the human race and appealing to the common destiny of all human beings does not provide a key for the solution of apprehensions and distrust. Bureaucratic regulation from above, a straight-forward top-down approach does not appear to be helpful. Open borders or calls for promoting migration cannot be a promising perspective either. The fact is that humankind lives today in separate governmental units, i.e. in States, which have emerged as the main actors at the international level. No strategy can therefore be fruitful that would ignore this basic constellation of power and legitimacy.[40] Those who advocate for the demise of the State, proclaiming unlimited individual freedom, have generally fairly limited historical knowledge, not being aware of the fact that States constitute frameworks of responsibility and accountability that are not only suited and capacitated, but also required for the purpose of amalgamating citizens' individual political freedom into governance mechanisms able to combine principles-based policies with sound pragmatism under auspices of equality.[41] Of course there is no denying the Janus-faced identity of the State that can rapidly change from benefactor to monster – as currently demonstrated by the Russian Federation.

[40] See D. Miller and C. Straehle, 'Introduction', in: id., *The Political Philosophy of Refuge* (OUP: 2019) 1, 2.

[41] No serious consideration of the issue by E. Bettinelli, "Migration towards an interdisciplinary governance model", in A. R. Calabrò (ed.), *Borders, Migration and Globalization: An Interdisciplinary Perspective* , 2021, pp. 291-299; C. Simoncini, 'Freedom of movement and new immigration rights', *Ibid.*, 301-316. Pure philosophical speculation is also found with K. Oberman, "Immigration as a Human Right", in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory. The Ethics of Movement and Membership* (OUP: 2016) pp. 32-53.

Resettlement, which was considered a useful mechanism still few years ago, has widely lost its attractiveness and suitability as a remedy able to alleviate population pressures. The world has lost the open spaces which it still had before World War I and to some extent also before World War II. In the first half of the 20th century, e.g., Canada still received millions of Ukrainians to populate its vast land spaces,[42] and it continues to receive people seeking a new home under the auspices of resettlement, but it is a rare exception in that regard.[43] Today, migration can only be a kind of *ultima ratio*. Countries must first of all seek to settle their domestic conflicts internally. In the case of islands and countries threatened by flooding as a consequence of the melting of the ice masses accumulated at both poles in the north and in the south of this globe, universal human solidarity will be needed to develop suitable strategies that take into account the interests of all human beings and countries involved. The same considerations apply to countries that because of heat and drought have become truly inhabitable. Intensive processes of negotiation and balancing will become necessary for the purpose of identifying rescue strategies. Under no circumstances would 'open borders' prove efficient as a lifeline since that popular slogan blurs a clear sight on the deep-seated causes and complexities of the migration issue. Migration does not provide new homes *ex nihilo*. The burden of demographic concerns cannot be shifted to others. Self-determination is not a hollow word. It means, above all, self-responsibility.[44]

Our short overview of some salient events in German history has shown that immigration may be most welcome where government accept immigration as a useful addition to their human resources. The two examples provided from the 17th and the 18th century display an ideal situation that will rarely be encountered in real life. For the most part in Germany's history of the 19th century, when individuals acted on their own without any collective organization, a stable order grew sponta-

[42] https://en.wikipedia.org/wiki/Ukrainian_Canadians#Ukrainians_by_province.

[43] S. Adèle Garnier, 'The Pact and Refugee Settlement. Lessons sfrom Australia and Canada", in S. Carrera and Andrew Geddes, *The EU Pact on Migration and Asylum in light of the UN Global Compact on Refugees* (European University Institute, 2021) pp. 25, 27.

[44] See C. Tomuschat, 'Der UN-Migrationspakt', *Verfassungsrecht, Völkerrecht, Menschenrechte – Vom Recht im Zentrum der Internationalen Beziehungen* 2019, pp. 207, 222.

neously even in the absence of governmental intervention. On the other hand, it has become clear that even sophisticated legal migration regimes remain vulnerable to factual pressures from both sides, the pressures exerted by migrants and asylum-seekers on the one hand and the resistance opposed by populations defending, on the other hand, their priority rights by invoking the right of self-determination.[45] Management of immigration conflicts can only hope to mitigate any emerging conflicts. Where the appropriation and distribution of land comes into issue, the need to preserve the integrity of national identity will be invoked and used as a key argument. World-wide solidarity is not a natural fact of life.[46] It is incumbent on our generation to develop strategies for action suited to overcome the archaic instincts unleashed by the global climate change. Prevention should have started yesterday already.

[45] See the cautious appeal not to ignore the limits of burden sharing by the former president of the German Constitutional Court, Andreas Vosskuhle, *Die Verfassung der Mitte* (München: Carl Friedrich von Siemens-Stiftung, 2015) 56/57.

[46] See the empirically based study of M. Cinalli et al., *Solidarity in the Media and Public Contention over Refugees in Europe,* note 37.

MAPS READER: BASIC FEATURES OF GERMAN IMMIGRATION LAW
(INCLUDING RESIDENCE AND ASYLUM LAW)

PETER KNÖSEL*, JENS LOWITZSCH** AND STEFAN HANISCH***

1 Introduction

This reader presents the basic features of the immigration law of the Federal Republic of Germany. Immigration law is extremely fragmented because the essential characteristic of a foreigner's status is determined by the purpose of his or her stay and secondarily by his or her nationality. An example of this is the legal status of an European Union (EU) national who is allowed to stay in the Federal Republic of Germany without a visa, inter alia, for the purpose of seeking employment. In contrast, the status of an asylum seeker is utterly different because he is subject to the restrictions of the Asylum Act[1] with a temporarily limited status. In this respect, an asylum seeker also has a worse residence status under social law and work permit law.

Immigration law is thus fragmented into a multitude of different laws and legal norms and was also essentially enacted as a package of legislative amendments, similar to the law on child and youth welfare. The core law is the Residence Act[2], which came into force on January 1, 2005 and replaced the Aliens Act of 1990[3]. The Residence Ordinance[4],

* University of Applied Sciences Potsdam.

** European University Viadrina Frankfurt (Oder).

*** European University Viadrina Frankfurt (Oder).

[1] Asylum Act / Asylgesetz (AsylG), in the version promulgated on September 2, 2008 (Federal Law Gazette I – BGBl. I, p. 1798), as last amended by Article 9 of the Act of July 9, 2021 (BGBl. I p. 2467).

[2] BGBl. I, p. 1950.

[3] Act on the Entry and Residence of Foreigners in the Federal Territory (Aliens Act) / Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz – AuslG) of July 9, 1990 (BGBl. I p. 1354), last amended by decision of the Federal Constitutional Court – 2 BvR 524/01 – of October 25, 2005 (BGBl. I p. 3620), repealed at the end of December 31, 2004, by Art. 15 para. 3 No. 1 G of July 30, 2004 (BGBl. I p. 1950).

[4] Residence Ordinance / Aufenthaltsverordnung (AufenthV) of November 25, 2004 (BGBl. I p. 2945), last amended by Article 4 of the Ordinance of August 20, 2021 (BGBl. I p. 3682).

Employment Ordinance[5] and the Integration Course Ordinance[6] also apply. The Federal Ministry of the Interior has issued instructions on the application of various laws in order to ensure the uniform application of regulations on aliens and asylum.

Since the EU has legislative competence in the area of aliens law and asylum law, large parts of the concerning legal matters are directly set by EU regulations and directives with the usual leeway during the transposition process into national law. The case law of the European Court of Justice is of particular importance.[7]

With the Immigration Act, which is a framework law and has amended numerous other laws relevant to aliens' law. Also, the Freedom of Movement Act/EU[8] has entered into force. This law regulates the legal residence of EC nationals. Furthermore, the Immigration Act also includes amendments to the Asylum Act, which regulates the basic features of the asylum procedure. In addition, the Citizenship Act[9] and the Federal Displaced Persons Act (BVFG)[10] as well as Social Security Code III[11] have also been amended in immigration law.

[5] Ordinance on the Employment of Foreign Nationals (Employment Ordinance) / Verordnung über die Beschäftigung von Ausländerinnen und Ausländern (Beschäftigungsverordnung – BeschV) of June 6, 2013 (BGBl. I p. 1499), as last amended by Article 2 of the Act of July 20, 2022 (BGBl. I p. 1325).

[6] Ordinance on the Implementation of Integration Courses for Foreigners and Late Repatriates (Integration Course Ordinance) / Verordnung über die Durchführung von Integrationskursen für Ausländer und Spätaussiedler (Integrationskursverordnung – IntV) of December 13, 2004 (BGBl. I p. 3370), as last amended by Article 26 of the Act of August 10, 2021 (BGBl. I p. 3436).

[7] Cf. the explanations in chapter 3.1.3.1.

[8] Act on the General Freedom of Movement of EU Citizens (Freedom of Movement Act/EU) / Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Freizügigkeitsgesetz/EU – FreizügG/EU) of July 30, 2004 (BGBl. I p. 1950, 1986), as last amended by Article 4 of the Act of July 9, 2021 (BGBl. I p. 2467).

[9] Citizenship Act / Staatsangehörigkeitsgesetz (StAG), in the adjusted version published in BGBl. III, Section No. 102-1, as last amended by Article 1 of the Act of August 12, 2021 (BGBl. I p. 3538).

[10] Act on the Affairs of Displaced Persons and Refugees (Federal Displaced Persons Act) / Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge (Bundesvertriebenengesetz – BVFG), in the version published on August 10, 2007 (BGBl. I p. 1902), as last amended by Article 162 of the Ordinance of June 19, 2020 (BGBl. I p. 1328).

[11] Social Security Code (SGB) Book Three (III) – Employment Promotion / Sozialgesetzbuch (SGB) Drittes Buch (III) - Arbeitsförderung (Article 1 of the Act of

For the approx. 8.2 million foreigners living in the Federal Republic of Germany, social law is also of particular importance because many social benefits for migrants require a permanent right of residence. For certain groups of foreigners, mostly with uncertain or temporary residence, the Asylum Seekers' Benefits Act[12] determines their eligibility for social benefits. The same applies to work permit law. Here, the Employment Ordinance regulates admission to the labour market.

In the following, the most important groups of migrants are therefore discussed and presented separately according to their legal status. In this respect, the scheme follows the main bullet points of entry, residence, termination of residence and other.

1.1. History of migration

Migration in and out of the Federal Republic of Germany has taken place for many centuries. It is only with the formation of nation states that this issue takes on greater importance. As early as in the 19th century, the first regulations on the admission of non-residents became important.[13] Statutorily, however, this became regulated specifically only by the General Prussian Police Regulations of 1932, which were then amended in 1938 by the General Police Regulations under the Nazi regime.[14] The situation of foreign workers/prisoners of war under the Nazi regime was characterised, inter alia, by explicitly deliberate extermination practices in forced labour.[15] Millions of foreign workers, prisoners of war and detainees had to work in the Nazi empire, often under devastating conditions.

In the further history of migration in the Federal Republic of Germany, a strong differentiation of the various groups of foreigners took

March 24, 1997, BGBl. I p. 594, 595), as last amended by Article 1 of the Act of October 19, 2022 (BGBl I p. 1790).

[12] Asylum Seekers' Benefits Act / Asylbewerberleistungsgesetz (AsylbLG), in the version promulgated on August 5, 1997 (BGBl. I p. 2022), as last amended by Article 4 of the Act of May 23, 2022 (BGBl. I p. 760).

[13] Cf. the excellent comprehensive overview by *Bade*, Migration in Geschichte und Gegenwart.

[14] *Renner*, Ausländerrecht in Deutschland, München (C.H. Beck Verlag) 1998, p. 17 ff.

[15] Cf. *Herbert*, Geschichte der Ausländerbeschäftigung in Deutschland 1880 bis 1980, Bonn (J.H.W. Dietz) 1986.

place in the following years. While labour migration was the first focus, later the focus shifted to asylum seekers, civil war refugees and other refugee groups. In addition, the development of the European Economic Community (EEC) from an economic community to a political union was also of central importance.

With the founding of the Federal Republic of Germany, the General Police Regulations continued to apply until 1965, although the National Socialist ideas were deleted. In 1952, the Federal Office for the Recognition of Foreign Refugees (Bundesamt für die Anerkennung ausländischer Flüchtlinge – BA) was founded. Its headquarters were in Zirndorf, Bavaria. The legal status of refugees was significantly shaped by the signing of the Convention Relating to the Status of Refugees (Geneva Refugee Convention) of July 28, 1951). The Basic Law of the Federal Republic of Germany (Grundgesetz / Basic Law – GG)[16] also contained the guarantee in Art. 16 para. 2 sentence 2 Basic Law (old version): "Politically persecuted persons enjoy the right of asylum". When migration to the Federal Republic of Germany began in 1955 by recruiting foreign workers, the need quickly arose to create a solid, democratically legitimised legal basis for increased labour migration.

In 1965, the Aliens Act (Ausländergesetz – AuslG 1965) was passed. This law regulated the residence of foreign workers in the Federal Republic of Germany in a very incomplete manner. For example, at that time, section 7 Aliens Act 1965 contained the laconic formulation: "A temporary residence permit may be extended". Essential areas such as family reunification, foreigner statistics, differentiated expulsion regulations etc. were not included in this law. In addition, the federal states were able to fill in gaps in the Aliens Act with their own state regulations and thus contributed to the fragmentation of the application of the law. Once about four million foreigners were living in the Federal Republic of Germany in 1973, most of whom were subject to social security contributions, further differentiated regulations were needed. These were partly created by administrative regulations and agreements between the federal states.

The year 1973 marked a special turning point in the field of migration

[16] Basic Law for the Federal Republic of Germany / Grundgesetz für die Bundesrepublik Deutschland (GG), in the adjusted version published in BGBl. III, Gliederungsnummer 100-1, as last amended by Article 1 of the Act of June 28, 2022 (BGBl. I p. 968).

policy, because a recruitment stop was announced that has persisted to this day, although it still permits targeted recruitment and immigration in certain occupational areas. In migration research, the phase from 1955 to 1973 is called the recruitment phase, followed by the integration phase until 1982.

In order to enforce fundamental migrants' rights, the case law of the Federal Constitutional Court played an important role during these phases.[17]

It was only with the 1990 Aliens Act that the codification of many regulations and cases under aliens' law began. The act regulated the entire areas of entry, residence, consolidation of residence, termination of residence, statistics on foreigners, criminal provisions, etc. for various groups of foreigners in approx. 120 paragraphs, and was in force since on January 1, 1991, until December 31, 2004. The 1990 Aliens Act differentiated the existing residence titles (*Aufenthaltsgenehmigung* – as the generic term was under this Act) by creating in addition to the unlimited or limited residence permit (Aufenthaltserlaubnis) and the residence permit without any restrictions in terms of place and time (Aufenthaltsberechtigung)[18] the residence permit for a limited period of time for reasons of international law or urgent humanitarian reasons or to safeguard the political interests of the Federal Republic of Germany (Aufenthaltsbefugnis)[19] and the residence permit for a limited period for a special purpose (Aufenthaltsbewilligung)[20]. The political justification for these different residence titles was based on the differentiated legal situation of certain groups of foreigners.

[17] Collection of decisions of the Federal Constitutional Court / BVerfGE 49, 168 (26 September 1978-1 BvR 525/77, Indians decision), 35, 382 ff. (Palestinian decision).

[18] *Aufenthaltsberechtigung* was a form of residence permit (*Aufenthaltsgenehmigung*) under the 1990 Aliens Act (section 27). Since it was unlimited in time and place, its holder had reached the highest solidification level of residence. Furthermore, holders had special protection against expulsion.

[19] *Aufenthaltsbefugnis* was a form of residence permit (*Aufenthaltsgenehmigung*) under the 1990 Aliens Act. Under sections 30 to 33, it could be granted if a foreigner's residence was to be permitted for a limited period of time for reasons of international law or urgent humanitarian reasons or to safeguard the political interests of the Federal Republic of Germany.

[20] *Aufenthaltsbewilligung* was a form of residence permit (*Aufenthaltsgenehmigung*) under the 1990 Aliens Act (sections 28 and 29), allowing a foreigner to stay only for a specific purpose, which by its nature required only a temporary stay, e.g., for the purpose of education and training (studies, language course, etc.) or temporary gainful employment (seasonal workers, au-pair stays, etc.).

Migration in the German Democratic Republic (GDR) – The 1990 Aliens Act also replaced the GDR's regulations on foreigners.[21] Due to the merger of the two German states, the approx. 250,000 foreigners who lived in the GDR were transferred to the residence system of the Federal Republic, with partly unsatisfactory solutions. Only about 50,000 foreigners lived in the GDR with a permanent status. The rest were contract workers, especially from Cuba, Mozambique, Angola and Vietnam. Many of these people had to leave the GDR in the period between Peaceful Revolution and German Unity. Others who remained had an uncertain future here and their legal treatment caused great social and political damage.

1.2. Reform and introduction of the Residence Act 2005

The various residence titles introduced by the 1990 Aliens Act became subject to further reform when the Residence Act 2005[22] entered into force. The rationale behind this change was that such a large number of residence titles had not proven their effectiveness in practice. Under the initial Residence Act 2005 only three residence titles existed, namely

- the residence permit (*Aufenthaltserlaubnis*),
- the visa and
- the settlement permit (*Niederlassungserlaubnis*).

Due to the implementation of an EU directive, the permit for permanent residence (section 9a) was later created. Due to the ever-advancing integration of the European states, the legal situation of European Communities' (EC) nationals had permanently improved in the 1960s and 1970s. The former Residence Act/EEC provided for a residence permit/EC for EC nationals working here. Providers and consumers of services received the same. Now even third-country nationals who have a permanent right of residence in an EU Member State are entitled to reside in all EU states (cf. section 9a).

The EC had conducted accession negotiations with Turkey and con-

[21] Cf. on the history of foreigners in the GDR, *Renner*, Ausländerrecht in Deutschland München (C.H. Beck Verlag) 1998, p. 26.

[22] Act on the Residence, Employment and Integration of Foreigners in the Federal Territory (Residence Act - AufenthG), in the version published on February 25, 2008 (BGBl. I p. 162), as last amended by Article 4a of the Act of May 23, 2022 (BGBl. I p. 760).

cluded an Association Council Decision No. 3/80. This provided, inter alia, for the granting of a residence permit if Turkish nationals had been in regular legal employment for one year. The EC considered this treaty to be non-binding. The European Court of Justice (ECJ) has granted this treaty binding character, so that Turkish nationals who already reside in EU Member States can derive special rights from this agreement.[23] However, newly arrived EC citizens were and are excluded from receiving social benefits.

Four main factors have led to the new regulation embodied in the Immigration Act.

On the one hand, a paradigm shift occurred in the Federal Republic of Germany since the end of the 1990s, also due to the change in the governing coalition. The Red-Green coalition had amended the 1990 Aliens Act several times and, inter alia, shortened the period of marriage required to join one's spouse from four to two years. At that time, it had already been made easier to naturalise under the 1990 Aliens Act. In addition, despite the high unemployment in the Federal Republic of Germany, it became apparent that there was still a great shortage of labour, which could not be filled by further education and training of the unemployed.[24] For this reason, the Red-Green government created regulations that facilitated the immigration of specialised workers, such as employees from the IT sector. Their residence status became known as the "green card". [25]

On the other hand, a shift of legislative powers from the nation state to the EU (cf. Art. 23 Basic Law) also made the amendment of the law necessary. Whereas previously the EU only had a coordinating role in the areas of migration and asylum matters, the Maastricht Treaty transferred this coordinating responsibility to the first pillar, that is, the EU now has original responsibility for aliens policy and aliens law.[26] As a result, the number of EU directives permanently increases and the only recently adopted Residence Act had to be amended again.[27]

[23] Cf. Bericht der Beauftragten für Migration, Flüchtlinge und Integration (Report of the Commissioner for Migration, Refugees and Integration) 2005, p. 461 ff.

[24] Cf. Bericht der Süssmuth-Kommission "Zuwanderung gestalten – Integration fördern" (Report of the Süssmuth Commission "Shaping Immigration – Promoting Integration", July 2001, http://www.fluechtlingsrat.org/download/berkommzusfas.pdf, retrieved: December 8, 2020.

[25] Cf. *Kolb*, Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR) 2003, p. 231.

[26] Cf. presentation of EU law in chapter 1.3.

[27] First amendment to Residence Act, BGBl. 2005 I p. 721.

In addition, amendments to the 1990 Aliens Act were made due to the events of September 11, 2001. Numerous provisions have been introduced for the entry and residence of foreigners, which, inter alia, serve to prevent the influx and entry of possible terrorist perpetrators of violence. With the creation of the deportation order according to section 58a, a facilitated termination of residence has been standardised in the Residence Act.

Ultimately, the Red-Green coalition under the leadership of former Interior Minister Schily set out to create a more manageable and readable version of aliens law, the result being the Residence Act. The reduction of residence titles was also intended to serve this goal. A glance at the relevant laws may suffice to show that the legislators have not succeeded in coming closer to their set goal.

1.3. Overview of the legal framework

Since the EU has competences for migration and asylum, Art. 78 Treaty on the Functioning of the European Union (TFEU) stipulates the obligation to establish a Common European Asylum System (CEAS). Under international law, the Geneva Convention and the European Convention on Human Rights (ECHR) contain binding regulations in the field of human rights which are also enforceable.

Important amendments to immigration law were made in 2007 through the transposition of EU directives (Act on the Implementation of European Union Directives on Residence and Asylum Laws of August 19, 2007, BGBl. I p. 1970). Among other things, the granting of residence permits for humanitarian reasons was newly regulated. In addition, the Directive on the Protection of Victims (Directive 2004/81/EC)[28] was implemented by section 25 para. 4a of the Residence Act. In 2008, the Labour Migration Control Act[29] (BGBl. I p. 2846) cre-

[28] Council Directive 2004/81/EC of April 29, 2004, on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

[29] Act on the Labor-Market Adequate Management of Immigration of Highly Qualified Persons and on the Amendment of Further Residence Law Regulations / Gesetz zur arbeitsmarktadäquaten Steuerung der Zuwanderung Hochqualifizierter und zur Änderung weiterer aufenthaltsrechtlicher Regelungen (Arbeitsmigrationssteuerungsgesetz) of December 20, 2008.

ated a work opportunity in certain constellations for persons, whose deportation has been temporarily suspended for a long time, through the creation of section 18a Residence Act.

With the Directive Transposition Act 2011[30], the Act to Combat Clandestine Employment was concretised in aliens law, by the insertion of section 25 para. 4b Residence Act. Also in 2011, the Act to combat forced marriages was passed. According to this Act, in the case of family reunification, the marriage had to exist for three years before the person, who joins his or her spouse, receives an own right of residence. In addition, a right of return was created for young people who had to leave Germany as minors in accordance with section 38 para. 2a Residence Act.

Moreover, at the EU level, there are numerous directives and regulations, most of which have been transposed into the law of the Federal Republic, however, with some not having yet been transposed. The following list give a brief chronological overview:

- Council Directive 2000/43/EC of June 29, 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- Council Directive 2003/109/EC of November 25, 2003, concerning the status of third-country nationals who are long-term residents, regulates the residence of third-country nationals in all EU Member States. It was transposed in section 9a Residence Act.
- Council Directive 2003/86/EC of September 22, 2003, on the right to family reunification, was transposed in the provisions of sections 27 ff. Residence Act.
- Directive 2008/115/EC of the European Parliament and of the Council of December 16, 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals. The Directive regulates the fields of deportation and detention pending deportation of illegally staying third-country nationals in the EU. It was transposed, inter alia, by the regulation of section 62 Residence Act.
- Council Directive 2009/50/EC of May 25, 2009, on the conditions of entry and residence of third-country nationals for the purposes

[30] Gesetz zur Umsetzung aufenthaltsrechtlicher Richtlinien der Europäischen Union und zur Anpassung nationaler Rechtsvorschriften an den EU-Visakodex / Act on the Implementation of European Union Directives on Residence Law and the Adaptation of National Legislation to the EU Visa Code of November 22, 2011, BGBl. I p. 2258.

of highly qualified employment, regulates the entry and residence of highly qualified persons. The directive was transposed by sections 19, 19a (Blue Card). In addition, section 18b Residence Act provides for the early granting of a settlement permit to graduates of German universities. According to section 18c Residence Act, a residence permit may be issued to academics (German or comparable international degree) for the purpose of seeking employment in Germany.

- Directive 2011/95/EU of the European Parliament and of the Council of December 13, 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), comprehensively regulates the legal requirements for granting asylum. The Directive incorporates the Geneva Convention and created subsidiary protection pursuant to section 4 Asylum Act. The transposition took place in 2013 through the Directive Transposition Act 2013.
- Directive 2013/32/EU of the European Parliament and of the Council of June 26, 2013, on common procedures for granting and withdrawing international protection (recast) should be implemented by July 2015 and July 2018. The directive standardises legal requirements for the asylum procedure that go beyond existing rights in the previous procedure, e.g., legal counselling. The transposition has been transposed with delay. However, since many regulations contain clear legal positions, the directive has been applicable law and must be enforced, even if the transposition deadline was not met.
- Directive 2013/33/EU of the European Parliament and of the Council of June 26, 2013, laying down standards for the reception of applicants for international protection (recast), regulates reception conditions in the asylum procedure.
- The Dublin III Regulation No. 604/2013 is considered direct law and regulates the distribution of asylum seekers within the EU. Its application is controversial for several reasons. The countries of first reception are saddled with the unilateral burden of taking in asylum seekers. This is one of the reasons why many refugees leave these countries (Greece, Italy, Hungary, Bulgaria, Romania) and seek refuge in other countries. This readmission unsettles the refugees and may only take place if a dignified existence can be lived in the first host country. The case law is complex.

- In 2013, the legislation on the employment of foreigners[31] was simplified.
- In 2014, the Act to Improve the Legal Status of Asylum Seekers and Foreigners whose deportation is temporarily suspended[32] was passed. Among other things, it provided for improvements in the social sphere.
- In 2014, Bosnia, Serbia and Macedonia were declared safe countries of origin by a law (BGBl. I p. 1649). Albania, Kosovo and Montenegro have also been defined as safe countries of origin. Previously, only Ghana and Senegal were safe countries of origin.
- In 2015, the Act on the Redefinition of the Right to Remain and the Termination of Residence,[33] inter alia, completely changed the rules on expulsion. Furthermore, the provisions of sections 25a and 60a para. 2 Residence Act established introduced a right to stay that is independent of any cut-off date.
- In October 2015, the Asylum Procedure Acceleration Act,[34] also known as Asylum Package I, was passed. Inter alia, it worsens the situation of asylum seekers from safe countries of origin.
- In 2016, the Data Exchange Improvement Act[35] was enacted, followed in 2019 by the Second Data Exchange Improvement Act[36]. They provide for extensive data collection and storage powers. In particular, the transmission of data between Foreigners' Registration Offices, police authorities and the Federal Office for Migration and Refugees (BAMF) was improved.

[31] Ordinance amending the legislation on the employment of foreign nationals / Verordnung zur Änderung des Ausländerbeschäftigungsrechts of June 6, 2013, BGBl. I 2013 p. 1499 ff.

[32] Gesetz zur Verbesserung der Rechtsstellung von asylsuchenden und geduldeten Ausländern, December 23, 2014, BGBl. I 2014 p. 2439.

[33] Gesetz zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung, July 27, 2015, BGBl. I 2015 p. 1386.

[34] Asylverfahrensbeschleunigungsgesetz, October 20, 2015, BGBl. I 2015 p. 1722.

[35] Act to Improve Registration and Data Exchange for Purposes of Residence and Asylum Law (Data Exchange Improvement Act) / Gesetz zur Verbesserung der Registrierung und des Datenaustausches zu aufenthalts- und asylrechtlichen Zwecken (Datenaustauschverbesserungsgesetz – DatAustVG) of February 2, 2016 (BGBl. I p. 130 (No. 5), last amended by Art. 346 Ordinance of June 19, 2020 (BGBl. I p. 1328).

[36] Second Act to Improve Registration and Data Exchange for Purposes of Residence and Asylum Law (Second Data Exchange Improvement Act) / Zweites Gesetz zur Verbesserung der Registrierung und des Datenaustausches zu aufenthalts- und asylrechtlichen Zwecken (Zweites Datenaustauschverbesserungsgesetz – 2. DAVG) of August 4, 2019, BGBl. I S. 1131.

- In 2016, the Act on the Introduction of Accelerated Asylum Procedures[37], also known as Asylum Package II, was enacted. It created, inter alia, special reception facilities, restrictions in the asylum procedure and the abolition of family reunification for two years for beneficiaries of subsidiary protection.
- The Integration Act[38] and a related ordinance were also enacted in 2016. The regulations include, inter alia, the residence obligation for persons granted asylum and beneficiaries of international protection pursuant to section 12a Residence Act. The conditions for granting settlement permits have been tightened for this group of persons.
- The Act on the Better Enforcement of the Obligation to Leave the Country[39], inter alia, extended detention pending departure to ten days, introduced ankle bracelets for persons obliged to leave the country and made it possible to analyse mobile phone data. It was followed in 2019 by the Second Act on the Better Enforcement of the Obligation to Leave the Country[40].

The individual regulations are then dealt with in each case. In addition, every amendment to the law must comply with EU law. Whether this has always been fulfilled in a law-abiding manner in view of the Federal Republic's legislative hectic may be shown in future by the rulings of the Federal German administrative and constitutional courts and the ECJ. Due to the abundance of individual case constellations, serious counselling of migrants requires reference to a detailed reference book, commentary or other source of knowledge.

2. The Residence Act

2.1. General

The Residence Act regulates the entry and residence of foreigners in

[37] Gesetz zur Einführung beschleunigter Asylverfahren, March 11, 2016, BGBl. I 2016 p. 390.

[38] Integrationsgesetz, July 31, 2016, BGBl. I 2016 p. 1939; Verordnung zum Integrationsgesetz, July 31, 2016, BGBl. I p. 1950.

[39] Gesetz zur besseren Durchsetzung der Ausreisepflicht, July 20, 2017, BGBl. I 2017 p. 2780.

[40] Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht, August 15, 2019, BGBl. I 2019 p. 1294.

the Federal Republic. This does not include Aussiedler, to whom the Act on the Affairs of Displaced Persons and Refugees (Federal Displaced Persons Act) applies. The Freedom of Movement Act/EU applies to EU citizens. Therefore, if it is not a question of Germans and EU citizens, one also speaks of third-country nationals, e.g., citizens from India or the rest of Yugoslavia. Asylum seekers are not covered by the Residence Act, because they are subject to the right of asylum guaranteed in Article 16a Basic Law, the Geneva Convention and, in particular, the Asylum Act for the asylum recognition procedure.

The Residence Act has maintained the general restriction on immigration to the Federal Republic of Germany. There is still a general ban on entry with the reservation of permission. This means that the Residence Act specifies the permitted purposes of entry and the particular circumstances in which permission is granted.

In particular, these are:

- training;
- gainful employment;
- international law, humanitarian and political reasons;
- family reasons;
- special residence purposes.[41]

The main provisions of the Residence Act:

- seven residence titles: visa, residence permit, settlement permit, EU Blue Card, ICT card, mobile ICT card and permit for permanent residence EU;
- uniform decision on residence (entry) and work permit by the Foreigners' Registration Office;
- entry for gainful employment in certain cases;
- entry on humanitarian, political and legal grounds;
- creation of integration courses;
- termination of residence by deportation order;
- extension of the expulsion regulations;
- extension of the rules on obstacles to deportation;
- expansion of the offences;
- granting residence in cases of hardship according to sections 23a, 60a Residence Act.

Entry and stay – Section 2 Residence Act contains legal definitions

[41] Cf. *Frings/Knösel*, Das neue Ausländerrecht, Frankfurt am Main (Fachhochschulverlag) 2005, p. 24 ff.

of, inter alia, the terms gainful employment and securing a livelihood, categories of language level, concretisation of grounds for detention pending deportation, definitions of the terms sufficient living space and Schengen visa, as well as a reference to a European refugee directive (01/55/EC).

Section 3 Residence Act stipulates that foreigners who wish to enter Germany are required to have a passport.

Section 4 Residence Act prescribes the possession of a valid residence title for entry and residence in the Federal Republic of Germany, unless there is an exemption.

Section 5 Residence Act sets out general requirements for the issuance of residence permits, including securing a livelihood, clarification of identity and the absence of grounds for expulsion. The stay may be temporary or permanent.

2.2. Overview for specific groups

In the following, individual entry groups are briefly outlined. In addition to the residence possibilities of the respective group, their work permit and social benefits law would also have to be dealt with, which is only done to a limited extent due to the complexity of the topic.

2.2.1. Tourists

Tourists seek a temporary stay. The Residence Act differentiates between a national visa, which is valid for longer than three months, and the EU Schengen visa, which is only valid for a tourist stay of up to three months. According to the Schengen Agreement, this entry visa is called type C, in contrast to type A for airport transit and type B for transit. The visa is supposed to be forgery-proof and is affixed to the respective passport as an EU visa sticker. In accordance with the regulation of the positive list of the Implementation Ordinance to the Aliens Act 1990, the EU visa regulation distinguishes between negative and positive states in the form of the Schengen Implementation Convention, i.e., negative states require a visa for entry, positive states do not.

Annex 1 of the Ordinance lists the approximately 130 negative states, including Turkey, Macedonia, Russia, Ukraine, Colombia, and the majority of Asian and African states.

Annex 2 lists around 45 positive states whose nationals can stay in

the Schengen area without a visa for up to three months. These include the nationals of Israel, Japan, the USA and the majority of Latin American states.

A Turkish citizen who wants to enter the Federal Republic of Germany as a tourist needs an EU visa, which he or she must apply for at the German Embassy in Ankara or at a German Consulate General or at another diplomatic representation of an EU state. With this Schengen visa, which is usually valid for one month within a three-month period, he or she can then enter the relevant EU countries. Since the visa is always valid for all EU states, the Lithuanian embassy could also issue a Schengen visa and the person concerned could then travel to Spain and stay in other EU countries within the visa validity period. The transnational visa of EU countries can also be extended up to a total duration of three months according to section 6 para. 3 Residence Act. Taking up employment is generally not permitted with the EU Schengen visa, apart from a few exceptions (cf. section 16 Employment Ordinance).

Generally, before a visa is issued, an automatic register check is made at the Central Register of Foreigners to determine whether there is a national entry ban against the foreigner. Likewise, the data of the Schengen Information System (SIS) is queried. This means that all expulsions, deportations or residence bans of other Schengen states also lead to an entry ban for the applicant applying for a visa. The applicant must have sufficient means of his or her own to enter the country or, in the case of a visit, he or she must be invited by the person living here, who at the same time must provide the diplomatic mission or consular post with a life insurance policy and sufficient health insurance cover in accordance with section 68 Residence Act. The foreigner may also be required to provide security. Pursuant to section 84, there is a possibility of taking legal action against negative decisions, which can be contested to a limited extent.

2.2.2. Workforce

The Residence Act has reorganised the entry of workers. The originally envisaged points system for migrants entering the Federal Republic for the first time is not included in the second version of the Residence Act.

The right to work in the Federal Republic is divided into three stages:

1) The acquisition permit, which allows dependent and self-employed activity.

2) The employment permit, which according to the Employment Ordinance only allows dependent activities.

3) The employment permit for a specific workplace.

Section 18 provides for the first-time employment of non-self-employed workers. Section 19 regulates the granting of settlement permits for highly qualified persons, section 19 a (EU Blue Card) regulates the requirements for the granting of a residence permit for highly qualified employees, and section 20 states that foreign researchers may be granted a residence permit under certain conditions. Section 21 regulates the admission and entry of self-employed workers.

For all persons entitled to immigrate, the residence title must in future already indicate whether the person entering the country is also allowed to engage in gainful employment.

Pursuant to section 18 Residence Act, a residence permit can be granted to jobseekers if the German labour market so requires. The law distinguishes between applicants with or without qualified vocational training.

A uniform decision is issued to the foreigner willing to enter the country, which includes both permission to enter the country and the possibility of gainful employment. The Federal Employment Agency is thus involved in the internal administrative procedure.

Either the Federal Employment Agency has issued a general authorisation to take up employment or the Federal Agency must be involved in an entry application on a case-by-case basis.

The prerequisites for the general authorisation are regulated in section 39 para. 1 Residence Act in conjunction with the Employment Ordinance.

Through regulations of the Employment Ordinance, the Federal Agency can declare its general consent to employment for corresponding applicants or insists on its consent in individual cases. This concerns, inter alia, training and further education, the employment of highly qualified persons, the employment of executives, the employment of persons in science, research and development, for persons with commercial activities, for special occupational groups such as festival personnel, day performers, photo models, journalists, for holiday employment, sporting events, for seasonal employment, for showmen's assistants, for au-pair girls, for domestic helpers and for household employees.

The legal requirements for issuing a work permit in individual cases

are set out in section 39 para. 2 of the Residence Act. According to this, the granting of a work permit by the Federal Employment Agency in particular must not have any detrimental effects on the labour market. In this context, it is important to note the preferential right to placement of a German worker and an EU worker who has the same status as a German worker.

Before a work permit is issued, an examination of the situation and development on the labour market usually takes place. Vacancies are weighted against applicant numbers. If the applicant numbers exceed the vacancies, the granting of a work permit to first-time foreign applicants is almost impossible. For foreign workers, the prohibition of employment under less favourable working conditions applies, i.e., the amount of the wage, working hours, etc. must correspond to German labour law provisions.

Example: An Albanian nurse intends to work in Germany. Albania does not belong to the EU, therefore other legal provisions that have priority (free entry for the purpose of seeking work according to section 2 para. 2 sentence 1 of the Freedom of Movement Act/EU) are not relevant. Furthermore, there are no intergovernmental agreements between Germany and the EU, and Albania on this point that would have to be taken into account. The Albanian nurse must apply to the German embassy in Tirana for a visa for the purpose of employment in Germany. The requirements are regulated in section 18 Residence Act. The embassy would pass the application on to the relevant Foreigners' Registration Office. The Foreigners' Registration Office must involve the Federal Employment Agency. The Federal Employment Agency carries out the examination in accordance with section 39 para. 2 Residence Act. If there are more vacancies than current applicants (including sponsored persons) and if the future working conditions are the same, a permit can be considered.

Highly qualified persons who are allowed to enter the country under section 19 Residence Act generally receive a better residence title, namely the settlement permit, and usually do not require the approval of the Federal Employment Agency for employment.

According to section 20, researchers are entitled to the granting of a residence permit if, inter alia, they cooperate with special research institutions, special contractual relationships exist, or the Federal Office for Migration and Refugees has approved this institution.

A self-employed person may also be granted a residence permit for

self-employment if, according to section 21 para. 1 Residence Act, there is an overriding economic interest or a special regional need for it, or the activity is expected to have a positive impact on the economy, or the financing of the implementation is secured by equity capital or by a loan commitment. As a rule, the self-employed person is required to make an investment of at least EUR 250,000 and to create 5 jobs.

As of January 1, 2009, the Labour Migration Control Act (Arbeitsmigrationssteuerungsgesetz) also allowed the granting of a residence permit for the purpose of taking up work for persons, whose deportation is temporarily suspended, under section 18a if, inter alia, they have completed vocational training here or have a job.

2.2.3. Students

Students also seek temporary residence. Their entry is regulated according to § 16 Residence Act. Students must pass a language test before beginning their studies and therefore first enter Germany to attend language classes. In order to study, they must have a general higher education entrance qualification, be able to secure their livelihood and have sufficient health insurance cover.[42]

The place of study can be sought after entry. In addition, special work permit-free employment is provided for students during the semester break in the amount of 120 days or 240 half days. Now foreign students have up to 18 months to find a suitable job after successfully completing their studies. A doctorate is considered part of the degree programme. Section 16 also provides for residence for the purpose of completing a language course, school education and in-company training.

Students who have a residence title from another EU state may, under certain conditions, complete part of their studies in the Federal Republic of Germany according to section 16 para. 6 of the Residence Act. The application of the individual regulations is characterised by a multitude of exceptions, legal provisions to be applied in individual cases and cross-references that are difficult to comprehend, which incidentally applies to the entire law on foreigners and thus requires a high level of knowledge for counselling. In addition, the regulations are constantly being amended and have often been concretised by case law.

[42] Cf. on securing subsistence section 2 para. 3 Residence Act. The rate of ALG II plus housing costs is required.

According to section 17a Residence Act, migrants whose foreign educational qualification can be equated to a German qualification through German post-qualification can be granted an 18-month residence permit, which can then lead to a permanent right of residence.

2.3. Family reunification

Family reunification represents the main contingent (previously approx. 200,000 to 300,000) of the annual immigration cases.[43] Family reunification can take place with a spouse living here, with parents living here or with a child or other family members. Registered civil partnerships are treated in the same way as spousal reunification. The Directive Implementation Act 2007 has introduced extensive tightening here. Reunification with Germans is regulated more privileged than with foreigners living here.

In the case of foreigners, subsequent immigration is made dependent on a certain residence status of the foreigner living here and on securing a livelihood. For constitutional reasons, the joining of foreign spouses to Germans cannot be made dependent on securing a livelihood in accordance with Art. 6 of the Basic Law. The general conditions for joining a foreign spouse according to sections 3 to 5, 11 Residence Act must always be fulfilled, e.g., fulfilment of the passport obligation, no entry ban, securing a livelihood and sufficient living space. For this purpose, the Foreigners' Registration Offices take as a basis the ALG II together with the housing costs. Deviations then result from the provisions of sections 27 to 36 Residence Act.

[43] Cf. Bericht der Beauftragten für Migration, Flüchtlinge und Integration (Report of the Commissioner for Migration, Refugees and Integration) 2002, p. 271.

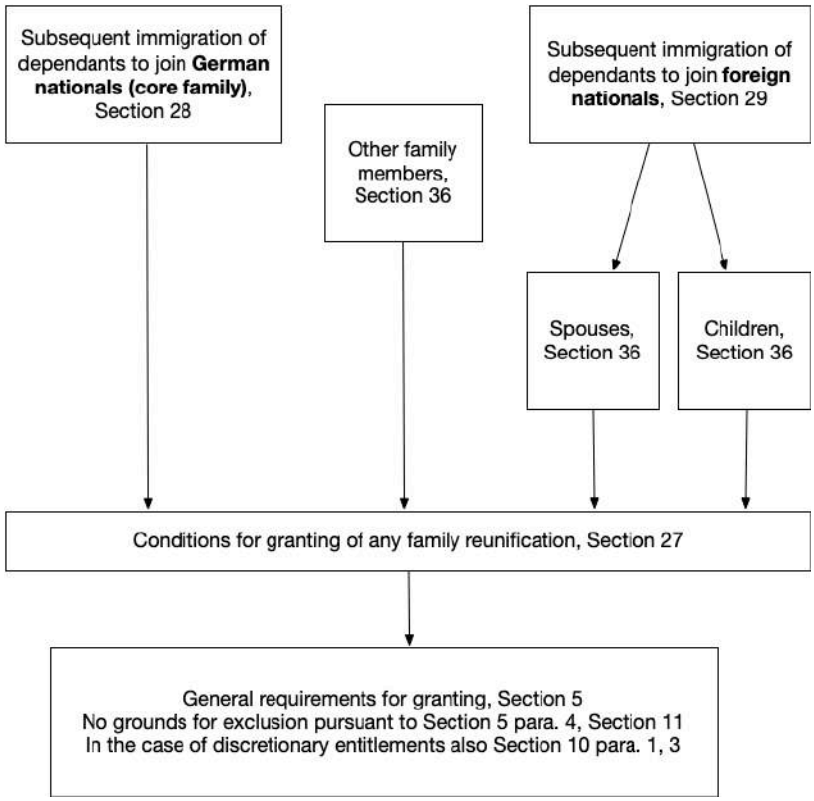


Chart 1: Residence permit for dependents, sections 27, 28, 29, 30, 32, 36 Residence Act

Section 27 of the Residence Act regulates the general requirements for family reunification, whether German or foreign; section 28 regulates family reunification with Germans; section 29 regulates the general requirements for family reunification with foreigners; section 30 regulates the reunification of spouses with foreigners; section 32 regulates the reunification of foreign children; section 36 regulates the reunification of other family members; section 31 regulates the requirements for the spouse's independent right of residence. According to section 27 para. 1a, "sham mariages"[44] and "coerced" spouses are now not entitled to join their spouses. Since the Foreigners' Registration Offices are obliged to provide evidence, it remains to be seen how the regulation will be

[44] BVerfGE 76, p. 1, 61.

implemented in practice. The same regulations apply to civil partnerships.

2.3.1. Family reunification with Germans

According to section 28 Residence Act, a residence permit must be granted to the spouse, the unmarried child or the foreign parent with custody of an unmarried German minor. The non-custodial parent can be granted a residence permit if the family relationship is lived with the child. In my opinion, this restrictive regulation is not sufficient. In the case of rights of access (section 1684 Civil Code) of foreigners with their German children, the federal Constitutional Court has set clear cornerstones. The residence permit entitles the holder to unrestricted gainful employment.[45]

[45] The original regulation of an authority's right of challenge pursuant to section 1600 para. 1 no. 5 German Civil Code in cases of suspected false acknowledgement of paternity has been rejected by the Federal Constitutional Court (BVerfG) as unconstitutional. BVerfG, Decision of December 17, 2013 – 1 BvL 6/10.

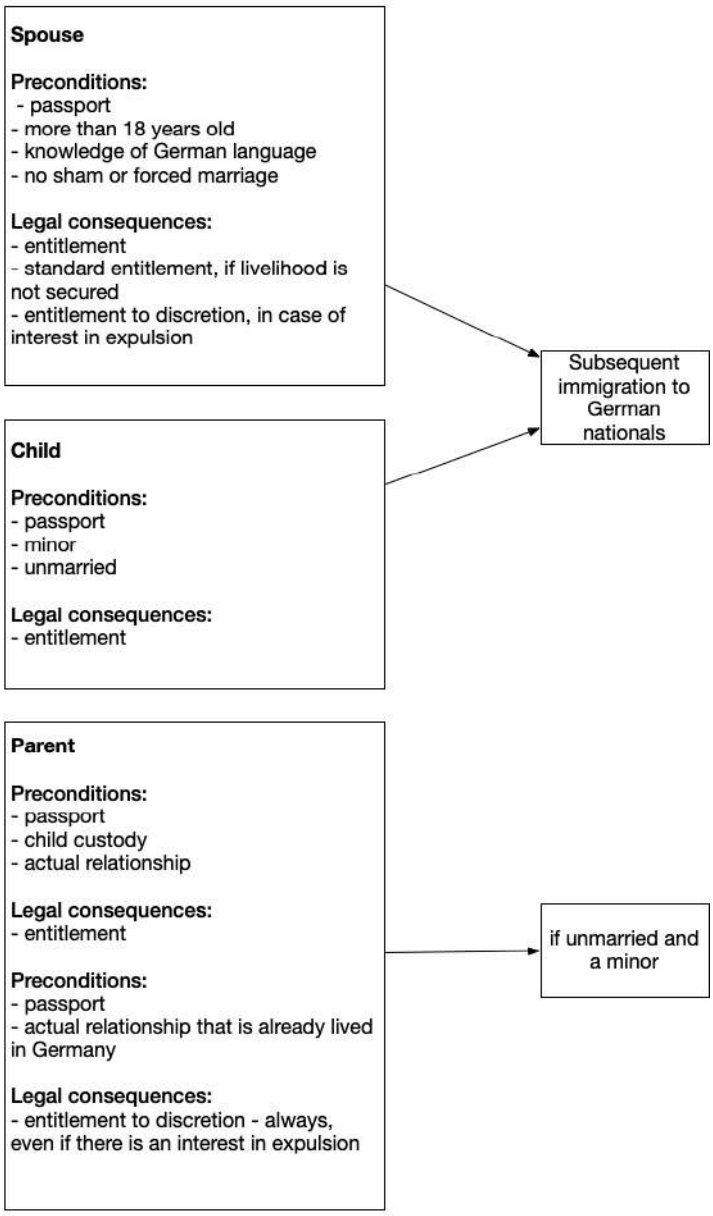


Chart 2: Subsequent immigration for the purpose of establishing family cohabitation, sections 28, 27 Residence Act

With the amendments to the Directive Transposition Act, foreign spouses

of Germans must now also have reached a minimum age of 18 and have a basic knowledge of the German language. These regulations could violate Article 6 para. 1 Basic Law or the EU Family Reunification Directive.[46]

After three years, the foreign parent is entitled to be granted a settlement permit in accordance with section 28 para. 2 Residence Act.

With regard to entitlement to social benefits, foreigners who have joined the country are on an equal footing with Germans.

Approximately 100,000 foreigners come to Germany each year by way of family reunification with Germans, e.g., in 2015, approximately 85,000.[47]

2.3.2. Reunification of spouses with foreigners

Section 30 Residence Act defines six cases of legal entitlement to spousal reunification. Both spouses must be 18 years old and the person joining them must be able to communicate in a simple manner in German, from which there are numerous exceptions in section 30 para. 1 sentence 3. In its terminology, the law speaks of the foreigner (Stammberechtigte) who lives here and the spouse who wants to join him or her. There is an entitlement to move in in the following cases:

1) joining a foreigner who is in possession of a settlement permit pursuant to section 30 para. 1 Residence Act,

2) reunification with a foreigner who has a permit for permanent residence in the EU,

3) joining the holder of the research residence permit and person entitled to asylum or recognised refugee under the Refugee Convention together with subsidiary protection

4) joining the foreigner who has been in possession of a residence permit for two years,

5) joining a foreigner whose marriage already existed at the time of entry and

6) reunification with foreigners who are long-term residents in another EU state in accordance with section 38a,

7) have a Blue Card.

[46] Directive 2003/86/EC of September 22, 2003, cf. *Marx*, Ausländer- und Asylrecht, Berlin (Nomos) 2007, § 5 marginal no. 154 ff.

[47] Cf. German Federal Government, Migrationsbericht 2015 (Migration Report 2015), Berlin 2016, https://www.bundesregierung.de/breg-de/service/publikationen/migrationsbericht-2015-726770, retrieved: December 8, 2020, p. 109.

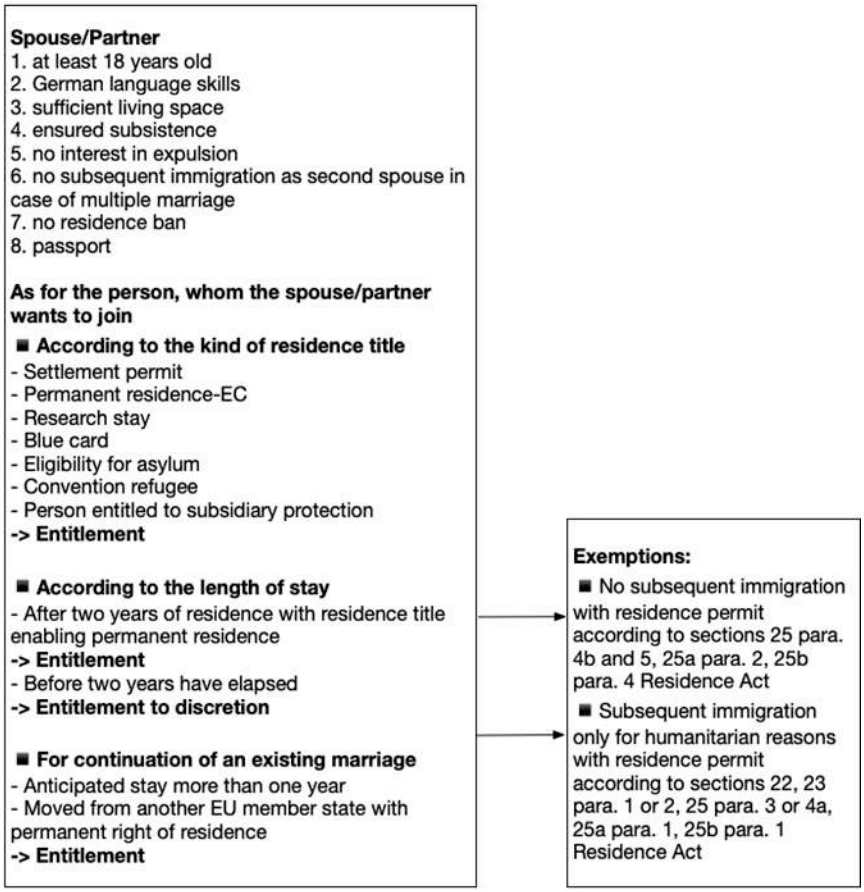


Chart 3: Subsequent immigration for the purpose of establishing family cohabitation, sections 30, 29, 27, 5 Residence Act

In addition, there are a number of discretionary provisions, e.g., subsequent immigration in the case of humanitarian residence pursuant to section 29 para. 3 Residence Act. In turn, the fulfilment of certain requirements may be waived, e.g., the requirement of German language skills when joining a person entitled to asylum.

In the granting procedure, the spouse wishing to join the spouse must go to the respective German mission abroad and present the relevant documents, in particular the marriage certificate, and the local Foreigners' Registration Office involved by the Federal Foreign Office will then check the aforementioned legal requirements. The Foreigners' Reg-

istration Office then approves or disapproves the granting of the visa in accordance with section 6 Residence Act for the purpose of spousal reunification. In the case of a negative decision, the foreigner can of course take legal action in the Federal Republic (Administrative Court of Berlin).

Chart 4: Preconditions and legal consequences of entitlement and entitlement to discretion to subsequent immigration for the purpose of establishing family cohabitation

A: Entitlement

- **Preconditions**

1. Residence permit of the foreigner, whom a family member wants to join

Range of alternative preconditions

a) Settlement permit
b) Permanent residence-EC
c) Eligibility for asylum or Convention refugee
d) After two years of residence, if consolidation is possible in principle
e) Residence expected to be longer than one year, and the marriage already existed in the country of origin
f) Residence according to section 38a Residence Act, and the marriage already existed in the country of origin
g) Blue card

2. Mutual intention to live the conjugal partnership in Germany, no sham or forced marriage
3. Ensuring the subsistence of both spouses (and any children), no other foreign dependents in need of assistance

- Exception: Foreigner, whom a family member wants to join, has residence permit according to section 25 paras. 1 and 2 Residence Act, if application is submitted three months after recognition, otherwise → B: Entitlement to discretion

4. Sufficient living space

- Exception: Foreigner, whom a family member wants to join, has residence permit according to section 25 paras. 1 and 2 Residence Act, if application is submitted three months after recognition, otherwise → see Legal consequences

5. Passport or passport replacement of joining family member,
6. At least 18 years old (exception)

7. German language skills

8. No reason for expulsion, otherwise → Entitlement to discretion

9. No residence ban according to section 5 para. 4 (terrorism) or section 11 para. 1 Residence Act (blocking period after expulsion, pushback)

- **Legal consequences**

1. Application to the diplomatic mission or consular post

Legal entitlement to a national visa

2. **Application in Germany at the Foreigners' Registration Office (Ausländerbehörde)**

(in case of legal residence of the joining family member or temporary suspension of his/her deportation and marriage in Germany): Residence permit according to section 30 Residence Act

B: Entitlement to discretion

- **Preconditions**

1. Alternative

Out of the preconditions listed in A Legal Entitlement, the following are dispensable:

- No interest in expulsion:

If there is an interest in expulsion, which does not weigh heavily in relation to the importance of the right to conjugal partnership (Article 6 para. 1 Basic Law), e.g., low-level criminal offenses, residence may still be granted on a discretionary basis.

- Alternative preconditions listed in A 1 a) to g): Even if none of these alternatives is fulfilled, residence may still be granted on a discretionary basis.
- The requirement to ensure subsistence may be dispensed with if there is an exceptional case in which the spouse's remaining in the country of origin would lead to a fundamental or human rights violation (only in extreme cases).
- Only for foreigners, whom a family member wants to join, with a residence permit in accordance with section 25 para. 1 to 3 of the Residence Act: Sufficient living space and ensured subsistence can be dispensed with.

2. Alternative

- Impediment to deportation (section 25 para. 3 Residence Act) and humanitarian reasons for subsequent immigration of family members
- Admitted refugee (section 22 Residence Act) and humanitarian reasons for subsequent immigration of family members

- Residence after right of abode (section 23 para. 1 or 2 Residence Act) and humanitarian reasons for subsequent immigration of family members
- Residence according to right of abode regulations pursuant to sections 25a para. 1 or section 25b para. 1 Residence Act and humanitarian reasons for subsequent immigration of family members

In addition, the preconditions listed in A 1. to 7. must be fulfilled. The same options for dispensations apply as under the Alternative 1.

- **Legal consequences**

1. Application to the diplomatic mission or consular post

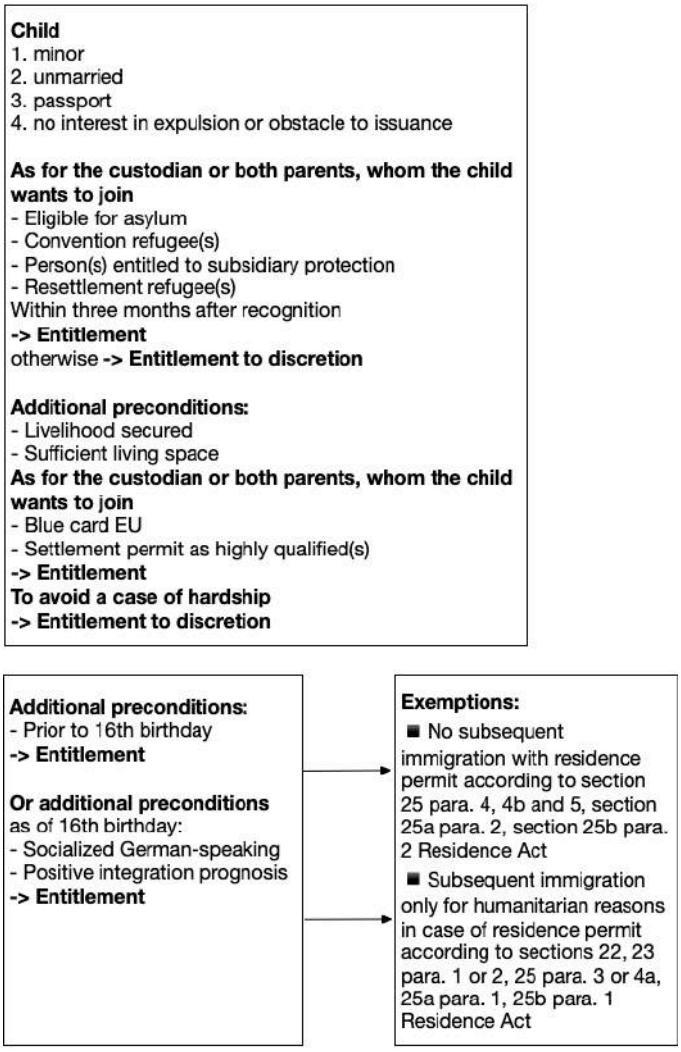
Entitlement to error-free exercise of discretion when deciding on a national visa

2. Application in Germany at the Foreigners' Registration Office (Ausländerbehörde)

(only if obtaining the visa in the country of origin is unreasonable and generally not after a rejected asylum application): Entitlement to error-free exercise of discretion when deciding on a residence permit pursuant to section 30 Residence Act

2.3.3. Children's reunification

Chart 5: Subsequent immigration for the purpose of establishing family cohabitation, sections 32, 29, 27, 5 Residence Act



Child reunification is regulated in section 32 of the Residence Act, according to which children can join their parents living here. The law differentiates in part according to the age of the child. The children join a parent who has been recognised as a resettlement refugee (section 23

para. 4) or as a refugee under the Geneva Convention (section 25 para. 1, 2, section 26 para. 3 Residence Act). Important: If the application for this group of persons is submitted within three months after recognition, the housing provision and the securing of subsistence are waived.

In the course of the restrictions, family reunification with beneficiaries of subsidiary protection was suspended for two years. Or the move is made as a minor, unmarried child together with parents who are in possession of a residence permit, Blue Card, settlement permit or EU permanent residence permit.

Up to the age of 16, the child can join the family if both parents or the parent with custody are in possession of a residence permit or settlement permit. A juvenile who is already 16 years old can only enter Germany if there is a positive integration prognosis or if the prerequisites of section 32 para. 2 nos. 1 and 2 are fulfilled.

Discretionary claims for reunification only exist in accordance with section 32 para. 4 Residence Act to avoid particular hardship.

2.3.4. Other family members

Other family members may join you in accordance with section 36 of the Residence Act if this is necessary to avoid exceptional hardship. This will always be the case if parents, adult children or grandparents do not have any further residence possibilities in the home country. In all these cases, the family member must of course be able to secure a livelihood, sufficient living space and health insurance.

Section 33 Residence Act newly regulates the granting of residence titles for foreign children born in Germany.[48] The previous linking of the child's right of residence to the status of the mother has now been changed.

If a minor who is entitled to asylum or a Geneva Convention refugee or a resettlement refugee has a residence permit, he or she can have his or her parents join him or her. In this case, the requirement of sufficient living space and the need to secure a livelihood is waived. However, the parents must have entered the country by the time their child reaches the age of 18. Their further stay when the child reaches the age limit is not regulated. For beneficiaries of subsidiary protection, parental reunification has been suspended for two years.[49]

[48] BVerfG, Decision of October 25, 2005 – 2 BvR 524/01.

[49] Cf. the extensive comments of the BAMF.

2.4. Immigration on humanitarian, political and international law grounds

The Residence Act has regulated entry on these grounds in sections 22 ff. Residence Act. According to section 22 Residence Act, a foreigner may be guaranteed admission from abroad by the German Foreigners' Registration Offices or the Federal Ministry of the Interior for reasons of international law or urgent humanitarian reasons.

If a supreme Land authority orders admission on the basis of a political decision pursuant to section 23 Residence Act, a residence permit can also be issued. The granting of admission is often made dependent on the assumption of the costs of living by third parties (section 68 Residence Act). In addition, the admission decision must be made in agreement with the Federal Minister of the Interior.

According to section 23 para. 2 Residence Act, a settlement permit can be granted to certain groups of refugees. This regulation replaces the previous Quota Refugee Act. According to this, "boat people" came to the Federal Republic in the 1980s. Jewish immigrants have so far been admitted to the Federal Republic of Germany in accordance with these regulations as decided by the Ministers of the Interior.

According to section 23 para. 4, 30,000 resettlement refugees have been accepted by the Federal Republic of Germany so far. The conditions of admission and the procedure are determined by the Federal Ministry of the Interior and the Federal Office for Migration and Refugees (BAMF).

According to section 23a Residence Act, a residence permit can be granted in cases of hardship. This requires the formation of a hardship commission. There is no obligation for the federal states to do so. Federal states such as Berlin, Brandenburg, Rhineland-Palatinate and North Rhine-Westphalia have had good experience with these commissions. [50]

According to section 24 Residence Act, a foreigner is to be granted the right of residence on the basis of the EU regulation Directive 01/55/EC. The regulation, which does not follow the other German system of aliens law, is thus solely within the EU's right of grant. This implements the aspect of "burden sharing", according to which EC countries mutually offset the costs of taking in refugees from civil wars and thus compensate each other.

[50] Cf. Bericht der Beauftragten für Migration, Flüchtlinge und Integration (Report of the Commissioner for Migration, Refugees and Integration) 2005, p. 408 ff.

Section 25 Residence Act regulates the granting of residence permit if the prerequisites under asylum law are met in accordance with the Asylum Act. Therefore, the asylum requirements are dealt with in the section on asylum.

Section 25 regulates the issuance of a residence permit under various conditions to persons entitled to asylum within the meaning of Article 16a para. 1 Basic Law according to section 25 para. 1.

According to section 25 para. 2, this also applies to beneficiaries of international protection according to the Geneva Refugee Convention (GRC) and holders of subsidiary protection according to section 60 para. 1 and 2.

In addition, a residence permit is to be granted on humanitarian grounds pursuant to section 25 para. 3 if there are obstacles to deportation pursuant to section 60 para. 5 and 7.

This concerns, inter alia, the prohibition of deportation in cases of danger of torture, danger of imposition of a death penalty and inadmissible deportation due to violation of the ECHR.

According to section 25 para. 4, a temporary humanitarian stay can also be approved by granting a residence permit. Reasons could be the completion of a medical treatment, an imminent marriage or the stay of witnesses in victim proceedings for human trafficking.

According to section 25 para. 44 sentence 2, a residence permit can be extended for humanitarian reasons if leaving the Federal Republic of Germany represents exceptional hardship for the person concerned.

By inserting section 25 para. 4a, the Federal Republic of Germany implements the Victim Protection Directive of the EU[51]. This is to enable victims of certain offences (sections 232, 233, 233a Criminal Code) to testify in criminal proceedings. The same applies to victims of undeclared work (Act to Combat Undeclared Work and Act on the Temporary Employment of Workers) according to section 25 para. 4b.

Pursuant to section 25 para. 5, a residence permit can be granted in the case of legal or factual obstacles to deportation. A discretionary reduction exists if deportation has been suspended for 18 months.

According to section 25a, a residence permit is to be granted accordingly if well-integrated foreigners have been residing in the Federal Republic of Germany for four years on a permitted or asylum status basis or if their deportation has been temporarily suspended, have been at-

[51] EU Victim Protection Directive 2004/81/EC of April 29, 2004.

tending school (vocational qualification) here for four years, concrete integration achievements have been made and the application was submitted before the 21st birthday. This regulation can be the concrete reason for a solidified residence for the approximately 60,000 unaccompanied minor foreigners (UMA) residing in the Federal Republic of Germany. Previous convictions and false statements can thwart these rights.

In the area of temporary suspension of deportation, the legislator has enacted a similar regulation pursuant to section 60a para. 2.

Section 25b regulates a similar situation for adults. Here, the duration of residence is eight or six years, respectively, if there are children, the livelihood is secured, German language skills of level A 2 are available and the children comply with their compulsory education. This is called the permanent "old case regulation".

According to section 26 Residence Act, if the reasons for issuing the residence permit have not ceased to exist, it can be extended and, if necessary, lead to a permanent right of residence via section 4.

2.5. Other subsequent immigration

The Residence Act grants young people who had to leave the Federal Republic of Germany as minors (partly involuntarily due to their parents' decision) a right of return according to section 37. For this purpose, the juvenile must, inter alia, before leaving the country

- have legally resided in the Federal Republic for eight years,
- his subsistence is secured and
- the application must be submitted between the 15th and 21st birthday.

In the case of forced marriage, section 37 para. 2a grants these victims more generous regulations, including the deviation from the age requirement.

The same applies to foreign pensioners if they receive a pension in the Federal Republic.

Granting a settlement permit to former Germans – Section 38 Residence Act provides for the facilitated granting of a settlement permit or residence permit to former Germans. This primarily concerns the group of naturalised persons who have lost their German citizenship due to a prohibited dual nationality.

For long-term residents – The general improvement of the position of third-country nationals, inter alia, by granting them a long-term resi-

dence permit, allows long-term residents to move to Germany in accordance with section 38a and to be granted a residence permit. Further prerequisites include taking up gainful employment.

2.6. Residence Consolidation

2.6.1. Residence title

The visa and the residence permit are temporary residence titles. As a rule, the foreigner requires a visa in accordance with section 6 Residence Act to enter the country. This visa is then converted into a temporary residence permit after entry, in accordance with the purpose of the stay. The foreigner may only settle with the residence title he or she indicated when entering the country or when the title was issued. A "switch" from a visa to a residence permit is only permitted if special conditions are met in accordance with 39 Residence Ordinance.

In the case of a temporary limited stay (e.g., au-pair activity for six months), the extension is excluded.

Otherwise, a residence permit can be extended according to the purpose for which it was issued, e.g., for students or family reunification.

According to section 31 Residence Act, the spouse joining the spouse receives an independent right of residence if the marriage has existed legally for three years and the spouse was in possession of a residence permit. Since the separation period in the case of divorce is one year pursuant to section 1566 para. 1 Civil Code, the spouses must generally live together for four years before the spouse joining them acquires his or her own independent right of residence. According to section 31 para. 2, this may be deviated from, e.g., in case of special hardship.

The respective duration of the temporary residence permit to be granted, e.g., for family reunification, does not result from the law. So far, a permit has been issued according to the pattern of one year, two years, two years and in the case of German marriage initially three years and then the issuance of a settlement permit comes into question.

In the case of children joining their parents, their residence is consolidated according to section 34 and becomes an independent right of residence when they reach the age of majority. In the case of successful integration, children can be granted a permanent right of residence at the age of 16 according to section 35. The same applies pursuant to section

33 if the parents of a child are residing in the Federal Republic of Germany with a residence title at the time of the child's birth.

What is different for all groups entitled to immigrate is the respective social legal situation and the entitlement to gainful employment.

In the case of family reunification, German spouses are entitled to social benefits without restriction. This also applies to persons entitled to asylum according to Article 16a para. 1 Basic Law and recognised refugees according to the Refugee Convention. However, if the residence permit was granted, e.g., for humanitarian reasons according to section 25 para. 3 to 5, the receipt of certain social benefits (child benefit, housing benefit, etc.) may be excluded.

The situation is similar with regard to the possibility of gainful employment. German-married persons are allowed to take up any gainful employment, asylum-seekers are usually also allowed to do so, as are spouses in the case of family reunification according to section 27 para. 5.

These decidedly fragmented regulations are therefore to be understood according to the respective purpose of residence.

The Residence Act has abolished the unlimited residence permit. For permanent residence, the title of settlement permit according to section 9 Residence Act was created.

This is unlimited in time and space and may not be subject to a secondary provision.

It is granted if the foreigner

- has had a residence permit for five years;
- his livelihood is secured;
- has paid at least 60 months of compulsory contributions to the pension insurance;
- there are no reasons of public safety and order (e.g., criminal offence) to the contrary;
- is in possession of a business licence;
- has sufficient knowledge of the German language;
- has basic knowledge of the legal and social order of the Federal Republic of Germany and
- has sufficient living space for themselves and their family.

If the grounds for issuance are present, the foreigner receives this settlement permit in the case of permanent residence.

2.6.2. Promoting integration

One of the most important changes to the Residence Act concerns the promotion of integration. In accordance with section 43 Residence Act, integration courses are offered, the content of which serves the acquisition of the German language and the teaching of basic knowledge of the legal system, culture, history and living conditions in Germany.

For this purpose, there are four groups of eligible persons according to section 44 Residence Act and the Integration Ordinance. These are the persons whose stay is intended to last more than one year.

These consist of, inter alia

- the employed and the self-employed;
- the entitled persons after family reunification;
- the recognised refugees according to Art. 16a Basic Law and the Geneva Convention and persons with humanitarian residence, e.g., granting a settlement permit on entry to Jewish citizens from the Soviet Union and
- Persons entitled to stay according to section 38a;
- Residence permit granted according to section 23 para. 2 or 4.

Likewise, ethnic German immigrants have a claim under the BVFG.

Other persons can be obliged by the Foreigners' Registration Offices to attend an integration course. Non-participation can lead to a reduction in ALG II benefits (section 44a para. 3 Residence Act) and be taken into account when deciding on the extension of the residence permit in accordance with section 8 para. 3 Residence Act.

In total, the three courses comprise 630 hours, namely 300 hours of basic language course, 300 hours of advanced language course and 30 hours of orientation course.

The courses end with an examination. After successful completion of the examination, the course will be credited towards the award of a settlement permit according to section 9 para. 2.

In addition, a successful course participant can already be naturalised after seven years pursuant to section 10 para. 3 Citizenship Act.

According to section 45, the federal government shall develop an integration programme, which shall include further offers by the federal government, the federal states and the municipalities.

According to section 45 a, job-related language support programmes are to be installed by the BAMF. Attendance can be compulsory for those receiving benefits according to Social Security Code II.

2.7. Termination of stay

2.7.1. Types of termination of stay

Pursuant to section 50 Residence Act, a foreigner is obliged to leave the Federal Republic of Germany if he or she does not have a residence title or if he or she no longer has a residence title.

According to section 51 Residence Act, a foreigner can lose his or her lawful status for several reasons, e.g., because his or her residence title has expired and will not be renewed or the residence title was only granted subject to a condition subsequent, in the case of the issuance of a deportation order according to section 58a, or the residence title was withdrawn by the Foreigners' Registration Office because the foreigner may have provided false information when it was issued or if the foreigner has left the federal territory without permission for more than six months.

In general, a residence title can be revoked pursuant to section 52 Residence Act if, inter alia, the foreigner

- no longer has a valid passport;
- loses or changes his or her nationality;
- has not yet entered the country;
- loses his status as a person entitled to asylum, or
- the residence permit issued is revoked.

The most important form of termination of residence is expulsion. If an expulsion/deportation has taken place, there is a ban on entry and residence pursuant to section 11 para. 1.

The Residence Act has now changed the former rigid regulation of mandatory, optional and mandatory expulsion into a more flexible expulsion system according to sections 53 ff. According to this system, the interest in expulsion is weighed against the foreigner's interest in remaining. There are particularly serious reasons in the respective category, e.g., because a foreigner has been convicted of serious criminal offences or in his or her favour because the foreigner is married to a German national or has a settlement permit.

Interest in expulsion exists, inter alia, in the case of:

- for providing false information in the procedure for obtaining a passport, residence title, temporary suspension of deportation in a Schengen state;
- in the event of an infringement of legal provisions of the Federal Republic of Germany;

- in the case of a conviction for the consumption of heroin, cocaine or comparable narcotics;
- in the event of a threat to public safety and order;
- in case of receipt of social assistance for himself, members of his family or other household members;
- coercion to enter into a marriage;
- influencing children or young people and inciting racial hatred and religious persecution;
- when using help for upbringing outside the own family under certain conditions or
- if there is approval of terrorism in public or incitement to racial hatred.

Further reasons would be the conviction to a custodial sentence and its non-suspension to probation. The same applies if narcotics have been cultivated, produced, imported, etc., if smuggling offences under sections 96 and 97 Residence Act have been committed, if support for terrorism has been provided or if the foreigner has endangered the free democratic basic order of the Federal Republic of Germany.

The realisation of the offences usually leads to expulsion, unless the foreigner presents special reasons for staying in accordance with section 55, which allow for a waiver.

According to section 55, further reasons would be, for example, to be married to a German citizen or to have a settlement permit or to have been recognised as a person entitled to asylum/refugee, or to be in possession of a permanent residence permit-EU.

Pursuant to section 53, the reasons in favour of and against the foreigner are weighed up in a complex balancing process that essentially compares the reasons for expulsion with the foreigner's reasons for expulsion and living circumstances.

2.7.2. Procedure for termination of stay

If a foreigner enters the country illegally and does not have a residence title or has previously held a residence title that has expired, the foreigner is subject to the obligation to leave the country pursuant to section 50.

In other cases (e.g., expulsion, non-granting or non-extension of a residence permit, deportation order), the termination of residence is effected by administrative act.

As a rule, the termination of residence requires a hearing. The reason for termination must be communicated by basic administrative act. Furthermore, a period of time must be granted to leave the country in accordance with section 50 para. 2. According to the rules of administrative enforcement (basic administrative act, threat of coercive measures, fixing and enforcement), the basic administrative act is also linked to the threat of deportation pursuant to section 59 Residence Act.

As a rule, the foreigner can lodge an objection against these administrative acts within one month. As a rule, the objection has a suspensive effect, unless the law excludes this effect or the Foreigners' Registration Office orders immediate enforcement pursuant to section 80 para. 2 Administrative Court Code. Appeals against this decision of the Foreigners' Registration Office can be lodged with the Foreigners' Registration Office pursuant to section 80 para. 4 Administrative Court Code or with the competent administrative court. As a rule, this is either an action for annulment or an application pursuant to section 80 para. 5 or section 123 (temporary injunction) Administrative Court Code.

Persons deported for terrorist acts are subject to special surveillance measures to enforce the deportation pursuant to section 56.

In the procedure of a termination of residence, obstacles to deportation pursuant to section 60 must be taken into account.

This is the case, for example, if a foreigner is threatened with political persecution in his or her home country. It could also be the case if the foreigner is subjected to a concrete danger of torture in his or her home country. In addition, a foreigner may not be deported if there is a risk of the death penalty being imposed in his or her home state. Furthermore, a foreigner should not be deported if there is a considerable concrete danger to life, limb or freedom in his or her home country.

If there are obstacles to deportation, deportation may not take place. If there are no obstacles to deportation or if the termination of residence has been approved by the court, the foreigner must leave the country voluntarily within the period allowed for departure.[52]

In general, it is possible to file different residence applications one after the other, e.g., to file an asylum application after a student stay. However, section 11 prohibits the issuance of a residence permit as long as an asylum procedure has not been concluded with final effect, unless

[52] Cf. *Frings/Knösel*, Das neue Ausländerrecht, Frankfurt am Main (Fachhochschulverlag) 2005, p. 84 ff.

the foreigner has a legal right to the issuance of a residence permit. In the past, it has been difficult to enforce the obligation to leave the country because the persons concerned have made use of extensive legal protection. For this reason, a deportation order was introduced under section 58a Residence Act, which provides for a shortened appeal procedure in the case of suspected terrorism.

If the foreigner does not leave voluntarily because he or she is ill or because the home country does not accept him or her or because he or she does not have a passport, there may be grounds for temporary suspension of deportation according to section 60a. In the Federal Republic of Germany, the deportation of about 150,000 foreigners is temporarily suspended, in some cases for several years.[53] The number of these persons should be reduced. The regulations of sections 25a, 25b and 60a exist in favour of persons, whose deportation is temporarily suspended, in the case of training. On the part of the Foreigners' Registration Offices, there are deficiencies in terms of content and organisation, which delay deportations or make them impossible. In the case of reasons of illness, the foreigner must submit special certificates according to section 60a para. 2c and 2d. Gainful employment may not be permitted (prevention of deportation, intentional receipt of benefits according to the Asylum Seekers Benefits Act and nationality of a safe country of origin and rejection of the asylum application filed after August 31, 2015.

According to section 60a para. 1, the Ministers of the Interior of the federal states may also temporarily suspend the deportation of certain groups of foreigners or nationals of certain countries, e.g., currently Lebanese nationals, Palestinians, Congolese, etc. The temporary suspension of deportation is a favourable decision and may have to be obtained before the administrative court by means of a temporary injunction in accordance with section 123 Administrative Court Code.

In the case of foreigners, who have to leave the Federal Republic of Germany, but do not comply with the requirement to leave within the time limit, there is the possibility of direct deportation or the imposition of detention pending deportation pursuant to section 62 Residence Act. The residence of the person to be deported can be geographically restricted pursuant to section 61.

In addition to detention pending deportation, there is also detention

[53] Cf. German Federal Government, Migrationsbericht 2015 (Migration Report 2015), Berlin 2016, https://www.bundesregierung.de/breg-de/service/publikationen/migrationsbericht-2015-726770, retrieved: December 8, 2020, p. 41.

pending transfer (section 2 para. 15) in the context of transfer back when applying the Dublin III Regulation and detention pending departure pursuant to section 62b. Detention pending departure, which can last up to ten days, is intended to ensure a feasible deportation.

Deportation is the forced termination of an unlawful status in the Federal Republic of Germany. Foreigners who do not have a right of residence in the Federal Republic of Germany but who do not leave the Federal Republic of Germany voluntarily are thus subject to deportation.

According to Article 104 para. 2 Basic Law, the Federal Republic of Germany is obliged to intervene in civil liberties only in a proportionate manner. Therefore, foreigners whose whereabouts are known are to be deported directly after judicial authorisation, usually by air. A date of deportation (section 60 para. 5) does not have to be announced unless the deportation is suspended for more than one year.

Important: Legal knowledge is extremely important for counselling on these issues. The migrant must be comprehensively supported at all levels (human, social, legal). During deportation, the entire previous living space is forcibly changed.

In other cases, where this is not possible due to factual or legal obstacles (missing papers, lack of permission from the home state, etc.), detention pending deportation is imposed.

Detention pending deportation then serves either to prepare for deportation (section 62 para. 2) or to secure deportation (section 62 para. 3) by arresting the foreigner. The procedure for deprivation of liberty is governed by the Act on Judicial Proceedings for Deprivation of Liberty[54] and is subject to the reservation of judgement. Pursuant to section 62 para. 5, the Foreigners' Registration Office may temporarily arrest a foreigner in urgent cases.

Detention pending deportation (preventive detention) may last a maximum of 18 months. As a rule, it is limited in time and extended in each case after the grounds for detention have been established. The procedure of detention pending deportation has repeatedly been subjected to strong criticism because both the procedure and the determination of the various grounds for detention in practice did not do justice to the high value of the fundamental rights of the persons concerned.[55]

[54] Gesetz über gerichtliche Verfahren bei Freiheitsentziehungen, June 29, 1956 (BGBl. I p. 599), BGBl. III/FNA 316-1, last amended December 17, 2008 (BGBl. I p. 2586).

[55] Cf. *Knösel*, Freiheitlicher Rechtsstaat und Abschiebung, Berlin (Berliner Wissenschafts-Verlag) 1991, p. 82 ff.

If a foreigner has been deported, expelled or returned, he or she is subject to an entry ban pursuant to section 11 of the Residence Act, which applies throughout the EU due to the Schengen provisions. With the deportation, the duration of the entry restriction pursuant to section 11 para. 2 must be stated.

Upon application, the competent Foreigners' Registration Office can subsequently set a time limit for this entry ban. The reason for the termination of residence or the reason for the time limit (e.g., marriage) is decisive.

In the case of voluntary departure, the Federal Republic of Germany has a programme to promote voluntary departure (REAG/GARP). This is implemented by the International Organisation for Migration (IOM). Travel costs, travel subsidies and start-up aid for a new beginning in the home country are granted.

If it is important to meet deadlines or to wait for the success of an appeal, deportees make use of church asylum. In keeping with an old tradition, the state respects the sovereignty of the church. In view of many questionable individual decisions and political procedures (deportation to Afghanistan), the pressure on this institution of church asylum is increasing. Persons involved are disciplined with criminal proceedings.

2.8. Excurse: Turkish nationals

The Decision 1/80 of the EEC-Turkey Association Council on the development of the Association of September 19, 1980 – hereinafter referred to as ARB 1/80 for short – placed the right of residence of Turkish workers and their family members in the Member States of the European Union on a basis of European law. Although the wording of ARB 1/80 only regulates the extension of the work permit of Turkish workers in the Member States of the European Union, it has also acquired significance in terms of residence law through the case law of the ECJ.

Turkish nationals are the largest group of migrants in the Federal Republic of Germany. On the basis of the EU Association Agreement (Association Council Decision ARB 1/80 and ARB 3/80) with Turkey, this group of persons enjoys a special status which is similar to that of EU citizens if the following conditions are met:

1) the Turkish national is an employee: If the employee works for

the same employer for more than one year, he/she has a right of extension and residence;

2) after three years there is a right to a work permit when changing employer;

3) after four years of proper employment there is free access to the labour market.

No rights of entry arise from the agreement. The right to family reunification is governed by the regulations of the Residence Act, but special rights of access to work are activated in the case of permanent residence. Part of the agreement is a clause according to which these regulations may not change to the disadvantage of Turkish nationals, the so-called "stand-still clause". This relates to the obligation for spouses joining their spouse to have German language skills pursuant to section 30 para. 1 no. 2 Residence Act.[56] Despite the ECJ ruling to the contrary, the Federal Republic of Germany adheres to the requirement of German language skills, but added exceptions according to section 30 para. 1 sentence 3 Residence Act.

Due to the right of association, Turkish nationals do not have to attend integration courses. This special right is also to be taken into account in expulsion law according to section 53 para. 3. When receiving social benefits, Turkish nationals are treated almost equally to German nationals. Turkey and its nationals have often been unjustly made the scapegoats of political disputes in the past. In view of the outcome of the vote on the introduction of a presidential system in Turkey and studies on the integration of Turks in the Federal Republic of Germany, there is certainly a lot to be done on both sides and at all levels.

[56] ECJ, July 10, 2014, C-153/14.

MIGRATION AND REFUGEE IN BRAZIL: FROM LEGISLATION TO UNIVERSITY PRACTICE

PATRICIA GRAZZIOTIN NOSCHANG*

1. Introduction

Migration in Brazil is regulated by two judicial instruments: The Migration Law (13.445/2017) and the Refugee Statute (Law 9.474/1997), which regulates the Geneva Convention on the 1951 (Convention Relating to the Status of Refugees). Thus, the immigrant, the migrant, the visitor, the transboundary resident, and the stateless person are ruled by Migration Law.

The Migration Law aligns with the primary international documents for human rights as the Universal Human Rights Declaration in the universal plan and the American Convention of Human Rights in the local plan. The text also considers the provisions contained in the Conventions relating to the 1951 Refugee Status and the 1954 Stateless Person Status.

It is essential to highlight that Brazilian migratory policy started to change only after thirty-seven years of Foreigners Statute Act, the Law 6.815/80, which was based on national security and the law that intended to criminalize migration – residues from the military govern period in Brazil. The Migration Law 13.445/2017 changes the nature of the migratory policy in Brazil, accompanying what is happening in the international ambit, and it goes further than the States forecast.

However, if there were advances in the Migration Law, on the other hand, Decree 9.199/17, which regulated it, abandoned the humanitarian essence that the Law brought, going backward in some respects. Another setback regarding immigration in Brazil was the communication of Brazil's withdrawal from the Global Compact for Safe, Orderly, and Regular Migration in 2018[1], which is in total harmony with the purposes presented by the Migration Law. By withdrawing from the Pact,

* University of Passo Fundo.

[1] Global Compact for Safe, Orderly and Regular Migration. (U.N.) https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf accessed 22 March 2022.

the Brazilian government has also abandoned its nationals since the document also protects Brazilian emigrants living abroad and not only immigrants residing in Brazil.

This work uses the deductive method and the technique of bibliographic and documentary research to present the advances brought by the Migration Law. It also points out some setbacks foreseen in the Decree that hinder - rather than facilitate - Law operationalization and rules relating to the institute of refuge at the national level and its procedure. Additionally, the study demonstrates the practical application of both legislations at the project is named, Refugee and Migrant Balcony (Balcão do Migrante e Refugiado in Brazilian Portuguese), which connecting the extension project on the Law School at the University of Passo Fundo in Brazil, with teaching and research: the three pillars of Brazilian universities.

2. Migration and Asylum legislation in Brazil

The proposal of a new law to treat judicial foreigners' conditions in Brazil began in 2014 with the 1st National Conference for Migrations and Refugees (COMIGRAR) organized by the Ministry of Justice. The agenda proposed by COMIGRAR tried to abandon the idea prescribed in the State's securitization that was fundamental to Law 6.815/80, known as Foreign Statute, to project a new regulatory mark for migratory policy in Brazil[2]. With this scope, in 2013, the Ministry of Justice, by Ordinance No. 2.162/2013, appointed a Committee of Experts to develop a legal text to replace the Law Project n. 5.655/09.The text was also proposed by the Executive that provided on the entry, stay, and exit of foreigners in the national territory, the Naturalization Institute, compulsory measures, the transformation of the National Immigration Council into the National Council of Migration, the definition of infractions and other provisions, also called the Foreigner's Law[3].

On August 4, 2015, the Senator Aloysio Nunes Ferreira, from the

[2] Ministry of Justice. *Conferência Nacional sobre Migrações e Refúgio*. [National Conference of Migration and Refugees] Caderno de Propostas. https://reporterbrasil.org.br/documentos/comigrar.pdf accessed 20 April 2022.

[3] House of Representatives - *Camera Câmara dos Deputados.* PL 5655/2009. www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=443102 accessed 11 January 2022.

Party of the Brazilian Social Democracy (Partido da Social Democracia Brasileira (PSDB/SP in Brazilian Portuguese), from São Paulo, presented the Law Project 2516/2015 (LP 2516/2015) that established, after approval in both legislative houses (House of Representatives and Federal Senate) the Migration Law nº 13.445 of May 24, 2017.

The Migration Law innovated in considering all the categories of migrants (both immigrant and migrant) and, mainly, in bringing a humanitarian aspect in favor of human rights and fundamental guarantees. The Law consists of 125 articles, recognizes, and relates to other international documents relative to the topic, such as the Geneva Convention on the 1951 Refugee Statute, the International Penal Court Status, and the Convention on the 1954 Stateless Person Status.

The Section II of the Migration Law introduces the Principles and Guarantees, in which article 3º determines the principles and guidelines that rule Brazilian migratory policy in twenty-two items. Among them are emphasized: the universality, the indivisibility, and the interdependence of human rights; the repudiation and prevention of xenophobia, the racism, and discrimination; the non-criminalization of migration; the humanitarian reception"[4]. Article 4th in the Section also guarantees the migrant, "in the national territory, with a condition of equality with the natives, the inviolability of the right to life, to freedom, to equality, to safety and the property, and assured [...]. From a series of sixteen rights, the following ones are emphasized: civil, social, cultural, and economic rights and freedoms; the right to circulate in national territory; the right of assembly to pacific finalities; the right of association, including trade-union filiation for licit finalities; the right to the public education; the right to health and social assistance, the right to opening a bank account; the right of leaving, of staying and of reentering the national territory, even while the solicitation of residence authorization is pending, of permanence prorogation or the transformation of the visa into residence authorization, etc.[5]

The Law also ensured that "nobody will be hindered from entering the Country by the motivation of race, religion, nationality, suitability to

[4] Article 3. The Brazilian Migration Policy is ruled by the following principles and directives… Brazilian Migration Law 13.445/2017.

[5] Article 4 of the Section guarantees to the migrant, "in the national territory, with a condition of equality with the natives, the inviolability of the right to life, to freedom, to equality, to safety and the property, and assured […] Migration Law 13.445/2017.

a social group, or political opinion, making it possible to hold those responsible for arbitrary acts in the primary border zone [3].”[6]

To facilitate the regulamentation of migrants that enter Brazil, Ramos also highlights the following updates:

> *rationalization of visa hypotheses (emphasizing the temporary visa for humanitarian reception); ii) prevision of residence permission; iii) simplification and reciprocal exemption of visa or consular fees and emoluments, defined by diplomatic communication. Still, members of vulnerable groups and individuals in conditions of financial hyposufficiency are exempt from payment of consular fees and emoluments for granting visas or for obtaining documents for migratory regularization.*[7]

The Migration Law also established new visas concerning the prior Foreign Status. The permanence visa was extinct, and the new law foresees the possibility of denominated “residence authorization”[8]. The visit, temporary, official, courtesy, and diplomatic visas are possible.

Although Law 13.445/17 has innovated in a set of matters, many determinations, headlines, and procedures remained pending for subsequent regulamentation. So, the Decree nº 9.199/17 that regulates the Migration Law to solve these omissions was published in the Official Union Journal on November 20th, 2017 and brought some regressions.

The Decree 9.1999/17 is composed of 319 articles, almost double what the Migration Law possesses. It demonstrates to be entirely absentminded for the debate that accompanied the process of Law elaboration that occurred primarily in the last ten years.

The Expert Committee that worked on the Migration Law elaboration considered that the Decree “depreciates the spirit of the new law.” Therefore, the Committee understood that the Decree presents a critical threat “[...] to historical conquests, both referring to the migrants’ rights and relating to the Brazilian State capacity of formulating proper policies about this matter of growing relevance”.[9]

[6] A. de Carvalho Ramos and oth., “Regulamento da nova Lei de Migração é contra legem e praeter legem”, *Revista Consultor Jurídico*, 2017. www.conjur.com.br/2017-nov-23/opiniao-regulamento-lei-migracao-praetem-legem. accessed 10 January 2022.

[7] *Ibid.*

[8] Article 30, Brazilian Migration Law 13.445/2017.

[9] A. de Carvalho Ramos. “Direitos Humanos são eixo central da nova Lei de Mi-

Among the drawbacks included in the Decree 9.1999/17, some dispositions make the entrance into the country more difficult for immigrants with economic issues, who leave their countries looking for an occupation, and those who have the objective of sending financial support to their relatives that stayed behind. For instance: the Law has determined, in contradiction with what was established in the law bill, that to conceive a temporary visa for work, the foreigner must submit a "formalized job offer by a legal entity acting in the country"[10] The Decree has determined that the job offer is characterized by using an individual employment contract or service agreement[11]. The Expert Committee states that "[...] a contract does not consist of an offer but a completion of a work-related or service agreement, which will hamper the acquisition of this kind of visa by the migrants".[12]

Thus, the Decree neither supported the advancements of the Migration Law nor regarded critical deadlines such as the temporary visa and the residence authorization relative to humanitarian reception. On top of that, the Decree allowed them to be regulated by Ordinances — jointly acts from Ministries of External Relations Justice, of Public Security, and Work. These determinations, which happen through administrative acts called Interministerial Ordinances[13], involve the referred ministries and bring legal insecurity because they are more susceptible to change than law or decree that require a greater formality. The acts promote differentiated rules for the entry of migrants depending on the nationality of origin of each person entering the country.

Conversely, the refugee status in Brazil was regulated by the signature and ratification of the Geneva Convention on the 1951 Refugees Status, consummated by Decree 50.215 of January 28th of, 1961, and

gração", *Revista Consultor Jurídico*, 2017. https://www.ssconjur.com.br/2017-mai-26/andre-ramos-direitos-humanos-sao-eixo-central-lei-migracao> accessed 10 January. 2022.

[10] Article 14, paragraph 5.

[11] Article 38, paragraph 1, item I. Brazil, Decrete 9.199/17

[12] A. de Carvalho Ramos and oth., "Regulamento da nova Lei de Migração é contra legem e praeter legem", *Revista Consultor Jurídico*, 2017. www.conjur.com.br/2017-nov-23/opiniao-regulamento-lei-migracao-praetem-legem. accessed 10 January 2021.

[13] Interministerial Ordinance nº 10 Provides temporary visas and residence authorization for humanitarian reception for Haitian citizens and stateless people living in the Republic of Haiti, Interministerial Ordinance nº 12 Provides temporary visa and the residence authorization for a family reunion, Interministerial Ordinance nº 18 provides procedures for requiring a Work and Social Security Card (CTPS) for immigrants.

ratification of the 1967 Additional Protocol that happened in 1972. In 1977, ACNUR (UNHCR - The United Nations Refugee Agency) firmed an agreement with Brazil and instilled an office ad hoc in Rio de Janeiro. However, the implementation of norms presented in the 1951 Convention and the 1967 Protocol just occurred two decades later, with the Law 9.474/97. This delay in implementing the international legislation was due to the period in which Brazil was governed by military forces when the guarantees and the respect for human rights practically disappeared[14]

With the Brazilian re-democratization process, throughout the Federal Constitution reform, in 1988, the rights and fundamental guarantees returned. Law 9.474/97 included the extended definition of refugees considering the critical and generalized violation of human rights mentioned in the 1984 Cartagena Declaration for Refugees.

According to this Law, the migrant that arrives in the national territory that fits article 1[15] requisites will be able to ask for recognition of the refugee status, making the online application for analysis by the National Committee for Refugees (CONARE - Comitê Nacional para Refugiados), associated with the Ministry of Justice.

The 1951 Geneva Convention[16], and the Law 9474/97[17], give protection to the refugee against the risk of being deported to the original country, where he/she is under death risk or threat, independently of any border lockdown based on the principle of non refoulement.

The same law instituted CONARE[18], composed of seven members[19]

[14]L. Lyra Jubliut, *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro*. (Método, 2007) pp. 05-08, 171-175.

[15] Article 1º Any individual who: I - afraid of being persecuted for reasons of race, religion, nationality, social group, or political opinion, is outside his/ her country of nationality and is unable or unwilling to avail himself of the protection of the country; II - having no nationality and being outside the country where he/she previously had his/her habitual residence, he/she is unable or forbidden to return to it, due to the circumstances described in the previous item; III - due to severe and generalized violation of human rights, he/she is forced to leave his/she country of nationality to ask for refuge in another country, Refugee Statute n. 9.474/97.

[16] Article 33 UN Convention Relating to the Status of Refugees.

[17] Article 7º, Refugee Statue n. 9.474/97.

[18] Body linked to the Ministry of Justice, which analyzes the requests for granting refuge and decides.

[19] The CONARE constitution was defined by article 14 of Refugee Statute 9474/97: Art. 14. CONARE will be constituted by: I - a representative of the Ministry of Justice, who will preside over it; II - a representative of the Ministry of Foreign Affairs; III - a

who analyze if the requisites for the concession of refugee status are present. The application on the SISCONARE (CONARE online System) web page consists of filling out a form. This form asks why the foreigner requires a refugee status for personal data. Also, the applicant should answer an interview. Moreover, the circumstances of their entrance into Brazilian territory must be informed. This information is used as an argument for the recognition or not of the refugee condition. All the information collected is confidential[20].

After making the requirement through SISCONARE, the applicant should ask for an appointment in the Immigration Bureau of the Federal Police at the place they live in to register themselves and collect fingerprints. In the end, Federal Police will deliver a Refugee Protocol to the applicant. This document will be used as the legal basis for the applicant's permanence in the country until the final decision of CONARE or the Ministry of Justice. Possessing the protocol, the foreigner may require the National Work and Social Welfare Card and the Individual Person Register[21] in order to be able to work in the country.

The analysis of the refugee request has no time limit, but the Provisional Protocol is valid for one year. Thus, if the protocol expires before obtaining a response on the refugee status, the foreigner must extend it at the Federal Police every year until the recognition of refugee status is granted or denied.[22]

If the Committee decides to grant refugee status, the applicant must go to the Federal Police to apply for a National Foreign Registration. If the Committee's answer is negative, the applicant will be notified within 15 days. If they wish, they may present an appeal before the Federal Police department itself, which will be sent to the Ministry of Justice. The

representative of the Ministry of Labor; IV - a representative of the Ministry of Health; V - a representative of the Ministry of Education and Sports; VI - a representative of the Federal Police Department; VII - a representative of a non-governmental organization dedicated to assist and protect activities for refugees in this country. § 1 The United Nations High Commissioner for Refugees - UNHCR will be an invited member to CONARE meetings, with the right to speak, without voting. § 2 The CONARE members will be appointed by the President of the Republic through indications of the bodies and the entity that composes them. § 3 CONARE will have a General Coordinator responsible for preparing the refuge application processes and the meeting agenda.

[20] Refugee Statue n. 9.474/97.

[21] Ministry of Justice www.gov.br/mj/pt-br/assuntos/seus-direitos/refugio/o-que-e-refugio/etapas-do-processo-de-refugio.

[22] Refugee Statue n. 9.474/97.

applicant and his family will be allowed to stay in the national territory during the appeal process.[23]

In June 2018, CONARE had about 86,000 cases in process, refugee applicants who can often stay in the protocol condition for four, five, or six years. From January 2016 to December 2021, CONARE issued 75,213 decisions, 75.8% of which were for nationals coming from Venezuela.[24] It is important to note that the recognition of Venezuelans as refugees is due to the inclusion of item III in article 1 of Law 9.474/97, that is, massive violation of human rights or other circumstances which have seriously disturbed public order, considering the Cartagena Declaration for Refugees.

However, when the refugee status is denied by CONARE, especially for Senegalese, Haitian, and Angolan requests, they can have their status regulated by the Interministerial Ordinances that govern the conditions for requesting the residence permit provided in Law 13,445/2017.

3. From the Brazilian context - migration and the rights restrictions of migrants and refugees during the COVID-19-COVID pandemic

During the Covid-19 pandemic, the federal government continued to regulate the (in)possibility of entry for nationals and non-nationals through Interministerial Ordinances. As mentioned before, the ordinances are administrative acts originating in the Executive Branch. At the same time, the Law goes through approval in the Federal Legislature (House and Senate) and presidential sanction. This topic will briefly present some ordinances that have determined the closing of the Brazilian borders, demonstrating the restriction of rights already guaranteed by the Migration Law, the 1951 Geneva Convention, and Law 9474/97.

From March 17, 2020, to January 2021, 21 ordinances were published restricting the entry of migrants into the national territory. The beginning of the restrictions occurred by Ordinance 120 of March 17, 2020, issued by the Ministers of the Civil House, of Justice and Public Safety, and of Health,

[23] Refugee Statue n. 9.474/97.

[24] Ministry of Justice. Interactive Platform for Decisions on Refugee in Brazil https://app.powerbi.com/view?r=eyJrIjoiNTQ4MTU0NGItYzNkMi00M2MwLWFhZWMtMDBiM2I1NWVjMTY5IiwidCI6ImU1YzM3OTgxLTY2NjQtNDEzNC04YTBjLTY1NDNkMmFmODBiZSIsImMiOjh9 accessed 29 April 2022.

which determined restrictions on the entry of migrants originating from the Bolivarian Republic of Venezuela, based on recommendations from the National Health Surveillance Agency (Agencia Nacional de Vigilância Sanitária - ANVISA). In 2019, the National Committee for Refugees (CONARE) recognized that Venezuelans[25] suffer severe human rights violations and can be considered refugees in Brazil[26]. Thus the infralegal norm violates the principle of non-refoulement provided both in the Geneva Convention and in Law 9.474/97. The second aspect is that the ordinance is discriminatory because it prohibits the entry of only one nationality, in this case, the Venezuelan. Furthermore, the third point is that the entry provided in the ordinance is restricted only to entry by land border[27], i.e., would be allowed to enter the national territory only Venezuelan migrants who have economic conditions to enter the national territory by air. This act is discriminatory due to nationality and economic condition, especially considering the Venezuelan population's economic vulnerability.

On March 19, two days after the first one, Ordinance No. 125 was published, which "provides for the exceptional and temporary restriction on the entry into the country of foreigners from neighboring countries": Argentina, the Plurinational State of Bolivia, Colombia, the French Republic (French Guyana), the Cooperative Republic of Guyana, Paraguay, Peru, and Suriname, and determined that another ordinance would regulate separately those who enter through the border with the Oriental Republic of Uruguay. With the justification of taking sanitary measures determined by ANVISA, the ordinance restricts the entry only by land, disregarding the possibility of contamination by the virus entering the country by air, referring again to the vulnerable who cross the land border.

The year 2020 followed with ten more ordinances[28] restricting the entry of migrants into the national territory. By June 2021, more than 20 ordinances were issued to regulate the migration problem regarding the closing of borders. Ordinance 655 of June 23, 2021, provides for the exceptional and tem-

[25] CONARE recognized 17,000 Venezuelans as refugees.

[26] Article 1º, III - devido a grave e generalizada violação de direitos humanos, é obrigado a deixar seu país de nacionalidade para buscar refúgio em outro país. Refugee Statue n. 9.474/97, Ordinance 120, 2021.

[27] Article 2º Ordinance No. 120.

[28] Ordinance No 1, July 29, 2020, Ordinance no 419, August 26, 2020, Ordinance no 456, September 24, 2020 Ordinance no 470, October 2, 2020, Ordinance no 478, October 14, 2020, Ordinance no 518, November 12, 2020, Ordinance no 615, December 2020, Ordinance no 630, December 17, 2020, Ordinance no 648, December 2020.

porary restriction on the entry of foreigners of any nationality into the country - as recommended by the National Health Surveillance Agency - Anvisa. The Agency determined the socioeconomic profile of migrants who entered the country by air, including norms on how to proceed with the submission of laboratory tests to prevent COVID-19 contamination. Migrants who arrived by land were not allowed to enter. It repeats the exact provisions of previous Ordinances that authorized the border agent to carry out repatriation, summary deportation, and the disqualification of the refugee claim.[29]

The migratory chaos in the country intensified when the Migration Bureau of Federal Police closed due to the lockdowns, and other restrictive measures, for about a year, not attending to thousands of migrants that had their documents expired during that period. The impossibility of making an appointment for documental migratory regulamentation created insecurity. It turned migrants even more vulnerable, conditioning their stay in Brazil (and the validity of their documents) to Ordinances from the Executive Branch. Why does the vulnerability intensify with the Ordinances? Due to the lack of effective communication between the Interministerial Ordinances and the sectors migrants seek for attendance. Bank institutions, stores that offer credit, community health centers, and hospitals demand the documents whose validity is expired. Moreover, most of the time, these institutions deny fundamental rights because they ignore an Ordinance in which the validity of the referred documents was guaranteed. When it occurs, the voice of those who are vulnerable (the immigrants, for instance) does not have/her rights respected.

4. The issues with implementing the rights of migrants and refugees: the extensionist practices concerning Migrant and Refugee Balcony

Regarding what has been reported in this study, the civil society was responsible to seek and intervene to guarantee and implement the rights of those considered by the State to be "temporary residents" in Sayad's[30] words and "oppressed people expelled from their lands" in Sassen's[31]

[29] Ordinance 655, 2021.

[30] Abdelmalek Sayad. *L'immiration ou les paradoxes de l'altérité*. (De Boeck-Wesmael s.a. 1991).

[31] S. Sassen. *Expulsions: Brutality and Complexity in the Global Economy* (Harvard University Press 2014).

conception. In other words, those who left their homes in search of a hospitable place to stay found even more difficulties and who, upon arriving in another country during pandemic, became even more vulnerable socially and legally. The restrictions of rights - determined by lower value norms than the Migration Law and the Refugee Statute Law - led civil society institutions to join forces to act together with the Federal Prosecutor's Office and the Federal Public Ministry in search of legal recognition and guarantee of the migrants' and refugees' rights.

An extensive network of contacts, work, and exchange of experiences and information was formed from north to south of the country, made up of non-governmental organizations, religious institutions, and universities that work in outreach and assistance to the migrant and refugee population. The network's civil society acted and still acts tirelessly for the recognition of rights, seeking to guarantee the promotion of public policies in all spheres: municipal, state, and national. The network has achieved some advances that were possible with the filing of lawsuits and the exercise of advocacy. The civil society, in a network, acted restlessly for the recognition of rights, demanding and promoting public policies in all the spheres: municipal, estate, and national levels.

The Extension Project: The Migrant and Refugee Balcony

Since 2010, with the arrival of the first Senegalese, the wish to build a place for receiving migrants and refugees in Passo Fundo city has been discussed. In 2017, because of the event named the First Seminar of the Right to Migrate, promoted by the Human Mobility Forum of Passo Fundo[32], a document was written and delivered to the Municipal Public Branch entitled Letters from Passo Fundo about Public Policies for Migrants and Refugees. Among the proposals the Letter, there was: the

[32] The Human Mobility Forum of Passo Fundo (FMHPF) was created from the Free Regional Conference on Migration and Refuge, held at the Passo Fundo City Council on March 23, 2014. It is a space for dialogue and debate on issues involving the contemporary migratory process. Currently, the FMH-PF is coordinated by a representative of the University of Passo Fundo and counts on the following institutions: Municipality of Passo Fundo - Coordination of Racial Equality, Human Rights Commission of Passo Fundo, Federal Institute of Education, Science and Technology – Passo Fundo (IFSul Campus Passo Fundo), Pastoral Care for Migrants and Refugees (Archdiocese of Passo Fundo), Association of Senegalese of Passo Fundo. Also, professionals and students (undergraduate, graduate, extension projects) whose affinity with the theme are part of it.

"Creation and implementation of a Center of Reference and Support to Migrants and Refugees as a community and public service." In 2019, the Law College of the University of Passo Fundo considered the possibility of attending part of the proposals addressed to the municipal public power described above to offer judicial and documentary assistance to the migrant and refugee population.

In October 2020, the University of Passo Fundo (UPF) issued a public notice for new extension projects, which resulted in the implementation of the Migrant and Refugee Balcony (Balcão do Migrante e Refugiado). This study, then, aims to attend to the judicial and documentary demands of the migrant population of Passo Fundo and provide the necessary support to other institutions that offer similar services in the 123 cities that make part of the division of the Federal Police of Passo Fundo. The project dialogues with the disciplines of International Private Law, International Public Law, International Refugee Law, and the master's Course in Law and with the Research Project "The effectiveness of Human Rights in the National Plan." The team that works on the project is formed by supervisor professors, college students, and volunteers from the Law College.

Unfortunately, when the team was ready to start attending migrants, all the establishments were closed or faced restrictions because of the COVID-19 pandemic. Because of that, the team only attended by cell phone, using the WhatsApp application.

During the pandemic period, the difficulties faced by the migrants overcame the daily ones because, besides the linguistic and cultural obstacles already experienced by them, there were added to it the uncertainties relative to the renovation and regulamentation of documents. The uncertainty caused echoes concerning migrants' stay in the country since employers did not accept the register of expired documents or because banks refused to open a salary account for migrants (it occurred due to the suspension of the validation of migratory documents or their systems). That is why The Migrant and Refugee Balcony acted in the city of Passo Fundo (RS) to enforce and guarantee fundamental human rights, consequently, to keep the work relations because, in the absence of a bank account, the migrants cannot receive an income. To face these violations, the project's coordination took contact with the bank institutions, companies, and the other sectors to communicate the existence of the Ordinance and prove the validity of the documents.

One of the important actions of the Project occurred in May 2021.

After receiving reports from several migrants about the impossibility of scheduling an appointment at the Migration Post of the Federal Police of Passo Fundo to make the renewal of documents, refuge requests, and residence authorization requests, intervention from the Federal Public Ministry was required. After an unsuccessful conciliation attempt, the Federal Public Prosecutor's Office filed a court proceeding with an injunction request[33] for the Police Inspector to renew expired documents and refugee requests accordingly to the legislation and the 1951 Geneva Convention. The court granted the injunction[34], and later the action was upheld, serving as a basis and model for other demands proposed throughout Brazil[35].

The measures implemented due to the Covid-19 pandemic, the Brazilian migratory legislation already spread throughout interministerial ordinances, have turned difficult access to information and judicial security. This disposition of texts demanded even more of the agents in the field of migration to systematize, compile, and repost the information quickly to the interested ones. As a result, there was a misunderstanding between the rules imposed by the ordinances and the access systems regarding essential services for citizens. During this pandemic moment, the university extension projects, and civil society have been essential by occupying the vacuum that the State left empty.

In 2020, some essential partnerships were also formed for the project's activities. The first was with the Federal Police, which granted half of the attendings to the migrants that sought The Migrant and Refugee Balcony. This kind of covenant is unprecedented in Brazil, and possibly it will become a tendency. So crucial as the covenant was the recognition by the United Nations High Commissioner for Refugees with a Sergio Vieira de Mello Chair that is awarded to Brazilian universities that work with teaching, research, and extension to help the migrant and refugee population.

In 2020, more than 120 attendings were made online during the pandemic. The return of face-to-face activities occurred in October of

[33] This kind of judicial instrument is called a writ of mandamus and aims to protect an individual right proven by documents.

[34] Federal Prosecutor. *Ministério Publico Federal.* www.mpf.mp.br/rs/sala-de-imprensa/noticias-rs/mpf-garante-direito-de-imigrantes-com-decisao-judicial-em-passo-fundo-rs accessed 20 April 2022.

[35] Federal Prosecutor. www.mpf.mp.br/rs/sala-de-imprensa/noticias-rs/mpf-busca-garantir-direitos-de-migrantes-atingidos-por-portaria-interministerial-no-rio-grande-do-sul.

2021. At this time, more than 1.600 assistances were made. The project ended in 2021 with 2.440 face-to-face and virtual attendings. It is crucial to mention that the project did not stop the online assistances because it facilitates the process and avoids travel costs for the migrants which did not live in Passo Fundo city, especially in a social vulnerability context. In 2022, the project attended to 800 migrants until the end of April. The majority comes from Venezuela. The second portion comes from Haiti, after the Africans in majority from Senegal.

The paramount necessity is the renovation of expired documents, the solicitation of residence authorization, and the refugee solicitation. The scope of these solicitations is linked directly to the applicant's nationality since that. For those who come from Venezuela, the Ordinance nº March 19 of 2021[36] has simplified the procedure and guaranteed the possibility of residence authorization solicitation, conditioned to hold the required documents; on the contrary, there is still the option to require refuge. In their turn, the Haitians have the Ordinance nº December 27 December 30th of 2021[37] that guaranteed them the possibility to solicit residence based on the humanitarian reception due to the mass migration because of earthquakes and civil war.

5. Final considerations

In 2017, by enacting the Migration Law, Brazil broke with a security paradigm that went against the guarantees and fundamental rights provided in the constitutional text of 1988. Although the Law brought an advance in human rights and fundamental guarantees, the practice is different from what is stated in the text. As demonstrated, the operators do not work with the Law to accomplish the documental regulation but with dozens of inferior administrative acts that seek to regulate what the Law did not foresee. If the Law operators are demanding, it is even more difficult for the migrant.

The normative context of the Brazilian migratory legislation has an umbrella law that guarantees rights for all. Dozens of normative acts regulate entry according to nationality, emphasizing that there are also different rules for residents of the Mercosul countries due to the signed re-

[36] Ordinance n. 19 13 March 2021.
[37] Ordinance n. 27 30 Dezember 2021.

gional agreement. Added to the normative insecurity is the lack of sufficient personnel at the Migration Stations of the Federal Police. Only at the Migrant and Refugee Desk, more than 700 migrants are awaiting scheduling for document regulation in Passo Fundo and the region. This delay occurs because the Migration Office of Passo Fundo has only two agents who attend to the migrant population of the 123 cities where this police station is located.

The refuge seeker is protected by the 1951 Geneva Convention and Law 9474/97. However, he/she faces a government structure created in 1997 when the Brazilian reality of refuge seekers was minimal. Currently, the structure and format for deciding refuge requests are not compatible with the current Brazilian demand that accompanies the movement of human mobility globally. A refugee request has taken more than four years to be analyzed by CONARE, which means that the document supposed to be temporary has become definitive. With this slowness, many migrants who requested refuge seek to change their requests for the residence permit.

The picture to be painted today is not of current and inclusive legislation but of practice and reality that distorts the text of the laws.

Finito di stampare nel mese di marzo 2023
presso la *Grafica Elettronica* - Napoli